STUDY MATERIALS

PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES

Codification Division of the United Nations Office of Legal Affairs

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**PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES**

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**Legal Instruments and Documents**

| 1. | Convention for the Pacific Settlement of International Disputes, 1899 | 10 |
| 2. | Convention for the Pacific Settlement of International Disputes, 1907 | 18 |
| 3. | Treaty between France and Switzerland providing for Compulsory Conciliation and Arbitration, 1925 | 30 |
| 4. | Revised General Act for the Pacific Settlement of International Disputes, adopted by the General Assembly of the United Nations on 28 April 1949 | 34 |
| 5. | Charter of the United Nations and Statute of the International Court of Justice, 1945  
For text, see *Charter of the United Nations and Statute of the International Court of Justice* | |
For text, see *The Work of the International Law Commission*, 8th ed., vol. II | |
| 7. | Security Council resolution 186 (1964) of 4 March 1964 | 44 |
For text, see *Study Materials, Law of the Sea* | |
| 11. | Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States, 1992 | 58 |
| 12. | Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, 1993 | 74 |
| 13. | General Assembly resolution 50/50 of 11 December 1995 (United Nations Model Rules for the Conciliation of Disputes between States) | 80 |
| 14. | 2005 World Summit Outcome (United Nations General Assembly resolution 60/1 of 16 September 2005) | 86 |

**Case Law**

| 18. | Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania),  
*Preliminary Objection, Judgment, I.C.J. Reports 1948*, p. 15 | 162 |
   Opinion, I.C.J. Reports 1949, p. 174
21. Interpretation of Peace Treaties (second phase), Advisory Opinion, I.C.J. Reports
   1950, p. 221
22. Interhandel (Switzerland v. United States of America), Preliminary Objections,
   Judgment, I.C.J. Reports 1959, p. 6
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   of 23 March 1962 of the Commission of Enquiry established by the Government of
   the United Kingdom of Great Britain and Northern Ireland and the Government of the
   Kingdom of Denmark on 15 November 1961, United Nations, Reports of
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   States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984,
   p. 392
26. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United
   States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14
27. Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v.
   Nigeria), Application to Intervene, Order of 21 October 1999, I.C.J. Reports 1999,
   p. 1029
   466
29. Eritrea-Ethiopia Boundary Commission, Decision regarding Delimitation of the
   Border between The State of Eritrea and The Federal Democratic Republic of
   Ethiopia, 13 April 2002 (not reproduced)
30. Eritrea-Ethiopia Boundary Commission, Statement by the Commission, 27 November
    2006 (not reproduced)
31. Award in the Arbitration regarding the delimitation of the maritime boundary
    (Guyana/Suriname), 17 September 2007, United Nations, Reports of
    International Arbitral Awards, vol. XXX, p. 1
   For text, see Reports of International Arbitral Awards, vol. XXX
32. Award in the Arbitration regarding the delimitation of the Abyei Area (Government of
    Sudan/the Sudan People’s Liberation Movement/Army), 22 July 2009, United
    Nations, Reports of International Arbitral Awards, vol. XXX, p. 145
   For text, see Reports of International Arbitral Awards, vol. XXX
33. Eritrea-Ethiopia Claims Commission, Decisions and Awards (not reproduced)
34. The ARA Libertad Arbitration (Argentina/Ghana), Notification of the Argentine
    Republic, 29 October 2012
35. The ARA Libertad Arbitration (Argentina/Ghana), Agreement between Argentina and
    Ghana, 27 September 2013
Legal Writings


Convention for the Pacific Settlement of International Disputes, 1899
CONVENTION
for the Pacific Settlement of International Disputes*

His Majesty the German Emperor, King of Prussia; His Majesty the Emperor of Austria, King of Bohemia, etc., and Apostolic King of Hungary; His Majesty the King of the Belgians; His Majesty the Emperor of China; His Majesty the King of Denmark; His Majesty the King of Spain and in His Name Her Majesty the Queen Regent of the Kingdom; the President of the United States of America; the President of the United Mexican States; the President of the French Republic; Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Empress of India; His Majesty the King of the Hellenes; His Majesty the King of Italy; His Majesty the Emperor of Japan; His Royal Highness the Grand Duke of Luxembourg, Duke of Nassau; His Highness the Prince of Montenegro; Her Majesty the Queen of the Netherlands; His Imperial Majesty the Shah of Persia; His Majesty the King of Portugal and of the Algarves, etc.; His Majesty the King of Roumania; His Majesty the Emperor of all the Russias; His Majesty the King of Serbia; his Majesty the King of Siam; His Majesty the King of Sweden and Norway; the Swiss Federal Council; His Majesty the Emperor of the Ottomans and His Royal Highness the Prince of Bulgaria;

Animated by a strong desire to work for the maintenance of general peace;
Resolved to promote by their best efforts the friendly settlement of international disputes;
Recognizing the solidarity uniting the members of the society of civilized nations;
Desirous of extending the empire of law, and of strengthening the appreciation of international justice;
Convinced that the permanent institution of a tribunal of arbitration, accessible to all, in the midst of the independent Powers, will contribute effectively to this result;
Having regard to the advantages attending the general and regular organization of the procedure of arbitration;
Sharing the opinion of the august initiator of the International Peace Conference that it is expedient to record in an international agreement the principles of equity and right on which are based the security of States and the welfare of peoples;
Being desirous of concluding a Convention to this effect, have appointed as their plenipotentiaries, to wit:

(Here follow the names of plenipotentiaries.)

* The text of the Convention reproduced here is a translation of the French text adopted at the 1899 Peace Conference. The French-language version is authoritative.
Who, after having communicated their full powers, found in good and due form, have agreed on the following provisions:

TITLE I. ON THE MAINTENANCE OF THE GENERAL PEACE

Article 1

With a view to obviating, as far as possible, recourse to force in the relations between States, the Signatory Powers agree to use their best efforts to insure the pacific settlement of international differences.

TITLE II. ON GOOD OFFICES AND MEDIATION

Article 2

In case of serious disagreement or conflict, before an appeal to arms the Signatory Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers.

Article 3

Independently of this recourse, the Signatory Powers recommend that one or more Powers, strangers to the dispute, should, on their own initiative, and as far as circumstances may allow, offer their good offices or mediation to the States at variance.

Powers, strangers to the dispute, have the right to offer good offices or mediation, even during the course of hostilities.

The exercise of this right can never be regarded by one or the other of the parties in conflict as an unfriendly act.

Article 4

The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance.

Article 5

The functions of the mediator are at an end when once it is declared, either by one of the parties to the dispute, or by the mediator himself, that the means of reconciliation proposed by him are not accepted.

Article 6

Good offices and mediation, either at the request of the parties at variance, or on the initiative of Powers strangers to the dispute, have exclusively the character of advice, and never have binding force.

Article 7

The acceptance of mediation cannot, unless there be an agreement to the contrary, have the effect of interrupting, delaying, or hindering mobilization or other measures of preparation for war.

If mediation occurs after the commencement of hostilities, it causes no interruption to the military operations in progress, unless there be an agreement to the contrary.

Article 8

The Signatory Powers are agreed in recommending the application, when circumstances allow, of special mediation in the following form:

In case of a serious difference endangering the peace, the States at variance choose respectively a Power, to whom they intrust the mission of entering into direct communication with the Power chosen on the other side, with the object of preventing the rupture of pacific relations.

For the period of this mandate, the term of which, unless otherwise stipulated, cannot exceed thirty days, the States in conflict cease from all direct communication on the subject of the dispute, which is regarded as referred exclusively to the mediating Powers, who must use their best efforts to settle it.

In case of a definite rupture of pacific relations, these Powers are charged with the joint task of taking advantage of any opportunity to restore peace.

TITLE III. ON INTERNATIONAL COMMISSIONS OF INQUIRY

Article 9

In differences of an international nature involving neither honour nor vital interests, and arising from a difference of opinion on points of fact, the Signatory Powers recommend that the parties, who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an International Commission of Inquiry, to facilitate a solution of these differences by elucidating the facts by means of an impartial and conscientious investigation.

Article 10

The International Commissions of Inquiry are constituted by special agreement between the parties in conflict.
The Convention for an inquiry defines the facts to be examined and the extent of the Commissioners’ powers.
It settles the procedure.
On the inquiry both sides must be heard.
The form and the periods to be observed, if not stated in the Inquiry Convention, are decided by the Commission itself.

Article 11

The International Commissions of Inquiry are formed, unless otherwise stipulated, in the manner fixed by Article 32 of the present Convention.

Article 12

The Powers in dispute engage to supply the International Commission of Inquiry, as fully as they may think possible, with all means and facilities necessary to enable it to be completely acquainted with and to accurately understand the facts in question.

Article 13

The International Commission of Inquiry communicates its Report to the conflicting Powers, signed by all the members of the Commission.

Article 14

The Report of the International Commission of Inquiry is limited to a statement of facts, and has in no way the character of an Arbitral Award. It leaves the conflicting Powers entire freedom as to the effect to be given to this statement.

TITLE IV. ON INTERNATIONAL ARBITRATION

Chapter I. On the System of Arbitration

Article 15

International arbitration has for its object the settlement of differences between States by judges of their own choice, and on the basis of respect for law.

Article 16

In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle.

Chapter II. On the Permanent Court of Arbitration

Article 20

With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the Signatory Powers undertake to organize a Permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the Rules of Procedure inserted in the present Convention.

Article 21

The Permanent Court shall be competent for all arbitration cases, unless the parties agree to institute a special Tribunal.

Article 22

An International Bureau, established at The Hague, serves as record office for the Court.
This Bureau is the channel for communications relative to the meetings of the Court.
It has the custody of the archives and conducts all the administrative business.
The Signatory Powers undertake to communicate to the International Bureau at The Hague a duly certified copy of any conditions of arbitration arrived at between them, and of any award concerning them delivered by special Tribunals.
They undertake also to communicate to the Bureau the Laws, Regulations, and documents eventually showing the execution of the Awards given by the Court.
**Article 23**

Within the three months following its ratification of the present Act, each Signatory Power shall select four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrators.

The persons thus selected shall be inscribed, as Members of the Court, in a list which shall be notified by the Bureau to all the Signatory Powers.

Any alteration in the list of Arbitrators is brought by the Bureau to the knowledge of the Signatory Powers.

Two or more Powers may agree on the selection in common of one or more Members. The same person can be selected by different Powers.

The Members of the Court are appointed for a term of six years. Their appointments can be renewed.

In case of the death or retirement of a Member of the Court, his place shall be filled in accordance with the method of this appointment.

**Article 24**

When the Signatory Powers desire to have recourse to the Permanent Court for the settlement of a difference that has arisen between them, the Arbitrators called upon to form the competent Tribunal to decide this difference, must be chosen from the general list of Members of the Court.

Failing the direct agreement of the parties on the composition of the Arbitration Tribunal, the following course shall be pursued:

Each party appoints two Arbitrators, and these together choose an Umpire.

If the votes are equal, the choice of the Umpire is intrusted to a third Power, selected by the parties by common accord.

If an agreement is not arrived at on this subject, each party selects a different Power, and the choice of the Umpire is made in concert by the Powers thus selected.

The Tribunal being thus composed, the parties notify to the Bureau their determination to have recourse to the Court and the names of the Arbitrators.

The Tribunal of Arbitration assembles on the date fixed by the parties.

The Members of the Court, in the discharge of their duties and out of their own country, enjoy diplomatic privileges and immunities.

**Article 25**

The Tribunal of Arbitration has its ordinary seat at The Hague.

Except in cases of necessity, the place of session can only be altered by the Tribunal with the assent of the parties.

**Article 26**

The International Bureau at The Hague is authorized to place its premises and its staff at the disposal of the Signatory Powers for the operations of any special Board of Arbitration.

The jurisdiction of the Permanent Court may, within the conditions laid down in the Regulations, be extended to disputes between non-Signatory Powers, or between Signatory Powers and non-Signatory Powers, if the parties are agreed on recourse to this Tribunal.

**Article 27**

The Signatory Powers consider it their duty, if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them.

Consequently, they declare that the fact of reminding the conflicting parties of the provisions of the present Convention, and the advice given to them, in the highest interests of peace, to have recourse to the Permanent Court, can only be regarded as friendly actions.

**Article 28**

A Permanent Administrative Council composed of the Diplomatic Representatives of the Signatory Powers accredited to The Hague and of the Netherlands Minister for Foreign Affairs, who will act as President, shall be instituted in this town as soon as possible after the ratification of the present Act by at least nine Powers.

This Council will be charged with the establishment and organization of the International Bureau, which will be under its direction and control.

It will notify to the Powers the constitution of the Court and will provide for its installation.

It will settle its Rules of Procedure and all other necessary Regulations.

It will decide all questions of administration which may arise with regard to the operations of the Court.

It will have entire control over the appointment, suspension or dismissal of the officials and employees of the Bureau.

It will fix the payments and salaries, and control the general expenditure.

At meetings duly summoned the presence of five members is sufficient to render valid the discussions of the Council. The decisions are taken by a majority of votes.

The Council communicates to the Signatory Powers without delay the Regulations adopted by it. It furnished them with an annual Report on the labours of the Court, the working of the administration, and the expenses.
Article 29

The expenses of the Bureau shall be borne by the Signatory Powers in the proportion fixed for the International Bureau of the Universal Postal Union.

Chapter III. On Arbitral Procedure

Article 30

With a view to encourage the development of arbitration, the Signatory Powers have agreed on the following Rules which shall be applicable to arbitral procedure, unless other Rules have been agreed on by the parties.

Article 31

The Powers who have recourse to arbitration sign a special Act (‘Compromis’), in which the subject of the difference is clearly defined, as well as the extent of the Arbitrators’ powers. This Act implies the undertaking of the parties to submit loyally to the Award.

Article 32

The duties of Arbitrator may be conferred on one Arbitrator alone or on several Arbitrators selected by the parties as they please, or chosen by them from the Members of the Permanent Court of Arbitration established by the present Act.

Failing the constitution of the Tribunal by direct agreement between the parties, the following course shall be pursued:

Each party appoints two Arbitrators, and these latter together choose an Umpire.

In case of equal voting, the choice of the Umpire is intrusted to a third Power, selected by the parties by common accord.

If no agreement is arrived at on this subject, each party selects a different Power, and the choice of the Umpire is made in concert by the Powers thus selected.

Article 33

When a Sovereign or the Chief of a State is chosen as Arbitrator, the arbitral procedure is settled by him.

Article 34

The Umpire is by right President of the Tribunal.

When the Tribunal does not include an Umpire, it appoints its own President.

Article 35

In case of the death, retirement, or disability from any cause of one of the Arbitrators, his place shall be filled in accordance with the method of his appointment.

Article 36

The Tribunal’s place of session is selected by the parties. Failing this selection the Tribunal sits at The Hague.

The place thus fixed cannot, except in case of necessity, be changed by the Tribunal without the assent of the parties.

Article 37

The parties have the right to appoint delegates or special agents to attend the Tribunal, for the purpose of serving as intermediaries between them and the Tribunal.

They are further authorized to retain, for the defence of their rights and interests before the Tribunal, counsel or advocates appointed by them for this purpose.

Article 38

The Tribunal decides on the choice of languages to be used by itself, and to be authorized for use before it.

Article 39

As a general rule the arbitral procedure comprises two distinct phases; preliminary examination and discussion.

Preliminary examination consists in the communication by the respective agents to the members of the Tribunal and to the opposite party of all printed or written Acts and of all documents containing the arguments invoked in the case. This communication shall be made in the form and within the periods fixed by the Tribunal in accordance with Article 49.

Discussion consists in the oral development before the Tribunal of the arguments of the parties.

Article 40

Every document produced by one party must be communicated to the other party.

Article 41

The discussions are under the direction of the President.

They are only public if it be so decided by the Tribunal, with the assent of the parties.
They are recorded in the procès-verbaux drawn up by the Secretaries appointed by the President. These procès-verbaux alone have an authentic character.

Article 42

When the preliminary examination is concluded, the Tribunal has the right to refuse discussion of all fresh Acts or documents which one party may desire to submit to it without the consent of the other party.

Article 43

The Tribunal is free to take into consideration fresh Acts or documents to which its attention may be drawn by the agents or counsel of the parties. In this case, the Tribunal has the right to require the production of these Acts or documents, but is obliged to make them known to the opposite party.

Article 44

The Tribunal can, besides, require from the agents of the parties the production of all Acts, and can demand all necessary explanations. In case of refusal, the Tribunal takes note of it.

Article 45

The agents and counsel of the parties are authorized to present orally to the Tribunal all the arguments they may think expedient in defence of their case.

Article 46

They have the right to raise objections and points. The decisions of the Tribunal on those points are final, and cannot form the subject of any subsequent discussion.

Article 47

The members of the Tribunal have the right to put questions to the agents and counsel of the parties, and to demand explanations from them on doubtful points. Neither the questions put nor the remarks made by members of the Tribunal during the discussions can be regarded as an expression of opinion by the Tribunal in general, or by its members in particular.

Article 48

The Tribunal is authorized to declare its competence in interpreting the ‘Compromis’ as well as the other Treaties which may be invoked in the case, and in applying the principles of international law.

Article 49

The Tribunal has the right to issue Rules of Procedure for the conduct of the case, to decide the forms and periods within which each party must conclude its arguments, and to arrange all the formalities required for dealing with the evidence.

Article 50

When the agents and counsel of the parties have submitted all explanations and evidence in support of their case, the President pronounces the discussion closed.

Article 51

The deliberations of the Tribunal take place in private. Every decision is taken by a majority of members of the Tribunal. The refusal of a member to vote must be recorded in the procès-verbal.

Article 52

The Award, given by a majority of votes, is accompanied by a statement of reasons. It is drawn up in writing and signed by each member of the Tribunal. Those members who are in the minority may record their dissent when signing.

Article 53

The Award is read out at a public meeting of the Tribunal, the agents and counsel of the parties being present, or duly summoned to attend.

Article 54

The Award, duly pronounced and notified to the agents of the parties at variance, puts an end to the dispute definitively and without appeal.

Article 55

The parties can reserve in the ‘Compromis’ the right to demand the revision of the Award. In this case, and unless there be an agreement to the contrary, the demand must be addressed to the Tribunal which pronounced the Award. It can only be made on the
ground of the discovery of some new fact calculated to exercise a decisive influence on the Award, and which, at the time the discussion was closed, was unknown to the Tribunal and to the party demanding the revision.

Proceedings for revision can only be instituted by a decision of the Tribunal expressly recording the existence of the new fact, recognizing in it the character described in the foregoing paragraph, and declaring the demand admissible on this ground.

The ‘Compromis’ fixes the period within which the demand for revision must be made.

**Article 56**

The Award is only binding on the parties who concluded the ‘Compromis’.

When there is a question of interpreting a Convention to which Powers other than those concerned in the dispute are parties, the latter notify to the former the ‘Compromis’ they have concluded. Each of these Powers has the right to intervene in the case. If one or more of them avail themselves of this right, the interpretation contained in the Award is equally binding on them.

**Article 57**

Each party pays its own expenses and an equal share of those of the Tribunal.

**GENERAL PROVISIONS**

**Article 58**

The present Convention shall be ratified as speedily as possible.

The ratifications shall be deposited at The Hague.

A procès-verbal shall be drawn up recording the receipt of each ratification, and a copy duly certified shall be sent, through the diplomatic channel, to all the Powers who were represented at the International Peace Conference at The Hague.

**Article 59**

The non-Signatory Powers who were represented at the International Peace Conference can adhere to the present Convention. For this purpose they must make known their adhesion to the Contracting Powers by a written notification addressed to the Netherlands Government, and communicated by it to all the other Contracting Powers.

**Article 60**

The conditions on which the Powers who were not represented at the International Peace Conference can adhere to the present Convention shall form the subject of a subsequent Agreement among the Contracting Powers.

**Article 61**

In the event of one of the High Contracting Parties denouncing the present Convention, this denunciation would not take effect until a year after its notification made in writing to the Netherlands Government, and by it communicated at once to all the other Contracting Powers.

This denunciation shall only affect the notifying Power.

In faith of which the Plenipotentiaries have signed the present Convention and affixed their seals to it.

Done at The Hague, the 29th July, 1899, in a single copy, which shall remain in the archives of the Netherlands Government, and copies of it, duly certified, be sent through the diplomatic channel to the Contracting Powers.
Convention for the Pacific Settlement of International Disputes, 1907
CONVENTION
for the Pacific Settlement of International Disputes*

His Majesty the German Emperor, King of Prussia; the President of the United States of America; the President of the Argentine Republic; His Majesty the Emperor of Austria, King of Bohemia, etc., and Apostolic King of Hungary; His Majesty the King of the Belgians; the President of the Republic of Bolivia; the President of the Republic of the United States of Brazil; His Royal Highness the Prince of Bulgaria; the President of the Republic of Chile; His Majesty the Emperor of China; the President of the Republic of Colombia; the Provisional Governor of the Republic of Cuba; His Majesty the King of Denmark; the President of the Dominican Republic; the President of the Republic of Ecuador; His Majesty the King of Spain; the President of the French Republic; His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India; His Majesty the King of the Hellenes; the President of the Republic of Guatemala; the President of the Republic of Haiti; His Majesty the King of Italy; His Majesty the Emperor of Japan; His Royal Highness the Grand Duke of Luxembourg, Duke of Nassau; the President of the United States of Mexico; His Royal Highness the Prince of Montenegro; the President of the Republic of Nicaragua; His Majesty the King of Norway; the President of the Republic of Paraguay; Her Majesty the Queen of the Netherlands; the President of the Republic of Peru; His Imperial Majesty the Shah of Persia; His Majesty the King of Roumania; His Majesty the Emperor of All the Russians; the President of the Republic of Salvador; His Majesty the King of Servia; His Majesty the King of Siam; His Majesty the King of Sweden; the Swiss Federal Council; His Majesty the Emperor of the Ottomans; the President of the Oriental Republic of Uruguay; the President of the United States of Venezuela;

Animated by the sincere desire to work for the maintenance of general peace;
Resolved to promote by all the efforts in their power the friendly settlement of international disputes;
Recognizing the solidarity uniting the members of the society of civilized nations;
Desirous of extending the empire of law and of strengthening the appreciation of international justice;
Convinced that the permanent institution of a Tribunal of Arbitration accessible to all, in the midst of independent Powers, will contribute effectively to this result;
Having regard to the advantages attending the general and regular organization of the procedure of arbitration;
Sharing the opinion of the august initiator of the International Peace Conference that it is expedient to record in an International Agreement the principles of equity and right on which are based the security of States and the welfare of peoples;

* The text of the Convention reproduced here is a translation of the French text adopted at the 1907 Peace Conference. The French-language version is authoritative.
Being desirous, with this object, of insuring the better working in practice of Commissions of Inquiry and Tribunals of Arbitration, and of facilitating recourse to arbitration in cases which allow of a summary procedure; 
Have deemed it necessary to revise in certain particulars and to complete the work of the First Peace Conference for the pacific settlement of international disputes;
The High Contracting Parties have resolved to conclude a new Convention for this purpose, and have appointed the following as their Plenipotentiaries:

(Here follow the names of Plenipotentiaries.)

Who, after having deposited their full powers, found in good and due form, have agreed upon the following:

PART I. THE MAINTENANCE OF GENERAL PEACE

Article 1

With a view to obviating as far as possible recourse to force in the relations between States, the Contracting Powers agree to use their best efforts to ensure the pacific settlement of international differences.

PART II. GOOD OFFICES AND MEDIATION

Article 2

In case of serious disagreement or dispute, before an appeal to arms, the Contracting Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers.

Article 3

Independently of this recourse, the Contracting Powers deem it expedient and desirable that one or more Powers, strangers to the dispute, should, on their own initiative and as far as circumstances may allow, offer their good offices or mediation to the States at variance.

Powers strangers to the dispute have the right to offer good offices or mediation even during the course of hostilities.

The exercise of this right can never be regarded by either of the parties in dispute as an unfriendly act.

Article 4

The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance.

Article 5

The functions of the mediator are at an end when once it is declared, either by one of the parties to the dispute or by the mediator himself, that the means of reconciliation proposed by him are not accepted.

Article 6

Good offices and mediation undertaken either at the request of the parties in dispute or on the initiative of Powers strangers to the dispute have exclusively the character of advice, and never have binding force.

Article 7

The acceptance of mediation cannot, unless there be an agreement to the contrary, have the effect of interrupting, delaying, or hindering mobilization or other measures of preparation for war.

If it takes place after the commencement of hostilities, the military operations in progress are not interrupted in the absence of an agreement to the contrary.

Article 8

The Contracting Powers are agreed in recommending the application, when circumstances allow, of special mediation in the following form:

In case of a serious difference endangering peace, the States at variance choose respectively a Power, to which they intrust the mission of entering into direct communication with the Power chosen on the other side, with the object of preventing the rupture of pacific relations.

For the period of this mandate, the term of which, unless otherwise stipulated, cannot exceed thirty days, the States in dispute cease from all direct communication on the subject of the dispute, which is regarded as referred exclusively to the mediating Powers, which must use their best efforts to settle it.

In case of a definite rupture of pacific relations, these Powers are charged with the joint task of taking advantage of any opportunity to restore peace.
PART III. INTERNATIONAL COMMISSIONS OF INQUIRY

Article 9

In disputes of an international nature involving neither honour nor vital interests, and arising from a difference of opinion on points of facts, the Contracting Powers deem it expedient and desirable that the parties who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an International Commission of Inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation.

Article 10

International Commissions of Inquiry are constituted by special agreement between the parties in dispute.

The Inquiry Convention defines the facts to be examined; it determines the mode and time in which the Commission is to be formed and the extent of the powers of the Commissioners.

It also determines, if there is need, where the Commission is to sit, and whether it may remove to another place, the language the Commission shall use and the languages the use of which shall be authorized before it, as well as the date on which each party must deposit its statement of facts, and, generally speaking, all the conditions upon which the parties have agreed.

If the parties consider it necessary to appoint Assessors, the Convention of Inquiry shall determine the mode of their selection and the extent of their powers.

Article 11

If the Inquiry Convention has not determined where the Commission is to sit, it will sit at The Hague.

The place of meeting, once fixed, cannot be altered by the Commission except with the assent of the parties.

If the Inquiry Convention has not determined what languages are to be employed, the question shall be decided by the Commission.

Article 12

Unless an undertaking is made to the contrary, Commissions of Inquiry shall be formed in the manner determined by Articles 45 and 57 of the present Convention.

Article 13

Should one of the Commissioners or one of the Assessors, should there be any, either die, or resign, or be unable for any reason whatever to discharge his functions, the same procedure is followed for filling the vacancy as was followed for appointing him.
Article 20

The Commission is entitled, with the assent of the Powers, to move temporarily to any place where it considers it may be useful to have recourse to this means of inquiry or to send one or more of its members. Permission must be obtained from the State on whose territory it is proposed to hold the inquiry.

Article 21

Every investigation, and every examination of a locality, must be made in the presence of the agents and counsel of the parties or after they have been duly summoned.

Article 22

The Commission is entitled to ask from either party for such explanations and information as it considers necessary.

Article 23

The parties undertake to supply the Commission of Inquiry, as fully as they may think possible, with all means and facilities necessary to enable it to become completely acquainted with, and to accurately understand, the facts in question.

They undertake to make use of the means at their disposal, under their municipal law, to insure the appearance of the witnesses or experts who are in their territory and have been summoned before the Commission.

If the witnesses or experts are unable to appear before the Commission, the parties will arrange for their evidence to be taken before the qualified officials of their own country.

Article 24

For all notices to be served by the Commission in the territory of a third Contracting Power, the Commission shall apply direct to the Government of the said Power. The same rule applies in the case of steps being taken on the spot to procure evidence.

The requests for this purpose are to be executed so far as the means at the disposal of the Power applied to under its municipal law allow. They cannot be rejected unless the Power in question considers they are calculated to impair its sovereign rights or its safety.

The Commission will equally be always entitled to act through the Power on whose territory it sits.

Article 25

The witnesses and experts are summoned on the request of the parties or by the Commission of its own motion, and, in every case, through the Government of the State in whose territory they are.

The witnesses are heard in succession and separately in the presence of the agents and counsel, and in the order fixed by the Commission.

Article 26

The examination of witnesses is conducted by the President.

The members of the Commission may however put to each witness questions which they consider likely to throw light on and complete his evidence, or get information on any point concerning the witness within the limits of what is necessary in order to get at the truth.

The agents and counsel of the parties may not interrupt the witness when he is making his statement, nor put any direct question to him, but they may ask the President to put such additional questions to the witness as they think expedient.

Article 27

The witness must give his evidence without being allowed to read any written draft. He may, however, be permitted by the President to consult notes or documents if the nature of the facts referred to necessitates their employment.

Article 28

A Minute of the evidence of the witness is drawn up forthwith and read to the witness. The latter may make such alterations and additions as he thinks necessary, which will be recorded at the end of his statement.

When the whole of his statement has been read to the witness, he is asked to sign it.

Article 29

The agents are authorized, in the course of or at the close of the inquiry, to present in writing to the Commission and to the other party such statements, requisitions, or summaries of the facts as they consider useful for ascertaining the truth.

Article 30

The Commission considers its decisions in private and the proceedings are secret. All questions are decided by a majority of the members of the Commission. If a member declines to vote, the fact must be recorded in the Minutes.
Article 31

The sittings of the Commission are not public, nor the Minutes and documents connected with the inquiry published except in virtue of a decision of the Commission taken with the consent of the parties.

Article 32

After the parties have presented all the explanations and evidence, and the witnesses have all been heard, the President declares the inquiry terminated, and the Commission adjourns to deliberate and to draw up its Report.

Article 33

The Report is signed by all the members of the Commission. If one of the members refuses to sign, the fact is mentioned; but the validity of the Report is not affected.

Article 34

The Report of the Commission is read at a public sitting, the agents and counsel of the parties being present or duly summoned.

A copy of the Report is given to each party.

Article 35

The Report of the Commission is limited to a statement of facts, and has in no way the character of an Award. It leaves to the parties entire freedom as to the effect to be given to the statement.

Article 36

Each party pays its own expenses and an equal share of the expenses incurred by the Commission.

PART IV. INTERNATIONAL ARBITRATION

Chapter I. The System of Arbitration

Article 37

International arbitration has for its object the settlement of disputes between States by Judges of their own choice and on the basis of respect for law.

Recourse to arbitration implies an engagement to submit in good faith to the Award.

1907 CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

Article 38

In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Contracting Powers as the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle.

Consequently, it would be desirable that, in disputes about the above-mentioned questions, the Contracting Powers should, if the case arose, have recourse to arbitration, in so far as circumstances permit.

Article 39

The Arbitration Convention is concluded for questions already existing or for questions which may arise eventually.

It may embrace any dispute or only disputes of a certain category.

Article 40

Independently of general or private Treaties expressly stipulating recourse to arbitration as obligatory on the Contracting Powers, the said Powers reserve to themselves the right of concluding new Agreements, general or particular, with a view to extending compulsory arbitration to all cases which they may consider it possible to submit to it.

Chapter II. The Permanent Court of Arbitration

Article 41

With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the Contracting Powers undertake to maintain the Permanent Court of Arbitration, as established by the First Peace Conference, accessible at all times, and operating, unless otherwise stipulated by the parties, in accordance with the rules of procedure inserted in the present Convention.

Article 42

The Permanent Court is competent for all arbitration cases, unless the parties agree to institute a special Tribunal.
Article 43

The Permanent Court sits at The Hague.

An International Bureau serves as registry for the Court. It is the channel for communications relative to the meetings of the Court; it has charge of the archives and conducts all the administrative business.

The Contracting Powers undertake to communicate to the Bureau, as soon as possible, a certified copy of any conditions of arbitration arrived at between them and of any Award concerning them delivered by a special Tribunal.

They likewise undertake to communicate to the Bureau the laws, regulations, and documents eventually showing the execution of the Awards given by the Court.

Article 44

Each Contracting Power selects four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrator.

The persons thus elected are inscribed, as Members of the Court, in a list which shall be notified to all the Contracting Powers by the Bureau.

Any alteration in the list of Arbitrators is brought by the Bureau to the knowledge of the Contracting Powers.

Two or more Powers may agree on the selection in common of one or more Members. The same person can be selected by different Powers. The Members of the Court are appointed for a term of six years. These appointments are renewable.

Should a Member of the Court die or resign, the same procedure is followed for filling the vacancy as was followed for appointing him. In this case the appointment is made for a fresh period of six years.

Article 45

When the Contracting Powers wish to have recourse to the Permanent Court for the settlement of a difference which has arisen between them, the Arbitrators called upon to form the Tribunal with jurisdiction to decide this difference must be chosen from the general list of Members of the Court.

Failing the direct agreement of the parties on the composition of the Arbitration Tribunal, the following course shall be pursued:

Each party appoints two Arbitrators, of whom one only can be its national or chosen from among the persons selected by it as Members of the Permanent Court. These Arbitrators together choose an Umpire.

If the votes are equally divided, the choice of the Umpire is intrusted to a third Power, selected by the parties by common accord.

If an agreement is not arrived at on this subject each party selects a different Power, and the choice of the Umpire is made in concert by the Powers thus selected.

If, within two months’ time, these two Powers cannot come to an agreement, each of them presents two candidates taken from the list of Members of the Permanent Court, exclusive of the members selected by the parties and not being nationals of either of them. Drawing lots determines which of the candidates thus presented shall be Umpire.

Article 46

The Tribunal being thus composed, the parties notify to the Bureau their determination to have recourse to the Court, the text of their ‘Compromis’, and the names of the Arbitrators.

The Bureau communicates without delay to each Arbitrator the ‘Compromis’, and the names of the other members of the Tribunal.

The Tribunal assembles at the date fixed by the parties. The Bureau makes the necessary arrangements for the meeting.

The members of the Tribunal, in the exercise of their duties and out of their own country, enjoy diplomatic privileges and immunities.

Article 47

The Bureau is authorized to place its offices and staff at the disposal of the Contracting Powers for the use of any special Board of Arbitration.

The jurisdiction of the Permanent Court may, within the conditions laid down in the regulations, be extended to disputes between non-Contracting Powers or between Contracting Powers and non-Contracting Powers, if the parties are agreed on recourse to this Tribunal.

Article 48

The Contracting Powers consider it their duty, if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them.

Consequently, they declare that the fact of reminding the parties at variance of the provisions of the present Convention, and the advice given to them, in the highest interests of peace, to have recourse to the Permanent Court, can only be regarded as friendly actions.

In case of dispute between two Powers, one of them can always address to the International Bureau a note containing a declaration that it would be ready to submit the dispute to arbitration.

The Bureau must at once inform the other Power of the declaration.

Article 49

The Permanent Administrative Council, composed of the Diplomatic Representatives of the Contracting Powers accredited to The Hague and of the Netherlands Minister for Foreign Affairs, who will act as President, is charged with the direction and control of the International Bureau.

The Council settles its rules of procedure and all other necessary regulations.
It decides all questions of administration which may arise with regard to the operations of the Court.

It has entire control over the appointment, suspension, or dismissal of the officials and employees of the Bureau.

It fixes the payments and salaries, and controls the general expenditure.

At meetings duly summoned the presence of nine members is sufficient to render valid the discussions of the Council. The decisions are taken by a majority of votes.

The Council communicates to the Contracting Powers without delay the regulations adopted by it. It furnishes them with an annual Report on the labours of the Court, the working of the administration, and the expenditure. The Report likewise contains a résumé of what is important in the documents communicated to the Bureau by the Powers in virtue of Article 43, paragraphs 3 and 4.

**Article 50**

The expenses of the Bureau shall be borne by the Contracting Powers in the proportion fixed for the International Bureau of the Universal Postal Union.

The expenses to be charged to the adhering Powers shall be reckoned from the date on which their adhesion comes into force.

**Chapter III. Arbitration Procedure**

**Article 51**

With a view to encouraging the development of arbitration, the Contracting Powers have agreed on the following rules, which are applicable to arbitration procedure, unless other rules have been agreed on by the parties.

**Article 52**

The Powers which have recourse to arbitration sign a 'Compromis', in which the subject of the dispute is clearly defined, the time allowed for appointing Arbitrators, the form, order, and time in which the communication referred to in Article 63 must be made, and the amount of the sum which each party must deposit in advance to defray the expenses.

The 'Compromis' likewise defines, if there is occasion, the manner of appointing Arbitrators, any special powers which may eventually belong to the Tribunal, where it shall meet, the language it shall use, and the languages the employment of which shall be authorized before it, and, generally speaking, all the conditions on which the parties are agreed.

**Article 53**

The Permanent Court is competent to settle the 'Compromis', if the parties are agreed to have recourse to it for the purpose.

**Article 54**

In the cases contemplated in the preceding Article, the 'Compromis' shall be settled by a Commission consisting of five members selected in the manner arranged for in Article 45, paragraphs 3 to 6.

The fifth member is President of the Commission ex officio.

**Article 55**

The duties of Arbitrator may be conferred on one Arbitrator alone or on several Arbitrators selected by the parties as they please, or chosen by them from the Members of the Permanent Court of Arbitration established by the present Convention.

Failing the constitution of the Tribunal by direct agreement between the parties, the course referred to in Article 45, paragraphs 3 to 6, is followed.

**Article 56**

When a Sovereign or the Chief of a State is chosen as Arbitrator, the arbitration procedure is settled by him.

**Article 57**

The Umpire is President of the Tribunal ex officio.

When the Tribunal does not include an Umpire, it appoints its own President.
Article 58

When the ‘Compromis’ is settled by a Commission, as contemplated in Article 54, and in the absence of an agreement to the contrary, the Commission itself shall form the Arbitration Tribunal.

Article 59

Should one of the Arbitrators either die, retire, or be unable for any reason whatever to discharge his functions, the same procedure is followed for filling the vacancy as was followed for appointing him.

Article 60

The Tribunal sits at The Hague, unless some other place is selected by the parties. The Tribunal can only sit in the territory of a third Power with the latter’s consent. The place of meeting once fixed cannot be altered by the Tribunal, except with the consent of the parties.

Article 61

If the question as to what languages are to be used has not been settled by the ‘Compromis’, it shall be decided by the Tribunal.

Article 62

The parties are entitled to appoint special agents to attend the Tribunal to act as intermediaries between themselves and the Tribunal. They are further authorized to retain for the defence of their rights and interests before the Tribunal counsel or advocates appointed by themselves for this purpose. The Members of the Permanent Court may not act as agents, counsel, or advocates except on behalf of the Power which appointed them Members of the Court.

Article 63

As a general rule, arbitration procedure comprises two distinct phases: pleadings and oral discussions.

The pleadings consist in the communication by the respective agents to the members of the Tribunal and the opposite party of cases, counter-cases, and, if necessary, of replies; the parties annex thereto all papers and documents called for in the case. This communication shall be made either directly or through the intermediary of the International Bureau, in the order and within the time fixed by the ‘Compromis’.

The time fixed by the ‘Compromis’ may be extended by mutual agreement by the parties, or by the Tribunal when the latter considers it necessary for the purpose of reaching a just decision.
Article 71

They are entitled to raise objections and points. The decisions of the Tribunal on these points are final and cannot form the subject of any subsequent discussion.

Article 72

The members of the Tribunal are entitled to put questions to the agents and counsel of the parties, and to ask them for explanations on doubtful points.

Neither the questions put, nor the remarks made by members of the Tribunal in the course of the discussions, can be regarded as an expression of opinion by the Tribunal in general or by its members in particular.

Article 73

The Tribunal is authorized to declare its competence in interpreting the ‘Compromis’, as well as the other Treaties which may be invoked, and in applying the principles of law.

Article 74

The Tribunal is entitled to issue rules of procedure for the conduct of the case, to decide the forms, order, and time in which each party must conclude its arguments, and to arrange all the formalities required for dealing with the evidence.

Article 75

The parties undertake to supply the Tribunal, as fully as they consider possible, with all the information required for deciding the case.

Article 76

For all notices which the Tribunal has to serve in the territory of a third Contracting Power, the Tribunal shall apply direct to the Government of that Power. The same rule applies in the case of steps being taken to procure evidence on the spot.

The requests for this purpose are to be executed as far as the means at the disposal of the Power applied to under its municipal law allow. They cannot be rejected unless the Power in question considers them calculated to impair its own sovereign rights or its safety.

The Court will equally be always entitled to act through the Power on whose territory it sits.

Article 77

When the agents and counsel of the parties have submitted all the explanations and evidence in support of their case the President shall declare the discussion closed.

Article 78

The Tribunal considers its decisions in private and the proceedings remain secret. All questions are decided by a majority of the members of the Tribunal.

Article 79

The Award must give the reasons on which it is based. It contains the names of the Arbitrators; it is signed by the President and Registrar or by the Secretary acting as Registrar.

Article 80

The Award is read out in public sitting, the agents and counsel of the parties being present or duly summoned to attend.

Article 81

The Award, duly pronounced and notified to the agents of the parties, settles the dispute definitively and without appeal.

Article 82

Any dispute arising between the parties as to the interpretation and execution of the Award shall, in the absence of an Agreement to the contrary, be submitted to the Tribunal which pronounced it.

Article 83

The parties can reserve in the ‘Compromis’ the right to demand the revision of the Award.

In this case and unless there be an Agreement to the contrary, the demand must be addressed to the Tribunal which pronounced the Award. It can only be made on the ground of the discovery of some new fact calculated to exercise a decisive influence upon the Award and which was unknown to the Tribunal and to the party which demanded the revision at the time the discussion was closed.

Proceedings for revision can only be instituted by a decision of the Tribunal expressly recording the existence of the new fact, recognizing in it the character described in the preceding paragraph, and declaring the demand admissible on this ground.
The ‘Compromis’ fixes the period within which the demand for revision must be made.

**Article 84**

The Award is not binding except on the parties in dispute. When it concerns the interpretation of a Convention to which Powers other than those in dispute are parties, they shall inform all the Signatory Powers in good time. Each of these Powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the Award is equally binding on them.

**Article 85**

Each party pays its own expenses and an equal share of the expenses of the Tribunal.

**Chapter IV. Arbitration by Summary Procedure**

**Article 86**

With a view to facilitating the working of the system of arbitration in disputes admitting of a summary procedure, the Contracting Powers adopt the following rules, which shall be observed in the absence of other arrangements and subject to the reservation that the provisions of Chapter III apply so far as may be.

**Article 87**

Each of the parties in dispute appoints an Arbitrator. The two Arbitrators thus selected choose an Umpire. If they do not agree on this point, each of them proposes two candidates taken from the general list of the Members of the Permanent Court exclusive of the members appointed by either of the parties and not being nationals of either of them; which of the candidates thus proposed shall be the Umpire is determined by lot. The Umpire presides over the Tribunal, which gives its decisions by a majority of votes.

**Article 88**

In the absence of any previous agreement the Tribunal, as soon as it is formed, settles the time within which the two parties must submit their respective cases to it.

**Article 89**

Each party is represented before the Tribunal by an agent, who serves as intermediary between the Tribunal and the Government who appointed him.

**Article 90**

The proceedings are conducted exclusively in writing. Each party, however, is entitled to ask that witnesses and experts should be called. The Tribunal has, for its part, the right to demand oral explanations from the agents of the two parties, as well as from the experts and witnesses whose appearance in Court it may consider useful.

**PART V. FINAL PROVISIONS**

**Article 91**

The present Convention, duly ratified, shall replace, as between the Contracting Powers, the Convention for the Pacific Settlement of International Disputes of the 29th July, 1899.

**Article 92**

The present Convention shall be ratified as soon as possible. The ratifications shall be deposited at The Hague. The first deposit of ratifications shall be recorded in a procès-verbal signed by the Representatives of the Powers which take part therein and by the Netherlands Minister for Foreign Affairs. The subsequent deposits of ratifications shall be made by means of a written notification, addressed to the Netherlands Government and accompanied by the instrument of ratification. A duly certified copy of the procès-verbal relative to the first deposit of ratifications, of the notifications mentioned in the preceding paragraph, and of the instruments of ratification, shall be immediately sent by the Netherlands Government, through the diplomatic channel, to the Powers invited to the Second Peace Conference, as well as to those Powers which have adhered to the Convention. In the cases contemplated in the preceding paragraph, the said Government shall at the same time inform the Powers of the date on which it received the notification.

**Article 93**

Non-Signatory Powers which have been invited to the Second Peace Conference may adhere to the present Convention. The Power which desires to adhere notifies its intention in writing to the Netherlands Government, forwarding to it the act of adhesion, which shall be deposited in the archives of the said Government. This Government shall immediately forward to all the other Powers invited to the Second Peace Conference a duly certified copy of the notification as well as of the act of adhesion, mentioning the date on which it received the notification.
Article 94

The conditions on which the Powers which have not been invited to the Second Peace Conference may adhere to the present Convention shall form the subject of a subsequent Agreement between the Contracting Powers.

Article 95

The present Convention shall take effect, in the case of the Powers which were not a party to the first deposit of ratifications, sixty days after the date of the procès-verbal of this deposit, and, in the case of the Powers which ratify subsequently or which adhere, sixty days after the notification of their ratification or of their adhesion has been received by the Netherlands Government.

Article 96

In the event of one of the Contracting Parties wishing to denounce the present Convention, the denunciation shall be notified in writing to the Netherlands Government, which shall immediately communicate a duly certified copy of the notification to all the other Powers informing them of the date on which it was received.

The denunciation shall only have effect in regard to the notifying Power, and one year after the notification has reached the Netherlands Government.

Article 97

A register kept by the Netherlands Minister for Foreign Affairs shall give the date of the deposit of ratifications effected in virtue of Article 92, paragraphs 3 and 4, as well as the date on which the notifications of adhesion (Article 93, paragraph 2) or of denunciation (Article 96, paragraph 1) have been received.

Each Contracting Power is entitled to have access to this register and to be supplied with duly certified extracts from it.

In faith whereof the Plenipotentiaries have appended their signatures to the present Convention.

Done at The Hague, the 18th October, 1907, in a single copy, which shall remain deposited in the archives of the Netherlands Government, and duly certified copies of which shall be sent, through the diplomatic channel, to the Contracting Powers.
Treaty between France and Switzerland providing for Compulsory Conciliation and Arbitration, 1925
FRANCE ET SUISSE

Traitó de conciliation et d’arbitrage obligatoire. Signé à Paris, le 6 avril 1925.

FRANCE AND SWITZERLAND


No. 3393. — TREATY # BETWEEN FRANCE AND SWITZERLAND PROVIDING FOR COMPULSORY CONCILIATION AND ARBITRATION. SIGNED AT PARIS, APRIL 6TH, 1925.

French official text communicated by the Minister for Foreign Affairs of the French Republic and by the Swiss Federal Council. The registration of this Treaty took place April 6th, 1934.

THE PRESIDENT OF THE FRENCH REPUBLIC and THE SWISS FEDERAL COUNCIL,

Being equally convinced of the need for ensuring in all cases the settlement by peaceful means of any disputes that may arise between the two countries,

Considering that the Arbitration Treaty# concluded between France and Switzerland on December 16th, 1904, expired on July 14th, 1917,

In view of the ties of friendship and the good neighbourly relations which happily unite the French nation and the Swiss nation,

Have resolved to conclude a Treaty for the pacific settlement by conciliation or, failing that, by judicial means or by arbitration, of all disputes that might arise between France and Switzerland and, for that purpose, have appointed as their Plenipotentiaries:

THE PRESIDENT OF THE FRENCH REPUBLIC:

Monsieur Edouard Herriot, President of the Council, Minister for Foreign Affairs;

THE SWISS FEDERAL COUNCIL:

Monsieur Alphonse Dunant, Envoy Extraordinary and Minister Plenipotentiary of the Swiss Confederation in Paris;

Who, having exchanged their full powers, found in good and due form, have agreed on the following provisions:

Article 1.

All disputes of every kind between the Government of the French Republic and the Swiss Federal Council which it may not be possible to settle by the normal methods of diplomacy shall, before any resort is made to procedure before the Permanent Court of International Justice or to

1 Traduction. — Translation.

# Traduit par le Secrétariat de la Société des Nations, à titre d’information. 1 Translated by the Secretariat of the League of Nations, for information.

# The exchange of ratifications took place at Paris, March 23rd, 1934.

arbitration, be submitted, with a view to amicable settlement, to a permanent international commission, styled the Permanent Conciliation Commission, constituted in accordance with the present Treaty.

The High Contracting Parties shall, however, be entitled at any time to agree that any specific dispute shall be settled directly by the Permanent Court of International Justice or by arbitration, without any preliminary recourse to the conciliation procedure mentioned above.

**Article 2.**

In the case of a dispute which, according to the municipal law of one of the Parties, falls within the competence of the national courts of such Party, the matter in dispute shall not be subjected to the procedure laid down in the present Treaty until a judgment with final effect has been pronounced by the competent national judicial authority.

**Article 3.**

The Permanent Conciliation Commission mentioned in Article 1 shall be composed of five members, who shall be appointed as follows, that is to say: the High Contracting Parties shall each nominate a commissioner chosen from among their respective nationals, and shall appoint, by common agreement, the three other commissioners from among the nationals of third Powers; these three commissioners must be of different nationalities, and the High Contracting Parties shall appoint the President of the Commission from among them.

The commissioners shall be appointed for three years, and their mandate shall be renewable. Their appointment shall continue until their replacement and, in any case, until the termination of the work in hand at the moment of the expiry of their mandate. Vacancies which may occur as a result of death or resignation shall be filled within the shortest possible time in the manner fixed for the appointments.

**Article 4.**

The Permanent Conciliation Commission shall be constituted within three months from the exchange of the ratifications of the present Treaty.

If the appointment of the commissioners to be nominated by common agreement should not have taken place within the said period, or, in the case of the filling of a vacancy, within three months from the time when the seat falls vacant, Her Majesty the Queen of the Netherlands shall, in the absence of other agreement, be requested to make the necessary appointments.

**Article 5.**

The Permanent Conciliation Commission shall be informed by means of a request addressed to the President by the two Parties acting in agreement or, in the absence of such agreement, by one or other of the Parties.

The request, after having given a summary account of the subject of the dispute, shall contain the invitation to the Commission to take all necessary measures with a view to arriving at an amicable settlement. If the request emanates from only one of the Parties, notification thereof shall be made without delay to the other Party.

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Article 12.

The High Contracting Parties undertake to facilitate the labours of the Permanent Conciliation Commission, and particularly to supply it with the greatest possible extent with all relevant documents and information, as well as to use the means at their disposal to allow it to proceed in their territory and in accordance with their law to the summoning and hearing of witnesses or experts, and to visit the localities in question.

Article 13.

During the labours of the Permanent Conciliation Commission each commissioner shall receive salary, the amount of which shall be fixed by agreement between the High Contracting Parties, each of which shall contribute an equal share.

Article 14.

In the event of no amicable agreement being reached before the Permanent Conciliation Commission, the dispute shall be submitted to the Permanent Court of International Justice whenever the case in question is of those provided for in Article 36, paragraph 2, of the Statute of that Court, relating to its jurisdiction. It will be for the Court to decide, if necessary, in accordance with Article 36, paragraph 4, of the Statute, whether it has jurisdiction.

All other disputes shall be settled by means of arbitration in the manner provided for in Article 15 of the present Treaty. Nevertheless, in the case of any disputes for the settlement of which a special arbitration procedure is laid down in other provisions of Conventions in force between the High Contracting Parties, that procedure shall be followed.

Article 15.

The resort to arbitration provided for in Article 14, paragraph 2, shall be governed by the Hague Convention of October 18, 1907, for the Peaceful Settlement of International Disputes.

Nevertheless, in the absence of agreement between the Parties, the arbitral tribunal shall consist of five members appointed according to the method laid down in Articles 3 and 4 of the present Treaty for the appointment of the Permanent Conciliation Commission.

Article 16.

Should any dispute arise between the High Contracting Parties concerning the application of the present Treaty, such dispute shall be submitted directly to the Permanent Court of International Justice in the manner laid down in Article 40 of the Statute of that Court.
Revised General Act for the Pacific Settlement of International Disputes, adopted by the General Assembly of the United Nations on 28 April 1949
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Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations

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No: 912

REVISED GENERAL ACT FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

Adopted by the General Assembly of the United Nations on 28 April 1949

Official texts: English and French.
Registered ex officio on 20 September 1950.

ACTE GÉNÉRAL REVISÉ POUR LE RÉGLEMENT PACIFIQUE DES DIFFÉRENDS INTERNATIONAUX

Adopté par l'Assemblée générale des Nations Unies le 28 avril 1949

Textes officiels anglais et français.
Enregistré d'office le 20 septembre 1950.
No. 912. REvised GENERAL ACT FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES. ADOPTED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS ON 28 APRIL 1949*

CHAPTER I

CONCILIATION

Article 1

Disputes of every kind between two or more Parties to the present General Act which it has not been possible to settle by diplomacy shall, subject to such reservations as may be made under article 39, be submitted, under the conditions laid down in the present chapter, to the procedure of conciliation.

Article 2

The disputes referred to in the preceding article shall be submitted to a permanent or special conciliation commission constituted by the parties to the dispute.

* In accordance with article 44 the Revised General Act came into force on 20 September 1950, the nineteenth day following the receipt by the Secretary-General of the second instrument of accession.

Accessions:

BELGIUM, 22 December 1949.—Accession extends to all the provisions of the Act (chapters I, II, III and IV).

SWEDEN, 22 June 1950.—Accession extends to the provisions relating to conciliation and judicial settlement (chapters I and II) together with the general provisions dealing with these procedures (chapter IV), with the reservation provided in article 39, paragraph 2 (a), to the effect of excluding, from the procedure described in the Act, disputes arising out of facts prior to the accession.

In the course of the study of methods for the promotion of international co-operation in the political field, the General Assembly, among other measures, decided to restore to the General Act of 28 September 1928 its original efficacy by introducing into its text a number of amendments taking into account that the organs of the League of Nations had ceased to function. However, in adopting the amendments and instructing the Secretary-General to prepare a revised text of the General Act and to hold it open for accessions by States, under the title “Revised General Act for the Pacific Settlement of International Disputes”, the General Assembly, in its resolution 288 A (III) of 28 April 1949, made it clear that “these amendments will only apply as between the States having acceded to the General Act as thus amended and, as a consequence, will not affect the rights of such States, parties to the Act as established on 28 September 1928, as should claim to invoke it in so far as it might still be operative”. For the text of the General Act of 28 September 1928 and subsequent accessions thereto see: League of Nations, Treaty Series, Volume XCIII, page 343; Volume C, page 260; Volume CVII, page 329; Volume CXI, page 414; Volume CXVII, page 304; Volume CLII, page 207; Volume CLVI, page 211; Volume CLX, page 854; Volume CXCVI, page 418; and Volume CXCIII, page 304.

On a request to that effect being made by one of the Contracting Parties to another party, a permanent conciliation commission shall be constituted within a period of six months.

Article 4

Unless the parties concerned agree otherwise, the Conciliation Commission shall be constituted as follows:

(1) The Commission shall be composed of five members. The parties shall each nominate one commissioner, who may be chosen from among their respective nationals. The three other commissioners shall be appointed by agreement from among the nationals of third Powers. These three commissioners must be of different nationalities and must not be habitually resident in the territory nor be in the service of the parties. The parties shall appoint the President of the Commission from among them.

(2) The commissioners shall be appointed for three years. They shall be re-eligible. The commissioners appointed jointly may be replaced during the course of their mandate by agreement between the parties. Either party may, however, at any time replace a commissioner whom it has appointed. Even if replaced, the commissioners shall continue to exercise their functions until the termination of the work in hand.

(3) Vacancies which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner fixed for the nominations.

Article 5

If, when a dispute arises, no permanent conciliation commission appointed by the parties is in existence, a special commission shall be constituted for the examination of the dispute within a period of three months from the date at which a request to that effect is made by one of the parties to the other party. The necessary appointments shall be made in the manner laid down in the preceding article, unless the parties decide otherwise.

Article 6

1. If the appointment of the commissioners to be designated jointly is not made within the periods provided for in articles 3 and 5, the making of the necessary appointments shall be entrusted to a third Power, chosen by agreement between the parties, or on request of the parties, to the President of the General Assembly, or, if the latter is not in session, to the last President.
2. If no agreement is reached on either of these procedures, each party shall designate a different Power, and the appointment shall be made in concert by the Powers thus chosen.

3. If, within a period of three months, the two Powers have been unable to reach an agreement, each of them shall submit a number of candidates equal to the number of members to be appointed. It shall then be decided by lot which of the candidates thus designated shall be appointed.

**Article 7**

1. Disputes shall be brought before the Conciliation Commission by means of an application addressed to the President by the two parties acting in agreement, or in default thereof by one or other of the parties.

2. The application, after giving a summary account of the subject of the dispute, shall contain the invitation to the Commission to take all necessary measures with a view to arriving at an amicable solution.

3. If the application emanates from only one of the parties, the other party shall, without delay, be notified by it.

**Article 8**

1. Within fifteen days from the date on which a dispute has been brought by one of the parties before a permanent conciliation commission, either party may replace its own commissioner, for the examination of the particular dispute, by a person possessing special competence in the matter.

2. The party making use of this right shall immediately notify the other party; the latter shall, in such case, be entitled to take similar action within fifteen days from the date on which it received the notification.

**Article 9**

1. In the absence of agreement to the contrary between the parties, the Conciliation Commission shall meet at the seat of the United Nations, or at some other place selected by its President.

2. The Commission may in all circumstances request the Secretary-General of the United Nations to afford it his assistance.

**Article 10**

The work of the Conciliation Commission shall not be conducted in public unless a decision to that effect is taken by the Commission with the consent of the parties.

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1. In the absence of agreement to the contrary between the parties, the Conciliation Commission shall lay down its own procedure, which in any case must provide for both parties being heard. In regard to enquiries, the Commission, unless it decides unanimously to the contrary, shall act in accordance with the provisions of part III of the Hague Convention of 18 October 1907 for the Pacific Settlement of International Disputes.

2. The parties shall be represented before the Conciliation Commission by agents, whose duty shall be to act as intermediaries between them and the Commission; they may, moreover, be assisted by counsel and experts appointed by them for that purpose and may request that all persons whose evidence appears to them desirable shall be heard.

3. The Commission, for its part, shall be entitled to request oral explanations from the agents, counsel and experts of both parties, as well as from all persons it may think desirable to summon with the consent of their Governments.

**Article 12**

In the absence of agreement to the contrary between the parties, the decisions of the Conciliation Commission shall be taken by a majority vote, and the Commission may only take decisions on the substance of the dispute if all its members are present.

**Article 13**

The parties undertake to facilitate the work of the Conciliation Commission, and particularly to supply it to the greatest possible extent with all relevant documents and information, as well as to use the means at their disposal to allow it to proceed in their territory, and in accordance with their law, to the summoning and hearing of witnesses or experts and to visit the localities in question.

**Article 14**

1. During the proceedings of the Commission, each of the commissioners shall receive emoluments the amount of which shall be fixed by agreement between the parties, each of which shall contribute an equal share.

2. The general expenses arising out of the working of the Commission shall be divided in the same manner.

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Article 15

1. The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of enquiry or otherwise, and to endeavour to bring the parties to an agreement. It may, after the case has been examined, inform the parties of the terms of settlement which seem suitable to it, and lay down the period within which they are to make their decision.

2. At the close of the proceedings the Commission shall draw up a procès-verbal stating, as the case may be, either that the parties have come to an agreement and, if need arises, the terms of the agreement, or that it has been impossible to effect a settlement. No mention shall be made in the procès-verbal of whether the Commission's decisions were taken unanimously or by a majority vote.

3. The proceedings of the Commission must, unless the parties otherwise agree, be terminated within six months from the date on which the Commission shall have been given cognizance of the dispute.

Article 16

The Commission's procès-verbal shall be communicated without delay to the parties. The parties shall decide whether it shall be published.

CHAPTER II
JUDICIAL SETTLEMENT

Article 17

All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under article 39, be submitted for decision to the International Court of Justice, unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal. It is understood that the disputes referred to above include in particular those mentioned in Article 38 of the Statute of the International Court of Justice.

Article 18

If the parties agree to submit the disputes mentioned in the preceding article to an arbitral tribunal, they shall draw up a special agreement in which they shall specify the subject of the dispute, the arbitrators selected, and the procedure to be followed. In the absence of sufficient particulars in the special agreement, the provisions of the Hague Convention of 18 October 1907 for the Pacific Settlement of International Disputes shall apply so far as is necessary.

If nothing is laid down in the special agreement as to the rules regarding the substance of the dispute to be followed by the arbitrators, the Tribunal shall apply the substantive rules enumerated in Article 39 of the Statute of the International Court of Justice.

Article 19

If the parties fail to agree concerning the special agreement referred to in the preceding article, or fail to appoint arbitrators, either party shall be at liberty, after giving three months' notice, to bring the dispute by an application direct before the International Court of Justice.

Article 20

1. Notwithstanding the provisions of article 1, disputes of the kind referred to in article 17 arising between parties who have acceded to the obligations contained in the present chapter shall only be subject to the procedure of conciliation if the parties so agree.

2. The obligation to resort to the procedure of conciliation remains applicable to disputes which are excluded from judicial settlement only by the operation of reservations under the provisions of article 39.

3. In the event of recourse to and failure of conciliation, neither party may bring the dispute before the International Court of Justice or call for the constitution of the arbitral tribunal referred to in article 18 before the expiration of one month from the termination of the proceedings of the Conciliation Commission.

CHAPTER III
ARBITERATION

Article 21

Any dispute not of the kind referred to in article 17 which does not, within the month following the termination of the work of the Conciliation Commission provided for in chapter I, form the object of an agreement between the parties, shall, subject to such reservations as may be made under article 39, be brought before an arbitral tribunal which, unless the parties otherwise agree, shall be constituted in the manner set out below.

Article 22

The Arbitral Tribunal shall consist of five members. The parties shall each nominate one member, who may be chosen from among their respective nationals. The other two arbitrators and the Chairman shall be chosen.
by common agreement from among the nationals of third Powers. They must be of different nationalities and must not be habitually resident in the territory nor be in the service of the parties.

**Article 23**

1. If the appointment of the members of the Arbitral Tribunal is not made within a period of three months from the date on which one of the parties requested the other party to constitute an arbitral tribunal, a third Power, chosen by agreement between the parties, shall be requested to make the necessary appointments.

2. If no agreement is reached on this point, each party shall designate a different Power, and the appointments shall be made in concert by the Powers thus chosen.

3. If, within a period of three months, the two Powers so chosen have been unable to reach an agreement, the necessary appointments shall be made by the President of the International Court of Justice. If the latter is prevented from acting or is a subject of one of the parties, the nominations shall be made by the Vice-President. If the latter is prevented from acting or is a subject of one of the parties, the appointments shall be made by the oldest member of the Court who is not a subject of either party.

**Article 24**

Vacancies which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner fixed for the nominations.

**Article 25**

The parties shall draw up a special agreement determining the subject of the disputes and the details of procedure.

**Article 26**

In the absence of sufficient particulars in the special agreement regarding the matters referred to in the preceding article, the provisions of the Hague Convention of 18 October 1907 for the Pacific Settlement of International Disputes shall apply so far as is necessary.

**Article 27**

Failing the conclusion of a special agreement within a period of three months from the date on which the Tribunal was constituted, the dispute may be brought before the Tribunal by an application by one or other party.

**Article 28**

If nothing is laid down in the special agreement or no special agreement has been made, the Tribunal shall apply the rules in regard to the substance of the dispute enumerated in Article 58 of the Statute of the International Court of Justice. In so far as there exists no such rule applicable to the dispute, the Tribunal shall decide *ex aequo et bono*.

**Chapter IV**

**General Provisions**

**Article 29**

1. Disputes for the settlement of which a special procedure is laid down in other conventions in force between the parties to the dispute shall be settled in conformity with the provisions of those conventions.

2. The present General Act shall not affect any agreements in force by which conciliation procedure is established between the Parties or they are bound by obligations to resort to arbitration or judicial settlement which ensure the settlement of the dispute. If, however, these agreements provide only for a procedure of conciliation, after such procedure has been followed without result, the provisions of the present General Act concerning judicial settlement or arbitration shall be applied in so far as the parties have agreed thereto.

**Article 30**

If a party brings before a Conciliation Commission a dispute which the other party, relying on conventions in force between the parties, has submitted to the International Court of Justice or an arbitral tribunal, the Commission shall defer consideration of the dispute until the Court or the Arbitral Tribunal has pronounced upon the conflict of competence. The same rule shall apply if the Court or the Tribunal is seized of the case by one of the parties during the conciliation proceedings.

**Article 31**

1. In the case of a dispute the occasion of which, according to the municipal law of one of the parties, falls within the competence of its judicial or administrative authorities, the party in question may object to the matter in dispute being submitted for settlement by the different methods laid down in the present General Act until a decision with final effect has been pronounced, within a reasonable time, by the competent authority.
2. In such a case, the party which desires to resort to the procedures laid down in the present General Act must notify the other party of its intention within a period of one year from the date of the aforementioned decision.

Article 32

If, in a judicial sentence or arbitral award, it is declared that a judgment, or a measure enjoined by a court of law or other authority of one of the parties to the dispute, is wholly or in part contrary to international law, and if the constitutional law of that party does not permit or only partially permits the consequences of the judgment or measure in question to be annulled, the parties agree that the judicial sentence or arbitral award shall grant the injured party equitable satisfaction.

Article 33

1. In all cases where a dispute forms the object of arbitration or judicial proceedings, and particularly if the question on which the parties differ arises out of acts already committed or on the point of being committed, the International Court of Justice, acting in accordance with Article 41 of its Statute, or the Arbitral Tribunal, shall lay down within the shortest possible time the provisional measures to be adopted. The parties to the dispute shall be bound to accept such measures.

2. If the dispute is brought before a conciliation commission, the latter may recommend to the parties the adoption of such provisional measures as it considers suitable.

3. The parties undertake to abstain from all measures likely to react prejudicially upon the execution of the judicial or arbitral decision or upon the arrangements proposed by the Conciliation Commission and, in general, to abstain from any sort of action whatsoever which may aggravate or extend the dispute.

Article 34

Should a dispute arise between more than two Parties to the present General Act, the following rules shall be observed for the application of the forms of procedure described in the foregoing provisions:

(a) In the case of conciliation procedure, a special commission shall invariably be constituted. The composition of such commission shall differ according as the parties all have separate interests or as two or more of their number act together.

In the former case, the parties shall each appoint one commissioner and shall jointly appoint commissioners nationals of third Powers not parties to the dispute, whose number shall always exceed by one the number of commissioners appointed separately by the parties.

In the second case, the parties who act together shall appoint their commissioner jointly by agreement between themselves and shall combine with the other party or parties in appointing third commissioners.

In either event, the parties, unless they agree otherwise, shall apply article 5 and the following articles of the present Act, so far as they are compatible with the provisions of the present article.

(b) In the case of judicial procedure, the Statute of the International Court of Justice shall apply.

(c) In the case of arbitral procedure, if agreement is not secured as to the composition of the Tribunal, in the case of the disputes mentioned in article 17, each party shall have the right, by means of an application, to submit the dispute to the International Court of Justice; in the case of the disputes mentioned in article 21, the above article 22 and following articles shall apply, but each party having separate interests shall appoint one arbitrator and the number of arbitrators separately appointed by the parties to the dispute shall always be one less than that of the other arbitrators.

Article 35

1. The present General Act shall be applicable as between the Parties thereto, even though a third Power, whether a Party to the Act or not, has an interest in the dispute.

2. In conciliation procedure, the parties may agree to invite such third Power to intervene.

Article 36

1. In judicial or arbitral procedure, if a third Power should consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit to the International Court of Justice or to the Arbitral Tribunal a request to intervene as a third party.

2. It will be for the Court or the Tribunal to decide upon this request.

Article 37

1. Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar of the International Court of Justice or the Arbitral Tribunal shall notify all such States forthwith.

2. Every State so notified has the right to intervene in the proceedings; but, if it uses this right, the construction given by the decision will be binding upon it.
Article 38

Accessions to the present General Act may extend:
A. Either to all the provisions of the Act (chapters I, II, III and IV);  
B. Or to those provisions only which relate to conciliation an  
   judicial settlement (chapters I and II), together with the general provisions  
   dealing with these procedures (chapter IV);  
C. Or to those provisions only which relate to conciliation (chapter I),  
   together with the general provisions concerning that procedure (chapter IV).

The Contracting Parties may benefit by the accessions of other Parties  
only in so far as they have themselves assumed the same obligations.

Article 39

1. In addition to the power given in the preceding article, a Party,  
in acceding to the present General Act, may make his acceptance conditional  
upon the reservations exhaustively enumerated in the following paragraph.  
These reservations must be indicated at the time of accession.  
2. These reservations may be such as to exclude from the procedure  
described in the present Act:  
(a) Disputes arising out of facts prior to the accession either of the  
Party making the reservation or of any other Party with whom the said  
Party may have a dispute;  
(b) Disputes concerning questions which by international law are  
solely within the domestic jurisdiction of States;  
(c) Disputes concerning particular cases or clearly specified subject-  
matters, such as territorial status, or disputes falling within clearly defined  
categories.  
3. If one of the parties to a dispute has made a reservation, the other  
parties may enforce the same reservation in regard to that party.  
4. In the case of Parties who have acceded to the provisions of the  
present General Act relating to judicial settlement or to arbitration, such  
reservations as they may have made shall, unless otherwise expressly  
stated, be deemed not to apply to the procedure of conciliation.

Article 40

A Party whose accession has been only partial, or was made subject  
to reservations, may at any moment, by means of a simple declaration,  
either extend the scope of his accession or abandon all or part of his  
reservations.
2. It shall remain in force for further successive periods of five years in the case of Contracting Parties which do not denounced it at least six months before the expiration of the current period.

3. Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations, who shall inform all the Members of the United Nations and the non-member States referred to in article 43.

4. A denunciation may be partial only, or may consist in notification of reservations not previously made.

5. Notwithstanding denunciation by one of the Contracting Parties concerned in a dispute, all proceedings pending at the expiration of the current period of the General Act shall be duly completed.

Article 46

A copy of the present General Act, signed by the President of the General Assembly and by the Secretary-General of the United Nations, shall be deposited in the archives of the Secretariat. A certified true copy shall be delivered by the Secretary-General to each of the Members of the United Nations, to the non-member States which shall have become parties to the Statute of the International Court of Justice and to those designated by the General Assembly of the United Nations.

Article 47

The present General Act shall be registered by the Secretary-General of the United Nations on the date of its entry into force.

Herbert V. Evatt
President of the General Assembly of the United Nations

Trygve Lie
Secretary-General of the United Nations
Security Council resolution 186 (1964) of 4 March 1964
istan to participate, without vote, in the discussion of
the item entitled “The India-Pakistan question: letter
dated 16 January 1964 from the Minister for External
Affairs of Pakistan addressed to the President of the
Security Council (S/5517); letter dated 24 January
1964 from the Permanent Representative of India
[to the United Nations] addressed to the President of
the Security Council (S/5522)”.

At its 1105th meeting, on 20 March 1964, the Council
decided to postpone the discussion of the question until
5 May.

At its 1116th meeting, on 13 May 1964, the Council
decided to request the President, after consulting informally with the members of the Council, to sum up the
conclusions that had emerged from the debate and to submit them to the Council.

THE CYPRUS QUESTION

Decision

At its 1098th meeting, on 27 February 1964, the Council decided, under rule 39 of the provisional rules of
procedure, to invite Mr. Rauf Denktas to make a statement before it.

186 (1964). Resolution of 4 March 1964
[S/5575]

The Security Council,

Noting that the present situation with regard to
Cyprus is likely to threaten international peace and
security and may further deteriorate unless additional
measures are promptly taken to maintain peace and to
seek out a durable solution,

3 See Official Records of the Security Council, Nineteenth Year,

186 (1964). Résolution du 4 mars 1964
[S/5575]

Le Conseil de sécurité,

Notant que la situation actuelle concernant Chypre
est de nature à menacer la paix et la sécurité internationales et peut encore empirer à moins que de nouvelles
mesures ne soient prises rapidement pour maintenir la
paix et pour rechercher une solution durable,

3 Questions ayant fait l’objet de résolutions ou décisions de la

4 Le Conseil a entendu la déclaration de M. Denktas lors de
sa 1099e séance, le 28 février 1964.
Considering the positions taken by the parties in relation to the treaties signed at Nicosia on 16 August 1960, 5

Having in mind the relevant provisions of the Charter of the United Nations and, in particular, its Article 2, paragraph 4, which reads:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations”,

1. Calls upon all Member States, in conformity with their obligations under the Charter of the United Nations, to refrain from any action or threat of action likely to worsen the situation in the sovereign Republic of Cyprus, or to endanger international peace;

2. Asks the Government of Cyprus, which has the responsibility for the maintenance and restoration of law and order, to take all additional measures necessary to stop violence and bloodshed in Cyprus;

3. Calls upon the communities in Cyprus and their leaders to act with the utmost restraint;

4. Recommends the creation, with the consent of the Government of Cyprus, of a United Nations Peace-keeping Force in Cyprus. The composition and size of the Force shall be established by the Secretary-General, in consultation with the Governments of Cyprus, Greece, Turkey and the United Kingdom of Great Britain and Northern Ireland. The Commander of the Force shall be appointed by the Secretary-General and report to him. The Secretary-General, who shall keep the Governments providing the Force fully informed, shall report periodically to the Security Council on its operation;

5. Recommends that the function of the Force should be, in the interest of preserving international peace and security, to use its best efforts to prevent a recurrence of fighting and, as necessary, to contribute to the maintenance and restoration of law and order and a return to normal conditions;

6. Recommends that the stationing of the Force shall be for a period of three months, all costs pertaining to it being met, in a manner to be agreed upon by them, by the Governments providing the contingents and by the Government of Cyprus. The Secretary-General may also accept voluntary contributions for that purpose;

7. Recommends further that the Secretary-General designate, in agreement with the Government of Cyprus

Ayant présentes à l’esprit les dispositions pertinentes de la Charte des Nations Unies et, notamment, celles du paragraphe 4 de l’Article 2, qui est ainsi conçu:

« Les Membres de l’Organisation s’abstiennent, dans leurs relations internationales, de recourir à la menace ou à l’emploi de la force, soit contre l’intégrité territoriale ou l’indépendance politique de tout État, soit de toute autre manière incompatible avec les buts des Nations Unies »,

1. Invite tous les États Membres, conformément à leurs obligations aux termes de la Charte des Nations Unies, à s’abstenir de toute action ou de toute menace d’action qui risquerait d’aggraver la situation dans la République souveraine de Chypre ou de mettre en danger la paix internationale;

2. Demande au Gouvernement chypriote, qui est responsable du maintien et du rétablissement de l’ordre public, de prendre toutes les nouvelles mesures nécessaires pour arrêter les actes de violence et les effusions de sang à Chypre;

3. Invite les communautés de Chypre et leurs dirigeants à faire preuve de la plus grande modération;


5. Recommande que la Force ait pour fonction, dans l’intérêt de la préservation de la paix et de la sécurité internationale, de faire tout ce qui est en son pouvoir pour prévenir toute reprise des combats et, selon qu’il conviendra, de contribuer au maintien et au rétablissement de l’ordre public ainsi qu’au retour à une situation normale;

6. Recommande que la Force soit stationnée pour trois mois, toutes les dépenses y relatives étant à la charge, selon les modalités dont ils conviendront, des gouvernements qui auront fourni les contingents et du Gouvernement chypriote. Le Secrétaire général pourra aussi accepter des contributions volontaires à cette fin;

7. Recommande en outre que le Secrétaire général désigne, en accord avec le Gouvernement chypriote et

and the Governments of Greece, Turkey and the United Kingdom, a mediator, who shall use his best endeavours with the representatives of the communities and also with the aforesaid four Governments, for the purpose of promoting a peaceful solution and an agreed settlement of the problem confronting Cyprus, in accordance with the Charter of the United Nations, having in mind the well-being of the people of Cyprus as a whole and the preservation of international peace and security. The mediator shall report periodically to the Secretary-General on his efforts;

8. **Requests** the Secretary-General to provide, from funds of the United Nations, as appropriate, for the remuneration and expenses of the mediator and his staff.

*Adopted unanimously at the 1102nd meeting.*

---

187 (1964). Resolution of 13 March 1964  
[S/5603]

The Security Council,

*Having heard* the statements of the representatives of the Republic of Cyprus, Greece and Turkey,

*Reaffirming* its resolution 186 (1964) of 4 March 1964,

*Being deeply concerned* over developments in the area,

*Noting* the progress reported by the Secretary-General in regard to the establishment of a United Nations Peace-keeping Force in Cyprus,

*Noting* the assurance from the Secretary-General that the United Nations Peace-keeping Force in Cyprus envisaged in resolution 186 (1964) is about to be established and that advance elements of that Force are already en route to Cyprus,

1. *Reaffirms* its call upon all Member States, in conformity with their obligations under the Charter of the United Nations, to refrain from any action or threat of action likely to worsen the situation in the sovereign Republic of Cyprus, or to endanger international peace;

2. *Requests* the Secretary-General to press on with his efforts to implement Security Council resolution 186 (1964), and requests Member States to co-operate with the Secretary-General to that end.

*Adopted unanimously at the 1103rd meeting.*

---

187 (1964). Résolution du 13 mars 1964  
[S/5603]

Le Conseil de sécurité,

*Ayant entendu* les déclarations des représentants de la République de Chypre, de la Grèce et de la Turquie,

*Réaffirmant* sa résolution 186 (1964) du 4 mars 1964,

*Profondément préoccupé* des événements de la région,

*Prenant note* des progrès indiqués par le Secrétaire général en ce qui concerne la constitution d’une Force des Nations Unies chargée du maintien de la paix à Chypre,

*Prenant note* de l’assurance donnée par le Secrétaire général que la Force des Nations Unies chargée du maintien de la paix à Chypre, envisagée dans la résolution 186 (1964), est sur le point d’être constituée et que des éléments avancés de la Force sont déjà en route vers Chypre,

1. *Réaffirme* l’appel qu’il a adressé à tous les États Membres pour qu’ils s’abstiennent, conformément à leurs obligations aux termes de la Charte des Nations Unies, de toute action ou de toute menace d’action qui risquerait d’aggraver la situation dans la République souveraine de Chypre ou de mettre en danger la paix internationale;

2. *Prie* le Secrétaire général de poursuivre activement ses efforts pour mettre en œuvre la résolution 186 (1964) du Conseil de sécurité, et prie les États Membres de coopérer avec le Secrétaire général à cette fin.

*Adoptée à l’unanimité à la 1103e séance.*
Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (United Nations General Assembly resolution 2625 (XXV) of 24 October 1970, annex)
## RESOLUTIONS ADOPTED ON THE REPORTS OF THE SIXTH COMMITTEE

### CONTENTS

<table>
<thead>
<tr>
<th>Resolution No.</th>
<th>Title</th>
<th>Item</th>
<th>Date of adoption</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2625 (XXV)</td>
<td>Declaration on Principles of International Law concerning Friendly</td>
<td>85</td>
<td>24 October 1970</td>
<td>121</td>
</tr>
<tr>
<td></td>
<td>Relations and Co-operation among States in accordance with the</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Charter of the United Nations (A/8082)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(A/8146)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2644 (XXV)</td>
<td>Report of the Special Committee on the Question of Defining Aggression</td>
<td>87</td>
<td>25 November 1970</td>
<td>126</td>
</tr>
<tr>
<td></td>
<td>(A/8171)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2645 (XXV)</td>
<td>Aerial hijacking or interference with civil air travel (A/8176)</td>
<td>99</td>
<td>25 November 1970</td>
<td>126</td>
</tr>
<tr>
<td>2669 (XXV)</td>
<td>Progressive development and codification of the rules of international</td>
<td>91</td>
<td>8 December 1970</td>
<td>127</td>
</tr>
<tr>
<td></td>
<td>law relating to international watercourses (A/8202)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2697 (XXV)</td>
<td>Need to consider suggestions regarding the review of the Charter of</td>
<td>88</td>
<td>11 December 1970</td>
<td>127</td>
</tr>
<tr>
<td></td>
<td>the United Nations (A/8219)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2698 (XXV)</td>
<td>United Nations Programme of Assistance in the Teaching, Study,</td>
<td>90</td>
<td>11 December 1970</td>
<td>128</td>
</tr>
<tr>
<td></td>
<td>Dissemination and Wider Appreciation of International Law (A/8213)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2723 (XXV)</td>
<td>Review of the role of the International Court of Justice (A/8238)</td>
<td>96</td>
<td>15 December 1970</td>
<td>128</td>
</tr>
<tr>
<td>Other decisions</td>
<td>Amendment to Article 22 of the Statute of the International Court of</td>
<td>89</td>
<td>8 December 1970</td>
<td>129</td>
</tr>
<tr>
<td></td>
<td>Justice (Seat of the Court) and consequential amendments to Articles</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>23 and 28</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Progressive development and codification of the rules of international</td>
<td>91</td>
<td>8 December 1970</td>
<td>129</td>
</tr>
<tr>
<td></td>
<td>law relating to international watercourses</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Review of the role of the International Court of Justice</td>
<td>96</td>
<td>15 December 1970</td>
<td>129</td>
</tr>
<tr>
<td></td>
<td>Aerial hijacking or interference with civil air travel</td>
<td>99</td>
<td>25 November 1970</td>
<td>129</td>
</tr>
</tbody>
</table>

### 2625 (XXV). Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations

The General Assembly,

Recalling its resolutions 1815 (XVII) of 18 December 1962, 1966 (XVIII) of 16 December 1963, 2103 (XX) of 20 December 1965, 2181 (XXI) of 12 December 1966, 2327 (XXII) of 18 December 1967, 2463 (XXIII) of 20 December 1968 and 2533 (XXIV) of 8 December 1969, in which it affirmed the importance of the progressive development and codification of the principles of international law concerning friendly relations and co-operation among States,

Having considered the report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States,\(^1\) which met in Geneva from 31 March to 1 May 1970,

Emphasizing the paramount importance of the Charter of the United Nations for the maintenance of international peace and security and for the development of friendly relations and co-operation among States,

Deeply convinced that the adoption of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations on the occasion of the twenty-fifth anniversary of the United Nations would contribute to the strengthening of world peace and constitute a landmark in the development of international law and of relations among States, in promoting the rule of law among nations and particularly the universal application of the principles embodied in the Charter,

Considering the desirability of the wide dissemination of the text of the Declaration,

1. Approves the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the text of which is annexed to the present resolution;
2. Expresses its appreciation to the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States for its work resulting in the elaboration of the Declaration;
3. Recommends that all efforts be made so that the Declaration becomes generally known.

ANNEX

DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS

PREAMBLE

The General Assembly,

Reaffirming in the terms of the Charter of the United Nations that the maintenance of international peace and security and the development of friendly relations and cooperation between nations are among the fundamental purposes of the United Nations,

Recalling that the peoples of the United Nations are determined to practise tolerance and live together in peace with one another as good neighbours,

Bearing in mind the importance of maintaining and strengthening international peace founded upon freedom, equality, justice and respect for fundamental human rights and of developing friendly relations among nations irrespective of their political, economic and social systems or the levels of their development,

Bearing in mind also the paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations,

Considering that the faithful observance of the principles of international law concerning friendly relations and cooperation among States and the fulfillment in good faith of the obligations assumed by States, in accordance with the Charter, is of the greatest importance for the maintenance of international peace and security and for the implementation of the other purposes of the United Nations,

Noting that the great political, economic and social changes and the scientific progress which have taken place in the world since the adoption of the Charter give increased importance to these principles and to the need for their more effective application in the conduct of States wherever carried on,

Recalling the established principle that outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means, and mindful of the fact that consideration is being given in the United Nations to the question of establishing other appropriate provisions similarly inspired,

Convinced that the strict observance by States of the obligations not to intervene in the affairs of any other State is of essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter, but also leads to the creation of situations which threaten international peace and security,

Recalling the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State,

Considering it essential that all States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

Considering it equally essential that all States shall settle their international disputes by peaceful means in accordance with the Charter,

Reaffirming, in accordance with the Charter, the basic importance of sovereign equality and stressing that the purposes of the United Nations can be implemented only if States enjoy sovereign equality and comply fully with the requirements of this principle in their international relations,

Convinced that the subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security,

Convinced that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality,

Convinced in consequence that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter,

Considering the provisions of the Charter as a whole and taking into account the role of relevant resolutions adopted by the competent organs of the United Nations relating to the content of the principles,

Considering that the progressive development and codification of the following principles:

(a) The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

(b) The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered,

(c) The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter,

(d) The duty of States to co-operate with one another in accordance with the Charter,

(e) The principle of equal rights and self-determination of peoples,

(f) The principle of sovereign equality of States,

(g) The principle that States shall fulfill in good faith the obligations assumed by them in accordance with the Charter, so as to secure their more effective application within the international community, would promote the realization of the purposes of the United Nations,

Having considered the principles of international law relating to friendly relations and co-operation among States,

1. Solemnly proclaims the following principles:

The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.

Every State has the duty to refrain, in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.

A war of aggression constitutes a crime against the peace, for which there is responsibility under international law.

In accordance with the purposes and principles of the United Nations, States have the duty to refrain from propaganda for wars of aggression.

Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.

Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. Nothing in the foregoing shall be construed as prejudicing the positions of the parties concerned with regard to the status and effects of such lines under their special régimes or as affecting their temporary character.

States have a duty to refrain from acts of reprisal involving the use of force.
Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal. Nothing in the foregoing shall be construed as affecting:

(a) Provisions of the Charter or any international agreement prior to the Charter régime and valid under international law; or
(b) The powers of the Security Council under the Charter.

All States shall pursu in good faith negotiations for the early conclusion of a universal treaty on general and complete disarmament under effective international control and strive to adopt appropriate measures to reduce international tensions and strengthen confidence among States.

All States shall comply in good faith with their obligations under the generally recognized principles and rules of international law with respect to the maintenance of international peace and security, and shall endeavour to make the United Nations security system based on the Charter more effective.

Nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful.

The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.

Every State shall settle its international disputes with other States by peaceful means in such a manner that international peace and security and justice are not endangered.

States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice. In seeking such a settlement the parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute.

The parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them.

States parties to an international dispute, as well as other States, shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations.

International disputes shall be settled on the basis of the sovereignty equality of States and in accordance with the principle of free choice of means. Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereignty equality.

Nothing in the foregoing paragraphs prejudices or derogates from the applicable provisions of the Charter, in particular those relating to the pacific settlement of international disputes.

The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter.

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

No State may use or encourage the use of economic, political or any other type of material to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State.

The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention.

Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.

Nothing in the foregoing paragraphs shall be construed as affecting the relevant provisions of the Charter relating to the maintenance of international peace and security.

The duty of States to co-operate with one another in accordance with the Charter.

States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.

To this end:

(a) States shall co-operate with other States in the maintenance of international peace and security;

(b) States shall co-operate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance;

(c) States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention;

(d) States Members of the United Nations have the duty to take joint and separate action in co-operation with the United Nations in accordance with the relevant provisions of the Charter.

States should co-operate in the economic, social and cultural fields as well as in the field of science and technology and for the promotion of international cultural and educational progress. States should co-operate in the promotion of economic growth throughout the world, especially that of the developing countries.

The principle of equal rights and self-determination of peoples.

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights.
and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

(a) To promote friendly relations and co-operation among States; and

(b) To bring to a speedy end colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

The principle of sovereign equality of States

All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.

In particular, sovereign equality includes the following elements:

(a) States are juridically equal;

(b) Each State enjoys the rights inherent in full sovereignty;

(c) Each State has the duty to respect the personality of other States;

(d) The territorial integrity and political independence of the State are inviolable;

(e) Each State has the right freely to choose and develop its political, social, economic and cultural systems;

(f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter

Every State has the duty to fulfil in good faith the obligations assumed by it in accordance with the Charter of the United Nations.

Every State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law.

Every State has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law.

Where obligations arising under international agreements are in conflict with the obligations of Members of the United Nations under the Charter of the United Nations, the obligations under the Charter shall prevail.

GENERAL PART

2. Declares that:

In their interpretation and application the above principles are interrelated and each principle should be construed in the context of the other principles.

Nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter or the rights and duties of Member States under the Charter or the rights of peoples under the Charter, taking into account the elaboration of these rights in this Declaration.

3. Declares further that:

The principles of the Charter which are embodied in this Declaration constitute basic principles of international law, and consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles.

2634 (XXV). Report of the International Law Commission

The General Assembly,

Having considered the report of the International Law Commission on the work of its twenty-second session, 2

Emphasizing the need for the further codification and progressive development of international law in order to make it a more effective means of implementing the purposes and principles set forth in Articles 1 and 2 of the Charter of the United Nations and to give increased importance to its role in relations among nations,

Noting with satisfaction that at its twenty-second session the International Law Commission completed its provisional draft articles on relations between States and international organizations, continued the consideration of matters concerning the codification and progressive development of the international law relating to succession of States in respect of treaties and State responsibility and included in its programme of work the question of treaties concluded between States and international organizations or between two or more international organizations, as recommended by the General Assembly in resolution 2501 (XXIV) of 12 November 1969,

Noting further that the International Law Commission has proposed to hold a fourteen-week session in 1971 in order to enable it to complete the second reading of the draft articles on relations between States

2 Ibid., Supplement No. 10 (A/8010/Rev.1).
Manila Declaration on the Peaceful Settlement of International Disputes (United Nations General Assembly resolution 37/10 of 15 November 1982, annex)
IX. RESOLUTIONS ADOPTED ON THE REPORTS OF THE SIXTH COMMITTEE

CONTENTS

<table>
<thead>
<tr>
<th>Resolution No.</th>
<th>Title</th>
<th>Item</th>
<th>Date of adoption</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>37/10</td>
<td>Manila Declaration on the Peaceful Settlement of International Disputes (A/37/590)</td>
<td>122</td>
<td>15 November 1982</td>
<td>261</td>
</tr>
<tr>
<td>37/11</td>
<td>United Nations Conference on Succession of States in respect of State Property, Archives and Debts (A/37/593)</td>
<td>124</td>
<td>15 November 1982</td>
<td>263</td>
</tr>
<tr>
<td>37/103</td>
<td>Progressive development of the principles and norms of international law relating to the new international economic order (A/37/720)</td>
<td>116</td>
<td>16 December 1982</td>
<td>265</td>
</tr>
<tr>
<td>37/104</td>
<td>Observer status of national liberation movements recognized by the Organization of African Unity and/or by the League of Arab States (A/37/750)</td>
<td>117 (a)</td>
<td>16 December 1982</td>
<td>265</td>
</tr>
<tr>
<td>37/105</td>
<td>Report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations (A/37/721)</td>
<td>118</td>
<td>16 December 1982</td>
<td>266</td>
</tr>
<tr>
<td>37/108</td>
<td>Consideration of effective measures to enhance the protection, security and safety of diplomatic and consular missions and representatives (A/37/699)</td>
<td>120</td>
<td>16 December 1982</td>
<td>268</td>
</tr>
<tr>
<td>37/109</td>
<td>Drafting of an international convention against the recruitment, use, financing and training of mercenaries (A/37/648)</td>
<td>121</td>
<td>16 December 1982</td>
<td>269</td>
</tr>
<tr>
<td>37/110</td>
<td>Review of the multilateral treaty-making process (A/37/751)</td>
<td>123</td>
<td>16 December 1982</td>
<td>269</td>
</tr>
<tr>
<td>37/112</td>
<td>Convention on the Law of Treaties between States and International Organizations or between International Organizations (A/37/700)</td>
<td>125</td>
<td>16 December 1982</td>
<td>271</td>
</tr>
<tr>
<td>37/113</td>
<td>Report of the Committee on Relations with the Host Country (A/37/752)</td>
<td>126</td>
<td>16 December 1982</td>
<td>271</td>
</tr>
<tr>
<td>37/115</td>
<td>Draft Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (A/37/710)</td>
<td>128</td>
<td>16 December 1982</td>
<td>273</td>
</tr>
<tr>
<td>37/116</td>
<td>State of signatures and ratifications of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of international armed conflicts (Protocol I) and the protection of victims of non-international armed conflicts (Protocol II) (A/37/641)</td>
<td>132</td>
<td>16 December 1982</td>
<td>273</td>
</tr>
</tbody>
</table>

37/10. Manila Declaration on the Peaceful Settlement of International Disputes

The General Assembly,

Having examined the item entitled "Peaceful settlement of disputes between States",

Recalling its resolutions 34/102 of 14 December 1979, 35/160 of 15 December 1980 and 36/110 of 10 December 1981,

Reaffirming the need to exert utmost efforts in order to settle any conflicts and disputes between States exclusively by peaceful means and to avoid any military action and hostilities, which can only make more difficult the solution of those conflicts and disputes,

Considering that the question of the peaceful settlement of disputes should represent one of the central concerns for States and for the United Nations and that the efforts to strengthen the process of the peaceful settlement of disputes should be continued,

Convinced that the adoption of the Manila Declaration on the Peaceful Settlement of International Disputes should enhance the observance of the principle of peaceful settlement of disputes in relations between States and contribute to the elimination of the danger of recourse to force or to the threat of force, to the relaxation of international tensions, to the promotion of a policy of co-operation and peace and
of respect for the independence and sovereignty of all States, to the enhancing of the role of the United Nations in preventing conflicts and settling them peacefully and, consequently, to the strengthening of international peace and security.

Considering the need to ensure a wide dissemination of the text of the Declaration,

1. Approves the Manila Declaration on the Peaceful Settlement of International Disputes, the text of which is annexed to the present resolution;

2. Expresses its appreciation to the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization for its important contribution to the elaboration of the text of the Declaration;

3. Requests the Secretary-General to inform the Governments of the States Members of the United Nations or members of specialized agencies, the Security Council and the International Court of Justice of the adoption of the Declaration;

4. Urges that all efforts be made so that the Declaration becomes generally known and fully observed and implemented.

68th plenary meeting
15 November 1982

ANNEX

Manila Declaration on the Peaceful Settlement of International Disputes

The General Assembly,

Reaffirming the principle of the Charter of the United Nations that all States shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered,

Conscious that the Charter of the United Nations embodies the means and an essential framework for the peaceful settlement of international disputes, the continuance of which is likely to endanger the maintenance of international peace and security,

Recognizing the important role of the United Nations and the need to enhance its effectiveness in the peaceful settlement of international disputes and the maintenance of international peace and security, in accordance with the principles of justice and international law, in conformity with the Charter of the United Nations,

Reaffirming the principle of the Charter of the United Nations that all States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

Reiterating that no State or group of States has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other State,

Reaffirming the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,¹

Bearing in mind the importance of maintaining and strengthening international peace and security and the development of friendly relations among States, irrespective of their political, economic and social systems or levels of economic development,

Reaffirming the principle of equal rights and self-determination of peoples as enshrined in the Charter of the United Nations and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations and in other relevant resolutions of the General Assembly,

Stressing the need for all States to desist from any forcible action which deprives peoples, particularly peoples under colonial and racist regimes or other forms of alien domination, of their inalienable right to self-determination, freedom and independence, as referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,

Mindful of existing international instruments as well as respective principles and rules concerning the peaceful settlement of international disputes, including the exhaustion of local remedies whenever applicable,

Determined to promote international co-operation in the political field and to encourage the progressive development of international law and its codification, particularly in relation to the peaceful settlement of international disputes,

Solemnly declares that:

1. All States shall act in good faith and in conformity with the purposes and principles enshrined in the Charter of the United Nations with a view to avoiding disputes among themselves likely to affect friendly relations among States, thus contributing to the maintenance of international peace and security. They shall live together in peace with one another as good neighbours and strive for the adoption of meaningful measures for strengthening international peace and security.

2. Every State shall settle its international disputes exclusively by peaceful means in such a manner that international peace and security, and justice, are not endangered.

3. International disputes shall be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means in conformity with obligations under the Charter of the United Nations and with the principles of justice and international law. Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with the sovereign equality of States.

4. States parties to a dispute shall continue to observe in their mutual relations their obligations under the fundamental principles of international law concerning the sovereignty, independence and territorial integrity of States, as well as other generally recognized principles and rules of contemporary international law.

5. States shall seek in good faith and in a spirit of cooperation an early and equitable settlement of their international disputes by any of the following means: negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional arrangements or agencies or other peaceful means of their own choice, including good offices. In seeking such a settlement, the parties shall agree on such peaceful means as may be appropriate to the circumstances and the nature of their dispute.

6. States parties to regional arrangements or agencies shall make every effort to achieve pacific settlement of their local disputes through such regional arrangements or agencies before referring them to the Security Council. This does not preclude States from bringing any dispute to the attention of the Security Council or of the General Assembly in accordance with the Charter of the United Nations.

7. In the event of failure of the parties to a dispute to reach an early solution by any of the above means of settlement, they shall continue to seek a peaceful settlement and shall consult forthwith on mutually agreed means to settle the dispute peacefully. Should the parties fail to settle by any of the above means a dispute the continuance of which is likely to endanger the maintenance of international peace and security, they shall refer it to the Security Council in accordance with the Charter of the United Nations and without prejudice to the functions and powers of the Council set forth in the relevant provisions of Chapter VI of the Charter.

8. States parties to an international dispute, as well as other States, shall refrain from any action whatsoever which may aggravate the situation so as to endanger the maintenance of international peace and security and make more difficult or impede the peaceful settlement of the dispute, and shall act in this respect in accordance with the purposes and principles of the United Nations.

9. States should consider concluding agreements for the peaceful settlement of disputes among them. They should also include in bilateral agreements and multilateral conventions to be concluded, as appropriate, effective provisions for the peaceful settlement of disputes arising from the interpretation or application thereof.

10. States should, without prejudice to the right of free choice of means, bear in mind that direct negotiations are a flexible and effective means of peaceful settlement of their disputes. When they choose to resort to direct negotiations, States should negotiate meaningfully, in order to arrive at an early settlement acceptable to the parties. States should be equally prepared to seek the settlement of their disputes by the other means mentioned in the present Declaration.

11. States shall in accordance with international law implement in good faith all the provisions of agreements concluded by them for the settlement of their disputes.

¹ Resolution 2525 (XXV), annex.
12. In order to facilitate the exercise by the peoples concerned of the right to self-determination as referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the parties to a dispute may have the possibility, if they agree to do so and as appropriate, to have recourse to the relevant procedures mentioned in the present Declaration, for the peaceful settlement of the dispute.

13. Neither the existence of a dispute nor the failure of a procedure of peaceful settlement of disputes shall permit the use of force or threat of force by any of the States parties to the dispute.

II

1. Member States should make full use of the provisions of the Charter of the United Nations, including the procedures and means provided for therein, particularly Chapter VI, concerning the peaceful settlement of disputes.

2. Member States shall fulfill in good faith the obligations assumed by them in accordance with the Charter of the United Nations. They should, in accordance with the Charter, as appropriate, duly take into account the recommendations of the Security Council relating to the peaceful settlement of disputes. They should also, in accordance with the Charter, as appropriate, duly take into account the recommendations adopted by the General Assembly, subject to Articles 11 and 12 of the Charter, in the field of peaceful settlement of disputes.

3. Member States reaffirm the important role conferred on the General Assembly by the Charter of the United Nations in the field of peaceful settlement of disputes and stress the need for it to discharge effectively its responsibilities. Accordingly, they should:

(a) Bear in mind that the General Assembly may discuss any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, and, subject to Article 12 of the Charter, recommend measures for its peaceful adjustment;

(b) Consider making use, when they deem it appropriate, of the possibility of bringing to the attention of the General Assembly any dispute or any situation which might lead to international friction or give rise to a dispute;

(c) Consider utilizing, for the peaceful settlement of their disputes, the subsidiary organs established by the General Assembly in the performance of its functions under the Charter;

(d) Consider, when they are parties to a dispute brought to the attention of the General Assembly, making use of consultations within the framework of the Assembly, with a view to facilitating an early settlement of their dispute.

4. Member States should strengthen the primary role of the Security Council so that it may fully and effectively discharge its responsibilities, in accordance with the Charter of the United Nations, in the area of the settlement of disputes or of any situation the continuance of which is likely to endanger the maintenance of international peace and security. To this end they should:

(a) Be fully aware of their obligation to refer to the Security Council any dispute or disputes they are willing to settle by the means indicated in Article 33 of the Charter;

(b) Make greater use of the possibility of bringing to the attention of the Security Council any dispute or any situation which might lead to international friction or give rise to a dispute;

(c) Consider making greater use of the fact-finding capacity of the Security Council in accordance with the Charter;

(e) Encourage the Security Council to make wider use, as a means to promote peaceful settlement of disputes, of the subsidiary organs established by it in the performance of its functions under the Charter;

(f) Bear in mind that the Security Council may, at any stage of a dispute of the nature referred to in Article 33 of the Charter or of a situation of like nature, recommend appropriate procedures or methods of adjustment;

(g) Encourage the Security Council to act without delay, in accordance with its functions and powers, particularly in cases where international disputes develop into armed conflicts.

5. States should be fully aware of the role of the International Court of Justice, which is the principal judicial organ of the United Nations. Their attention is drawn to the facilities offered by the International Court of Justice for the settlement of legal disputes, especially since the revision of the Rules of the Court.

States may entrust the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

States should bear in mind:

(a) That legal disputes should as a general rule be referred by the parties to the International Court of Justice, in accordance with the provisions of the Statute of the Court;

(b) That it is desirable that they:

(i) Consider the possibility of inserting in treaties, whenever appropriate, clauses providing for the submission to the International Court of Justice of disputes which may arise from the interpretation or application of such treaties;

(ii) Study the possibility of choosing, in the free exercise of their sovereignty, to recognize as compulsory the jurisdiction of the International Court of Justice in accordance with Article 36 of its Statute;

(iii) Review the possibility of identifying cases in which use may be made of the International Court of Justice.

The organs of the United Nations and the specialized agencies should study the advisability of making use of the possibility of requesting advisory opinions of the International Court of Justice on legal questions arising within the scope of their activities, provided that they are duly authorized to do so.

Recourse to judicial settlement of legal disputes, particularly referral to the International Court of Justice, should not be considered an unfriendly act between States.

6. The Secretary-General should make full use of the provisions of the Charter of the United Nations concerning the responsibilities entrusted to him. The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security. He shall perform such other functions as are entrusted to him by the Security Council or by the General Assembly. Reports in this connection shall be made whenever requested to the Security Council or the General Assembly.

Urges all States to observe and promote in good faith the provisions of the present Declaration in the peaceful settlement of their international disputes;

Declares that nothing in the present Declaration shall be construed as prejudicing in any manner the relevant provisions of the Charter or the rights and duties of States, or the scope of the functions and powers of the United Nations organs under the Charter, in particular those relating to the peaceful settlement of disputes;

Declares that nothing in the present Declaration could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration;

Stresses the need, in accordance with the Charter, to continue efforts to strengthen the process of the peaceful settlement of disputes through progressive development and codification of international law, as appropriate, and through enhancing the effectiveness of the United Nations in this field.

37/11. United Nations Conference on Succession of States in respect of State Property, Archives and Debts

The General Assembly,

Recalling that, by its resolution 36/113 of 10 December 1981, it decided to convene a conference of plenipotentiaries in 1983 to consider the draft articles on succession of States in respect of State property, archives and debts, adopted by
Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States, 1992
PERMANENT COURT OF ARBITRATION
OPTIONAL RULES FOR ARBITRATING
DISPUTES BETWEEN TWO STATES
INTRODUCTION

These Rules have been elaborated for use in arbitrating disputes arising under treaties or other agreements between two States; they can be modified for use in connection with multilateral treaties. The Rules are based on the UNCITRAL Arbitration Rules with changes in order to:

(i) reflect the public international law character of disputes between States, and diplomatic practice appropriate to such disputes;

(ii) indicate the role of the Secretary-General and the International Bureau of the Permanent Court of Arbitration at The Hague, and the relation of these Rules with the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes; and

(iii) provide freedom for the parties to choose to have an arbitral tribunal of one, three or five persons.

Experience in arbitrations since 1981 suggests that the UNCITRAL Arbitration Rules provide fair and effective procedures for peaceful resolution of disputes between States concerning the interpretation, application and performance of treaties and other agreements, although they were originally designed for commercial arbitration.

The Rules are optional and emphasize flexibility and party autonomy. For example:

(i) the Rules, and the services of the Secretary-General and the International Bureau of the Permanent Court of Arbitration, are available for use by all States, and are not restricted to disputes in which both States are parties to either The Hague Convention for the Pacific Settlement of International Disputes of 1899 or that of 1907;

(ii) the choice of arbitrators is not limited to persons who are listed as Members of the Permanent Court of Arbitration;

(iii) States have complete freedom to agree upon any individual or institution as appointing authority. In order to provide a failsafe mechanism to prevent frustration of the arbitration, the Rules provide that the Secretary-General will designate an appointing authority if the parties do not agree upon the authority, or if the authority they choose does not act.

A model clause that States may consider inserting in treaties or other agreements to provide for arbitration of future disputes and a model clause for arbitration of existing disputes are set forth at pages 231-232.

These Rules are also appropriate for use in connection with multilateral treaties, provided that appropriate changes are made in the procedures for choosing arbitrators and sharing costs. Guidelines to assist States in adapting these Rules for use in resolving disputes that may involve more than two parties are included at page 245.

Explanatory Notes to the Text appear at pages 64-65.
PERMANENT COURT OF ARBITRATION OPTIONAL RULES 
FOR ARBITRATING DISPUTES BETWEEN TWO STATES 

Effective October 20, 1992

SECTION I. INTRODUCTORY RULES

Scope of Application

Article 1

1. Where the parties to a treaty or other agreement have agreed in writing that disputes shall be referred to arbitration under the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing.

2. The International Bureau of the Permanent Court of Arbitration (the ‘International Bureau’) shall take charge of the archives of the arbitration proceeding. In addition, upon written request of all the parties or of the arbitral tribunal, the International Bureau shall act as a channel of communication between the parties and the arbitral tribunal, provide secretarial services and/or serve as registry.

3. If on the date the arbitration commences either The Hague Convention for the Pacific Settlement of International Disputes of 1899 or The Hague Convention for the Pacific Settlement of International Disputes of 1907 is in force between the parties, the applicable Convention shall remain in force, and the parties, in the exercise of their rights under the Convention, agree that the procedures set forth in these Rules shall govern the arbitration as provided for in the parties’ agreement.

Notice, Calculation of Periods of Time

Article 2

1. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received when it has been delivered to the addressee through diplomatic channels. Notice shall be deemed to have been received on the day it is so delivered.

2. For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or a non-work day in the State of the addressee, the period is extended until the first work day which follows. Official holidays or non-work days occurring during the running of the period of time are included in calculating the period.

Notice of Arbitration

Article 3

1. The party initiating recourse to arbitration (hereinafter called the ‘claimant’) shall give to the other party (hereinafter called the ‘respondent’) a notice of arbitration.

2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

3. The notice of arbitration shall include the following:

   (a) A demand that the dispute be referred to arbitration;

   (b) The names and addresses of the parties;

   (c) A reference to the arbitration clause or the separate arbitration agreement that is invoked;

   (d) A reference to the treaty or other agreement out of or in relation to which the dispute arises;

   (e) The general nature of the claim and an indication of the amount involved, if any;

   (f) The relief or remedy sought;

   (g) A proposal as to the number of arbitrators (i.e., one, three or five), if the parties have not previously agreed thereon.

4. The notice of arbitration may also include the statement of claim referred to in article 18.

Representation and Assistance

Article 4

Each party shall appoint an agent. The parties may also be assisted by persons of their choice. The name and address of the agent must be communicated in writing to the other party, to the International Bureau and to the arbitral tribunal after it has been appointed.
SECTION II. COMPOSITION OF THE ARBITRAL TRIBUNAL

**Number of Arbitrators**

**Article 5**

If the parties have not previously agreed on the number of arbitrators (i.e., one, three, or five), and if within thirty days after the receipt by the respondent of the notice of arbitration the parties have not agreed on the number of arbitrators, three arbitrators shall be appointed.

**Appointment of Arbitrators (Articles 6 to 8)**

**Article 6**

1. If a sole arbitrator is to be appointed, either party may propose to the other:
   
   (a) The names of one or more persons, one of whom would serve as the sole arbitrator; and
   
   (b) If no appointing authority has been agreed upon by the parties, the name or names of one or more institutions or persons, one of whom would serve as appointing authority.

2. If within sixty days after receipt by a party of a proposal made in accordance with paragraph 1 the parties have not agreed on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within sixty days of the receipt of a party’s request therefor, either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague (the ‘Secretary-General’) to designate an appointing authority.

3. The appointing authority shall, at the request of one of the parties, appoint the sole arbitrator as promptly as possible. In making the appointment the appointing authority shall use the following list-procedure, unless both parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:

   (a) At the request of one of the parties the appointing authority shall communicate to both parties an identical list containing at least three names;

   (b) Within thirty days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which it objects and numbered the remaining names on the list in the order of its preference.

   (c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;

   (d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

4. In making the appointment, the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account, as well as the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

**Article 7**

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal. If five arbitrators are to be appointed, the two party-appointed arbitrators shall choose the remaining three arbitrators and designate one of those three as the presiding arbitrator of the tribunal.

2. If within thirty days after the receipt of a party’s notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed:

   (a) The first party may request the appointing authority previously designated by the parties to appoint the second arbitrator; or

   (b) If no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within sixty days after receipt of a party’s request therefor, the first party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate the appointing authority. The first party may then request the appointing authority so designated to appoint the second arbitrator. In either case, the appointing authority may exercise its discretion in appointing the arbitrator.

3. If within sixty days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the remaining arbitrators and/or presiding arbitrator, the
remaining arbitrators and/or presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under article 6.

Article 8

1. When an appointing authority is requested to appoint an arbitrator pursuant to article 6 or article 7, the party which makes the request shall send to the appointing authority a copy of the notice of appointment, a copy of the treaty or other agreement out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the treaty or other agreement. The appointing authority may request from either party such information as it deems necessary to fulfil its function.

2. Where the names of one or more persons are proposed for appointment as arbitrators, their full names, addresses and nationalities shall be indicated, together with a description of their qualifications.

3. In appointing arbitrators pursuant to these Rules, the parties and the appointing authority are free to designate persons who are not Members of the Permanent Court of Arbitration at The Hague.

Challenge of Arbitrators (Articles 9 to 12)

Article 9

A prospective arbitrator shall disclose to those who approach him/her in connection with his/her possible appointment any circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him/her of these circumstances.

Article 10

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.

2. A party may challenge the arbitrator appointed by him/her only for reasons of which he/she becomes aware after the appointment has been made.

Article 11

1. A party who intends to challenge an arbitrator shall send notice of its challenge within thirty days after the appointment of the challenged arbitrator has been notified to the challenging party or within thirty days after the circumstances mentioned in articles 9 and 10 became known to that party.

2. The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notification shall be in writing and shall state the reasons for the challenge.

3. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his/her office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in article 6 or 7 shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise his/her right to appoint or to participate in the appointment.

Article 12

1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made:

   (a) When the initial appointment was made by an appointing authority, by that authority;

   (b) When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority;

   (c) In all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority as provided for in article 6.

2. If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in articles 6 to 9 except that, when this procedure would call for the designation of an appointing authority, the appointment of the arbitrator shall be made by the appointing authority which decided on the challenge.

Replacement of an Arbitrator

Article 13

1. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 6 to 9 that was applicable to the appointment or choice of the deceased or resigned arbitrator.
of the arbitrator being replaced. Any resignation by an arbitrator shall be addressed to
the arbitral tribunal and shall not be effective unless the arbitral tribunal determines that
there are sufficient reasons to accept the resignation, and if the arbitral tribunal so
determines the resignation shall become effective on the date designated by the arbitral
tribunal. In the event that an arbitrator whose resignation is not accepted by the tribunal
nevertheless fails to participate in the arbitration, the provisions of paragraph 3 of this
article shall apply.

2. In the event that an arbitrator fails to act or in the event of the de jure or de facto
impossibility of his/her performing his/her functions, the procedure in respect of the
challenge and replacement of an arbitrator as provided in the preceding articles shall
apply, subject to the provisions of paragraph 3 of this article.

3. If an arbitrator on a three- or five-person tribunal fails to participate in the arbitration,
the other arbitrators shall, unless the parties agree otherwise, have the power in their sole
discretion to continue the arbitration and to make any decision, ruling or award,
notwithstanding the failure of one arbitrator to participate. In determining whether to
continue the arbitration or to render any decision, ruling, or award without the partici-
ipation of an arbitrator, the other arbitrators shall take into account the stage of the
arbitration, the reason, if any, expressed by the arbitrator for such non-participation, and
such other matters as they consider appropriate in the circumstances of the case. In the
event that the other arbitrators determine not to continue the arbitration without the non-
participating arbitrator, the arbitral tribunal shall declare the office vacant, and a sub-
stitute arbitrator shall be appointed pursuant to the provisions of articles 6 to 9, unless
the parties agree on a different method of appointment.

Repetition of Hearings in the Event of the Replacement of an Arbitrator

Article 14

If under articles 11 to 13 the sole arbitrator or presiding arbitrator is replaced, any
hearings held previously shall be repeated; if any other arbitrator is replaced, such prior
hearings may be repeated at the discretion of the arbitral tribunal.

SECTION III. ARBITRAL PROCEEDINGS

General Provisions

Article 15

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such
manner as it considers appropriate, provided that the parties are treated with equality and
that at any stage of the proceedings each party is given a full opportunity of presenting
its case.

2. If either party so requests at any appropriate stage of the proceedings, the arbitral
tribunal shall hold hearings for the presentation of evidence by witnesses, including
expert witnesses, or for oral argument. In the absence of such a request, the arbitral
tribunal shall decide whether to hold such hearings or whether the proceedings shall be
conducted on the basis of documents and other materials.

3. All documents or information supplied to the arbitral tribunal by one party shall at the
same time be communicated by that party to the other party and a copy shall be filed
with the International Bureau.

Place of Arbitration

Article 16

1. Unless the parties have agreed otherwise, the place where the arbitration is to be held
shall be The Hague, The Netherlands. If the parties agree that the arbitration shall be
held at a place other than The Hague, the International Bureau of the Permanent Court of
Arbitration shall inform the parties and the arbitral tribunal whether it is willing to
provide the secretariat and registrar services referred to in article 1, paragraph 1, and the
services referred to in article 25, paragraph 3.

2. The arbitral tribunal may determine the locale of the arbitration within the country
agreed upon by the parties. It may hear witnesses and hold meetings for consultation
among its members at any place it deems appropriate, having regard to the circumstances
of the arbitration.

3. After inviting the views of the parties, the arbitral tribunal may meet at any place it
deems appropriate for the inspection of property or documents. The parties shall be given
sufficient notice to enable them to be present at such inspection.

4. The award shall be made at the place of arbitration.
Language

Article 17

1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.

2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Statement of Claim

Article 18

1. Unless the statement of claim was contained in the notice of arbitration, within a period of time to be determined by the arbitral tribunal, the claimant shall communicate its statement of claim in writing to the respondent and to each of the arbitrators. A copy of the treaty or other agreement and of the arbitration agreement if not contained in the treaty or agreement, shall be annexed thereto.

2. The statement of claim shall include a precise statement of the following particulars:

   (a) The names and addresses of the parties;

   (b) A statement of the facts supporting the claim;

   (c) The points at issue;

   (d) The relief or remedy sought.

The claimant may annex to its statement of claim all documents it deems relevant or may add a reference to the documents or other evidence it will submit.

Statement of Defence

Article 19

1. Within a period of time to be determined by the arbitral tribunal, the respondent shall communicate its statement of defence in writing to the claimant and to each of the arbitrators.

2. The statement of defence shall reply to the particulars (b), (c) and (d) of the statement of claim (art. 18, para. 2). The respondent may annex to its statement the documents on which it relies for its defence or may add a reference to the documents or other evidence it will submit.

3. In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same treaty or other agreement or rely on a claim arising out of the same treaty or other agreement for the purpose of a set-off.

4. The provisions of article 18, paragraph 2, shall apply to a counter-claim and a claim relied on for the purpose of a set-off.

Amendments to the Claim or Defence

Article 20

During the course of the arbitral proceedings either party may amend or supplement its claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

Pleas as to the Jurisdiction of the Arbitral Tribunal

Article 21

1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

2. The arbitral tribunal shall have the power to determine the existence or the validity of the treaty or other agreement of which an arbitration clause forms a part. For the
purposes of article 21, an arbitration clause which forms part of the treaty or agreement
and which provides for arbitration under these Rules shall be treated as an agreement
independent of the other terms of the treaty or agreement. A decision by the arbitral
tribunal that the treaty or agreement is null and void shall not entail *ipso jure* the
invalidity of the arbitration clause.

3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than
in the statement of defence or, with respect to a counter-claim, in the reply to the
counter-claim.

4. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a
preliminary question. However, the arbitral tribunal may proceed with the arbitration and
rule on such a plea in its final award.

**Further Written Statements**

*Article 22*

The arbitral tribunal shall, after inviting the views of the parties, decide which further
written statements, in addition to the statement of claim and the statement of defence,
shall be required from the parties or may be presented by them and shall fix the period
of time for communicating such statements.

**Periods of Time**

*Article 23*

The periods of time fixed by the arbitral tribunal for the communication of written
statements (including the statement of claim and statement of defence) should not exceed
ninety days. However, the arbitral tribunal may set longer time limits, if it concludes that
an extension is justified.

**Evidence and Hearings (Articles 24 and 25)**

*Article 24*

1. Each party shall have the burden of proving the facts relied on to support its claim or
defence.

2. The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the
tribunal and to the other party, within such a period of time as the arbitral tribunal shall
decide, a summary of the documents and other evidence which that party intends to
present in support of the facts in issue set out in its statement of claim or statement of
defence.

3. At any time during the arbitral proceedings the arbitral tribunal may call upon the
parties to produce documents, exhibits or other evidence within such a period of time as
the tribunal shall determine. The tribunal shall take note of any refusal to do so as well
as any reasons given for such refusal.

*Article 25*

1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate
advance notice of the date, time and place thereof.

2. If witnesses are to be heard, at least thirty days before the hearing each party shall
communicate to the arbitral tribunal and to the other party the names and addresses of
the witnesses it intends to present, the subject upon and the languages in which such
witnesses will give their testimony.

3. The International Bureau shall make arrangements for the translation of oral state-
ments made at a hearing and for a record of the hearing if either is deemed necessary by
the tribunal under the circumstances of the case, or if the parties have agreed thereto and
have communicated such agreement to the tribunal and the International Bureau at least
thirty days before the hearing or such longer period before the hearing as the arbitral
tribunal may determine.

4. Hearings shall be held *in camera* unless the parties agree otherwise. The arbitral
tribunal may require the retirement of any witness or witnesses during the testimony of
other witnesses. The arbitral tribunal is free to determine the manner in which witnesses
are examined.

5. Evidence of witnesses may also be presented in the form of written statements signed
by them.

6. The arbitral tribunal shall determine the admissibility, relevance, materiality and
weight of the evidence offered.
Interim Measures of Protection

Article 26

1. Unless the parties otherwise agree, the arbitral tribunal may, at the request of either party, take any interim measures it deems necessary to preserve the respective rights of either party.

2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.

3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

Experts

Article 27

1. The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert’s terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

2. The parties shall give the expert any relevant information or produce for his/her inspection any relevant documents or goods that he/she may request of them. Any dispute between a party and such expert as to the relevance and appropriateness of the required information or production shall be referred to the arbitral tribunal for decision.

3. Upon receipt of the expert’s report, the arbitral tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his/her report.

4. At the request of either party the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing either party may present expert witnesses in order to testify on the points at issue. The provisions of article 25 shall be applicable to such proceedings.

Failure to Appear or to Make Submissions

Article 28

1. If, within the period of time fixed by the arbitral tribunal, the claimant has failed to communicate its claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings. If, within the period of time fixed by the arbitral tribunal, the respondent has failed to communicate its statement of defence without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue.

2. If one of the parties, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

Closure of Hearings

Article 29

1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.

2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made.

Waiver of Rules

Article 30

A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating its objection to such non-compliance, shall be deemed to have waived its right to object.
SECTION IV. THE AWARD

Decisions

Article 31

1. When there are three or five arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.

2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide on his/her own, subject to revision, if any, by the arbitral tribunal.

Form and Effect of the Award

Article 32

1. In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.

2. The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.

3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.

4. An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three or five arbitrators and any one of them fails to sign, the award shall state the reason for the absence of the signature(s).

5. The award may be made public only with the consent of both parties.

6. Copies of the award signed by the arbitrators shall be communicated to the parties by the International Bureau.

Applicable Law

Article 33

1. The arbitral tribunal shall apply the law chosen by the parties, or in the absence of an agreement, shall decide such disputes in accordance with international law by applying:

   (a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

   (b) International custom, as evidence of a general practice accepted as law;

   (c) The general principles of law recognized by civilized nations;

   (d) Judicial and arbitral decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the arbitral tribunal to decide a case ex aequo et bono, if the parties agree thereto.

Settlement or Other Grounds for Termination

Article 34

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated to the parties by the International Bureau. Where an arbitral award on agreed terms is made, the provisions of article 32, paragraphs 2 and 4 to 6, shall apply.

Interpretation of the Award

Article 35

1. Within sixty days after the receipt of the award, either party, with notice to the other party, may request that the arbitral tribunal give an interpretation of the award.
2. The interpretation shall be given in writing within forty-five days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 32, paragraphs 2 to 6, shall apply.

**Correction of the Award**

*Article 36*

1. Within sixty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may within thirty days after the communication of the award make such corrections on its own initiative.

2. Such corrections shall be in writing, and the provisions of article 32, paragraphs 2 to 6, shall apply.

**Additional Award**

*Article 37*

1. Within sixty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

2. If the arbitral tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within sixty days after the receipt of the request.

3. When an additional award is made, the provisions of article 32, paragraphs 2 to 6, shall apply.

**Costs (Articles 38 to 40)**

*Article 38*

The arbitral tribunal shall fix the costs of arbitration in its award. The term 'costs' includes only:

(b) The travel and other expenses incurred by the arbitrators;

(c) The costs of expert advice and of other assistance required by the arbitral tribunal;

(d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague and the International Bureau.

*Article 39*

1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the complexity of the subject-matter, the time spent by the arbitrators, the amount in dispute, if any, and any other relevant circumstances of the case.

2. When a party so requests, the arbitral tribunal shall fix its fees only after consultation with the Secretary-General of the Permanent Court of Arbitration who may make any comment he/she deems appropriate to the arbitral tribunal concerning the fees.

*Article 40*

1. Each party shall bear its own costs of arbitration. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall fix the costs of arbitration referred to in article 38 and article 39, paragraph 1, in the text of that order or award.

3. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under articles 35 to 37.

**Deposit of Costs**

*Article 41*

1. The International Bureau following the commencement of the arbitration, may request each party to deposit an equal amount as an advance for the costs referred to in article 38, paragraphs (a), (b), (c) and (e). All amounts deposited by the parties pursuant to this paragraph and paragraph 2 of this article shall be directed to the International Bureau,
and disbursed by it for such costs, including, *inter alia*, fees to the arbitrators, the Secretary-General and the International Bureau.

2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

3. If the requested deposits are not paid in full within sixty days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

4. After the award has been made, the International Bureau shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

**NOTES TO THE TEXT**

These Rules are based on the UNCITRAL Arbitration Rules, with the following modifications:

(i) Modifications to reflect the public international law character of disputes between States, and diplomatic practice appropriate to such disputes:

- Article 1, para. 1
- Article 2, para. 2
- Article 4
- Article 8, paras. 1 and 2
- Article 13, paras. 1 and 2; para. 3 (added)
- Article 15, para. 2
- Article 23
- Article 24, para. 3
- Article 27, para. 2
- Article 32, para. 7 (deleted)
- Article 33
- Article 39, para. 1; paras. 2 and 4 (deleted); para. 3 (renumbered)
- Article 41, para. 4

Throughout the Rules, the words ‘treaty or other agreement’ are substituted for ‘contract’.

Throughout the Rules, time limits placed upon the parties have been made twice as long, e.g., ‘thirty days’ substituted for ‘fifteen days,’ ‘sixty days’ substituted for ‘thirty days,’ with the exception of article 7, paragraph 2.

Throughout the Rules, whenever reference is made to a State, the words ‘it’ and ‘its’ are substituted for ‘he’, ‘him’ and ‘his’, respectively; whenever reference is made to a person the words ‘he/she’, ‘him/her’ and ‘his/her’ are substituted for ‘he’, ‘him’ and ‘his’, respectively.

(ii) Modifications to indicate the functions of the Secretary-General and the International Bureau of the Permanent Court of Arbitration, and the relationship of the Rules to the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes:

- Article 1, para. 2; para. 3 (added)
- Article 3, para. 4
- Article 8, para. 1; para. 3 (added)
- Article 15, para. 3
Article 16, paras. 1 and 3  
Article 25, para 3  
Article 32, para 6  
Article 34, para 3  
Article 38, para (a); para. (e) (deleted); para. (f) (renumbered)  
Article 41, para 1; para 3 (deleted); paras. 4 and 5 (renumbered)

(iii) Modifications to provide freedom for the parties to choose to have an arbitral tribunal of one, three or five persons:

Article 5  
Article 7, paras. 1 and 3  
Article 13, para 3 (added)  
Article 31, para 1  
Article 32, para 4

(iv) Other modifications:

Article 18, para 2  
Article 22  
Article 26, para 1  
Headings preceding articles 28 and 33
Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, 1993
Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment

The United States of America and the Republic of Ecuador (hereinafter the "Parties");

Desiring to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party;

Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;

Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources;

Recognizing that the development of economic and business ties can contribute to the well-being of workers in both Parties and promote respect for internationally recognized worker rights; and

Having resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment;

Have agreed as follows:

Article I

1. For the purposes of this Treaty, (a) "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:

   (i) tangible and intangible property, including rights, such as mortgages, liens and pledges;

   (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;

   (iii) a claim to money or a claim to performance having economic value, and associated with an investment;

   (iv) intellectual property which includes, inter alia, rights relating to:

   literary and artistic works, including sound recordings; inventions in all fields of human endeavor; industrial designs; semiconductor mask works; trade secrets, know-how, and confidential business information; and trademarks, service marks, and trade names; and

   (v) any right conferred by law or contract, and any licenses and permits pursuant to law;

   (b) "company" of a party means any kind of corporation, company, association, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled;

   (c) "national" of a Party means a natural person who is a national of a Party under its applicable law; associate

   (d) "return" means an amount derived from or associated with an investment, including profit; dividend; interest; capital gain; royalty payment; management, technical assistance or other fee; or returns in kind;

   (e) "associated activities" include the organization, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including intellectual property rights; the borrowing of funds; the purchase, issuance, and sale of equity shares and other securities; and the purchase of foreign exchange for imports.

   (f) "state enterprise" means an enterprise owned, or controlled through ownership interests, by a Party.

   (g) "delegation" includes a legislative grant, and a government order, directive or other act transferring to a state enterprise or monopoly, or authorizing the exercise by a state enterprise or monopoly, of governmental authority.

2. Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.
3. Any alteration of the form in which assets are invested or reinvested shall not affect their character as investment.

Article II

1. Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investments and associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Protocol to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Protocol. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Protocol, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall, unless specified otherwise in the Protocol, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country.

2. (a) Nothing in this Treaty shall be construed to prevent a Party from maintaining or establishing a state enterprise.

(b) Each Party shall ensure that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under this Treaty wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees or other charges.

(c) Each Party shall ensure that any state enterprise that it maintains or establishes accords the better of national or most favored nation treatment in the sale of its goods or services in the Party's territory.

3. (a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

(b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.

(c) Each Party shall observe any obligation it may have entered into with regard to investments.

4. Subject to the laws relating to the entry and sojourn of aliens, nationals of either Party shall be permitted to enter and to remain in the territory of the other Party for the purpose of establishing, developing, administering or advising on the operation of an investment to which they, or a company of the first Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources.

5. Companies which are legally constituted under the applicable laws or regulations of one Party, and which are investments, shall be permitted to engage top managerial personnel of their choice, regardless of nationality.

6. Neither Party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements.

7. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.

8. Each Party shall make public all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments.

9. The treatment accorded by the United States of America to investments and associated activities of nationals and companies of the Republic of Ecuador under the provisions of this Article shall in any State, Territory or possession of the United States of America be no less favorable than the treatment accorded therein to investments and associated activities of nationals of the United States of America resident in, and companies legally constituted under the laws and regulations of other States, Territories or possessions of the United States of America.

10. The most favored nation provisions of this Treaty shall not apply to advantages accorded by either Party to nationals or companies of any third country by virtue of:

(a) that Party's binding obligations that derive from full membership in a free trade area or customs union; or

(b) that Party's binding obligations under any multilateral international agreement under the framework of the General Agreement on Tariffs and Trade that enters into force subsequent to the signature of this Treaty.

Article III

1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except: for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II (3). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be calculated in a freely usable currency on the basis of the prevailing market rate of exchange at that time; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable and be freely transferable.

2. A national or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation, and any associated compensation, conforms to the principles of international law.

3. Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to
nationals or companies of any third country, whichever is the most favorable treatment, as regards any measures it adopts in relation to such losses.

**Article IV**

1. Each Party shall permit all transfers related to an investment to be made freely and without delay into and out of its territory. Such transfers include: (a) returns; (b) compensation pursuant to Article III; (c) payments arising out of an investment dispute; (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement; (e) proceeds from the sale or liquidation of all or any part of an investment; and (f) additional contributions to capital for the maintenance or development of an investment.

2. Transfers shall be made in a freely usable currency at the prevailing market rate of exchange on the data of transfer with respect to spot transactions in the currency to be transferred.

3. Notwithstanding the provisions of paragraphs 1 and 2, either Party may maintain laws and regulations (a) requiring reports of currency transfer; and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers. Furthermore, either Party may protect the rights of creditors, or ensure the satisfaction of judgments in adjudicatory proceedings, through the equitable, nondiscriminatory and good faith application of its law.

**Article V**

The Parties agree to consult promptly, on the request of either, to resolve any disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty.

**Article VI**

1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:
   
   (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or
   
   (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or
   
   (c) in accordance with the terms of paragraph 3.

3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the data on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:
   
   (i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID convention"), provided that the Party is a party to such Convention; or
   
   (ii) to the Additional Facility of the Centre, if the Centre is not available; or
   
   (iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or
   
   (iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

(b) once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.

4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:

   (a) written consent of the parties to the dispute for Purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and

   (b) an "agreement in writing" for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 ("New York Convention").

5. Any arbitration under paragraph 3(a) (ii), (iii) or (iv) of this Article shall be held in a state that is a party to the New York Convention.

6. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement.

7. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

8. For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25 (2) (b) of the ICSID Convention.

**Article VII**

1. Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted,
upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), except to the extent modified by the Parties or by the arbitrators, shall govern.

2. Within two months of receipt of a request, each Party shall appoint an arbitrator. The two arbitrators shall select a third arbitrator as Chairman, who is a national of a third State. The UNCITRAL Rules for appointing members of three member panels shall apply mutatis mutandis to the appointment of the arbitral panel except that the appointing authority referenced in those rules shall be the Secretary General of the Centre.

3. Unless otherwise agreed, all submissions shall be made and all hearings shall be completed within six months of the date of selection of the third arbitrator, and the Tribunal shall render its decisions within two months of the date of the final submissions or the date of the closing of the hearings, whichever is later.

4. Expenses incurred by the Chairman, the other arbitrators, and other costs of the proceedings shall be paid for equally by the Parties. The Tribunal may, however, at its discretion, direct that a higher proportion of the costs be paid by one of the Parties.

Article VIII

This Treaty shall not derogate from:

(a) laws and regulations, administrative practices or procedures, or administrative or adjudicatory decisions of either Party;

(b) international legal obligations; or

(c) obligations assumed by either Party, including those contained in an investment agreement or an investment authorization, that entitle investments or associated activities to treatment more favorable than that accorded by this Treaty in like situations.

Article IX

1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

2. This Treaty shall not preclude either Party from prescribing special formalities in connection with the establishment of investments, but such formalities shall not impair the substance of any of the rights set forth in this Treaty.

Article X

1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.

2. Nevertheless, the provisions of this Treaty, and in particular Article VI and VII, shall apply to matters of taxation only with respect to the following:

(a) expropriation, pursuant to Article III;

(b) transfers, pursuant to Article IV; or

(c) the observance and enforcement of terms of an investment Agreement or authorization as referred to in Article VI (1) (a) or (b), to the extent they are not subject to the dispute settlement provisions of a Convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time.

Article XI

This Treaty shall apply to the political subdivisions of the Parties.

Article XII

1. This Treaty shall enter into force thirty days after the date of exchange of instruments of ratification. It shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with paragraph 2 of this Article. It shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.

2. Either Party may, by giving one year's written notice to the other Party, terminate this Treaty at the end of the initial ten year period or at any time thereafter.

3. With respect to investments made or acquired prior to the date of termination of this Treaty and to which this Treaty otherwise applies, the provisions of all of the other Articles of this Treaty shall thereafter continue to be effective for a further period of ten years from such date of termination.


IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty. DONE in duplicate at Washington on the twenty-seventh day of August, 1993, in the English and Spanish languages, both texts being equally authentic.

FOR THE UNITED STATES
OF AMERICA

FOR THE REPUBLIC
OF ECUADOR

PROTOCOL

1. The Parties note that the Republic of Ecuador may establish a debt-equity conversion program under which nationals or companies of the United States may choose to invest in the Republic of Ecuador through the purchase of debt at a discount.

The Parties agree that the rights provided in Article IV, paragraph 1, with respect to the transfer of returns and of proceeds from the sale or liquidation of all or any part of an investment, may, as such rights would apply to that part of an investment financed through a debt-equity conversion, be modified by the terms of a debt-equity conversion agreement between a national or company of the United States and the Government of the Republic of Ecuador or any agency or instrumentality thereof. The transfer of returns and/or proceeds from the sale or liquidation of all or any part of an investment shall in no case be on terms less favorable than those accorded, in like circumstances, to nationals or companies of the Republic of Ecuador or any third country, whichever is more favorable.

2. The United States reserves the right to make or maintain limited exceptions to national treatment, as provided in Article II, paragraph 1, in the sectors or matters it has indicated below:

air transportation; ocean and coastal shipping; banking; insurance; government grants; government insurance and loan programs; energy and power production; customhouse brokers; ownership of real property; ownership and operation of common carrier radio and television stations; ownership of shares in the Communications Satellite Corporation; the provision of common carrier telephone and telegraph services; the provision of submarine cable services;
use of land and natural resources; mining and the public domain; maritime services and maritime-related services; and primary dealership in United States government securities.

The treatment accorded pursuant to these exceptions unless specified in paragraph 3 of this Protocol, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country.

3. The United States reserves the right to make or maintain limited exceptions to most favored nation treatment, as provided in Article II, paragraph 1, in the sectors or matters it has indicated below:

- ownership of real property; mining on the public domain; maritime services and maritime-related services; and primary dealership in United States government securities.

4. The Republic of Ecuador reserves the right to make or maintain limited exceptions to national treatment, as provided in Article II, paragraph 1, in the sectors or matters it has indicated below:

- traditional fishing (which does not include fish processing or aquaculture);
- ownership and operation of broadcast radio and television stations.

The treatment accorded pursuant to these exceptions shall be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country.

THE UNITED STATES TRADE REPRESENTATIVE
Executive Office of the President
27 August 1993

Dear Mr. Minister:
I have the honor to confirm receipt of your letter which reads as follows:

"I have the honor to confirm the following understanding which was reached between the Government of the Republic of Ecuador and the Government of the United States of America in the course of negotiations of the Treaty Concerning the Encouragement and Reciprocal Protection of Investment (the "Treaty"):

With respect to Article II, paragraph 4, the Government of the Republic of Ecuador confirms that the Treaty shall serve to satisfy the requirements for any and all authorizations necessary under its laws for nationals of the United States to enter and to remain in the territory of the Republic of Ecuador for the purpose of establishing, developing, administering or advising on the operation of an investment to which they, or a company of the United States that employs them, have committed or are in the process of committing a substantial amount of capital or other resources. Such authorizations include those granted by the Labor Ministry, such as to waive local training requirements established as a condition to the entry of highly trained and specially qualified employees that are essential to the company's operations. Nationals of the United States, however, can be required to fulfill limited formalities in connection with entry and sojourn in the Republic of Ecuador, including the presentation of a visa application and relevant documentation.

With respect to Article II, paragraph 5, the Government of the Republic of Ecuador confirms that the Treaty shall serve to satisfy the requirements for any and all authorizations necessary under its laws for the engagement of foreign nationals as top managers.

In addition, the Government of the Republic of Ecuador indicates that under the Ecuadorian Constitution, including Article 18, and the laws of the Republic of Ecuador, foreign nationals and companies may need special administrative or other authorizations that are specific to the investments of foreign persons. The Government of the Republic of Ecuador confirms that the Treaty shall serve to satisfy the requirements for any and all such authorizations, except for those sectors or matters in which the Republic of Ecuador may make or maintain limited exceptions to national treatment, as provided in Article II, paragraph 1 and listed in paragraph 4 of the Protocol.

I have the honor to propose that this understanding be treated as an integral part of the Treaty. I would be grateful if you would confirm that this understanding is shared by your government.

I have the further honor to confirm that this understanding is shared by my Government and constitutes an integral part of the Treaty.

Sincerely,

Rufus H. Yerxa
Acting United States Trade Representative

[TRANSLATION]

His Excellency
Diego Paredes,
Minister of Foreign Relations of the Republic of Ecuador, Quito.

Washington, D.C., August 27, 1993

His Excellency
Ambassador Rufus Yerxa
Acting United States Trade Representative
Washington, D.C.

Mr. Ambassador:
I have the honor to confirm the following understanding, which was reached between the Government of Ecuador and the Government of the United States of America in the course of negotiations of the Treaty Concerning the Encouragement and Reciprocal Protection of Investment (the "Treaty"):

[For the text of the understanding, see Ambassador Yerxa's letter immediately preceding.]

I have the honor to propose that this understanding by treated as an integral part of the Treaty. I would be grateful if you would confirm that this understanding is shared by your Government.

Accept, Excellency, the assurances of highest consideration.

[s] Diego Paredes
General Assembly resolution 50/50 of 11 December 1995
(United Nations Model Rules for the Conciliation of Disputes between States)
RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY  
(on the report of the Sixth Committee (A/50/642 and Corr.1))

50/50. United Nations Model Rules for the Conciliation of Disputes between States

The General Assembly,  
Considering that conciliation is among the methods for the settlement of disputes between States enumerated by the Charter of the United Nations in Article 33, paragraph 1, that it has been provided for in numerous treaties, bilateral as well as multilateral, for the settlement of such disputes, and that it has proved its usefulness in practice,  
Convinced that the establishment of model rules for the conciliation of disputes between States which incorporate the results of the most recent scholarly work and experience in the field of international conciliation, as well as a number of innovations which can with advantage be made in the traditional practice in that area, can contribute to the development of harmonious relations between States,  
1. Commends the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization for having completed the final text of the United Nations Model Rules for the Conciliation of Disputes between States;  
2. Draws to the attention of States the possibility of applying the Model Rules. The text of which is annexed hereto, whenever a dispute has arisen between States which it has not been possible to solve through direct negotiations;

3. Requests the Secretary-General, to the extent possible and in accordance with the relevant provisions of the Model Rules, to lend his assistance to the States resorting to conciliation on the basis of those Rules;  
4. Also requests the Secretary-General to make the necessary arrangements to distribute to Governments the text of the present resolution, including the annex.

ANNEX

United Nations Model Rules for the Conciliation of Disputes between States

CHAPTER I  
APPLICATION OF THE RULES

Article 1

1. These rules apply to the conciliation of disputes between States where those States have expressly agreed in writing to their application.
2. The States which agree to apply these rules may at any time, through mutual agreement, exclude or amend any of their provisions.

CHAPTER II  
INITIATION OF THE CONCILIATION PROCEEDINGS

Article 2

1. The conciliation proceedings shall begin as soon as the States concerned (henceforth: the parties) have agreed in writing to the application of the present rules, with or without amendments, as well as on a definition of the subject of the dispute, the number and emoluments of members of the conciliation commission, its seat and the maximum duration of the proceedings, as provided in article 24. If necessary, the agreement shall contain provisions concerning the language or languages in which the proceedings are to be conducted and the linguistic services required.
2. If the States cannot reach agreement on the definition of the subject of the dispute, they may by mutual agreement request the assistance of the Secretary-General of the United Nations to resolve the difficulty. They may also by mutual agreement request his assistance to resolve any other difficulty that they may encounter in reaching an agreement on the modalities of the conciliation proceedings.
NUMBER AND APPOINTMENT OF CONCILIATORS

**Article 3**
There may be three conciliators or five conciliators. In either case the conciliators shall form a commission.

**Article 4**
If the parties have agreed that three conciliators shall be appointed, each one of them shall appoint a conciliator who may not be of its own nationality. The parties shall appoint by mutual agreement the third conciliator, who may not be of the nationality of any of the parties or of the other conciliators. The third conciliator shall act as president of the commission. If he is not appointed within two months of the appointment of the conciliators appointed individually by the parties, the third conciliator shall be appointed by the Government of a third State chosen by agreement between the parties or, if such agreement is not obtained within two months, by the President of the International Court of Justice. If the President is a national of one of the parties, the appointment shall be made by the Vice-President or the next member of the Court in order of seniority who is not a national of the parties. The third conciliator shall not reside habitually in the territory of the parties or have been in their service.

2. If the parties have agreed that five conciliators should be appointed, each one of them shall appoint a conciliator who may be of its own nationality. The other three conciliators, one of whom shall be chosen with a view to his acting as president, shall be appointed by agreement between the parties from among nationals of third States and shall be of different nationalities. None of them shall reside habitually in the territory of the parties or have been in their service. None of them shall have the same nationality as that of the other two conciliators.

3. If the appointment of the conciliators whom the parties are to appoint jointly has not been effected within three months, they shall be appointed by the Government of a third State chosen by agreement between the parties or, if such an agreement is not reached within three months, by the President of the International Court of Justice. If the President is a national of one of the parties, the appointment shall be made by the Vice-President or the next judge in order of seniority who is not a national of the parties. The Government or member of the International Court of Justice making the appointment shall also decide which of the three conciliators shall act as president.

4. If, at the end of the three-month period referred to in the preceding paragraph, the parties have been able to appoint only one or two conciliators, the two conciliators or the conciliator still required shall be appointed in the manner described in the preceding paragraph. If the parties have not agreed that the conciliator or one of the two conciliators whom they have appointed shall act as president, the Government or member of the International Court of Justice appointing the two conciliators or the conciliator still required shall also decide which of the three conciliators shall act as president.

5. If, at the end of the three-month period referred to in paragraph 2 of this article, the parties have appointed three conciliators but have not been able to agree which of them shall act as president, the president shall be chosen in the manner described in that paragraph.

**Article 6**
Vacancies which may occur in the commission as a result of death, resignation or any other cause shall be filled as soon as possible by the method established for appointing the members to be replaced.

CHAPTER IV
FUNDAMENTAL PRINCIPLES

**Article 7**
The commission, acting independently and impartially, shall endeavour to assist the parties in reaching an amicable settlement of the dispute. If no settlement is reached during the consideration of the dispute, the commission may draw up and submit appropriate recommendations to the parties for consideration.

CHAPTER V
PROCEDURES AND POWERS OF THE COMMISSION

**Article 8**
The commission shall adopt its own procedure.

**Article 9**
1. Before the commission begins its work, the parties shall designate their agents and shall communicate the names of such agents to the president of the commission. The president shall determine, in agreement with the parties, the date of the commission's first meeting, to which the members of the commission and the agents shall be invited.

2. The agents of the parties may be assisted before the commission by counsel and experts appointed by the parties.

3. Before the first meeting of the commission, its members may meet informally with the agents of the parties, if necessary, accompanied by the appointed counsel and experts to deal with administrative and procedural matters.

**Article 10**
1. At its first meeting, the commission shall appoint a secretary.

2. The secretary of the commission shall not have the nationality of any of the parties, shall not reside habitually in their territory and shall not be or have been in the service of any of them. He may be a United Nations official if the parties agree with the Secretary-General on the conditions under which the official will exercise these functions.
Article 11

1. As soon as the information provided by the parties so permits, the commission, having regard, in particular, to the time-limit laid down in article 24, shall decide in consultation with the parties whether the parties should be invited to submit written pleadings and, if so, in what order and within what time-limits, as well as the dates when, if necessary, the agents and counsel will be heard. The decisions taken by the commission in this regard may be amended at any later stage of the proceedings.

2. Subject to the provisions of article 20, paragraph 1, the commission shall not allow the agent or counsel of one party to attend a meeting without having also given the other party the opportunity to be represented at the same meeting.

Article 12

The parties, acting in good faith, shall facilitate the commission's work and, in particular, shall provide it to the greatest possible extent with whatever documents, information and explanations may be relevant.

Article 13

1. The commission may ask the parties for whatever relevant information or documents, as well as explanations, it deems necessary or useful. It may also make comments on the arguments advanced as well as the statements or proposals made by the parties.

2. The commission may accede to any request by a party that persons whose testimony it considers necessary or useful be heard, or that experts be consulted.

Article 14

In cases where the parties disagree on issues of fact, the commission may use all means at its disposal, such as the joint expert advisers mentioned in article 15, or consultation with experts, to ascertain the facts.

Article 15

The commission may propose to the parties that they jointly appoint expert advisers to assist it in the consideration of technical aspects of the dispute. If the proposal is accepted, its implementation shall be conditional upon the expert advisers being appointed by the parties by mutual agreement and accepted by the commission and upon the parties fixing their emoluments.

Article 16

Each party may at any time, at its own initiative or at the initiative of the commission, make proposals for the settlement of the dispute. Any proposal made in accordance with this article shall be communicated immediately to the other party by the president, who may, in so doing, transmit any comment the commission may wish to make thereon.

Article 17

At any stage of the proceedings, the commission may, at its own initiative or at the initiative of one of the parties, draw the attention of the parties to any measures which in its opinion might be advisable or facilitate a settlement.

Article 18

The commission shall endeavour to take its decisions unanimously but, if unanimity proves impossible, it may take them by a majority of votes of its members. Abstentions are not allowed. Except in matters of procedure, the presence of all members shall be required in order for a decision to be valid.

Article 19

The commission may, at any time, ask the Secretary-General of the United Nations for advice or assistance with regard to the administrative or procedural aspects of its work.

CHAPTER VI
CONCLUSION OF THE CONCILIATION PROCEEDINGS

Article 20

1. On concluding its consideration of the dispute, the commission may, if full settlement has not been reached, draw up and submit appropriate recommendations to the parties for consideration. To that end, it may hold an exchange of views with the agents of the parties, who may be heard jointly or separately.

2. The recommendations adopted by the commission shall be set forth in a report communicated by the president of the commission to the agents of the parties with a request that the agents inform the commission, within a given period, whether the parties accept them. The president may include in the report the reasons which, in the commission's view might prompt the parties to accept the recommendations submitted. The commission shall refrain from presenting in its report any final conclusions with regard to facts or from ruling formally on issues of law, unless the parties have jointly asked it to do so.

3. If the parties accept the recommendations submitted by the commission, a procès-verbal shall be drawn up setting forth the conditions of acceptance. A copy thereof signed by the secretary shall be provided to each party. This shall conclude the proceedings.

4. Should the commission decide not to submit recommendations to the parties, its decision to that effect shall be recorded in a procès-verbal signed by the president and the secretary. A copy thereof signed by the secretary shall be provided to each party. This shall conclude the proceedings.

Article 21

1. The recommendations of the commission will be submitted to the parties for consideration in order to facilitate an amicable settlement of the dispute. The parties undertake to study them in good faith, carefully and
objectively.

2. If one of the parties does not accept the recommendations and the other party does, it shall inform the latter, in writing, of the reasons why it could not accept them.

Article 22

1. If the recommendations are not accepted by both parties but the latter wish efforts to continue in order to reach agreement on different terms, the proceedings shall be resumed. Article 24 shall apply to the resumed proceedings, with the relevant time-limit, which the parties may, by mutual agreement, shorten or extend, running from the commission's first meeting after resumption of the proceedings.

2. If the recommendations are not accepted by both parties and the latter do not wish further efforts to be made to reach agreement on different terms, a procès-verbal signed by the president and the secretary of the commission shall be drawn up, omitting the proposed terms and indicating that the parties were unable to accept them and do not wish further efforts to be made to reach agreement on different terms. The proceedings shall be concluded when each party has received a copy of the procès-verbal signed by the secretary.

Article 23

Upon conclusion of the proceedings, the president of the commission shall, with the prior agreement of the parties, deliver the documents in the possession of the secretariat of the commission either to the Secretary-General of the United Nations or to another person or entity agreed upon by the parties. Without prejudice to the possible application of article 26, paragraph 2, the confidentiality of the documents shall be preserved.

Article 24

The commission shall conclude its work within the period agreed upon by the parties. Any extension of this period shall be agreed upon by the parties.

CHAPTER VII

CONFIDENTIALITY OF THE COMMISSION'S WORK AND DOCUMENTS

Article 25

1. The commission's meetings shall be closed. The parties and the members and expert advisers of the commission, the agents and counsel of the parties, and the secretary and the secretariat staff, shall maintain strictly the confidentiality of any documents or statements, or any communication concerning the progress of the proceedings unless their disclosure has been approved by both parties in advance.

2. Each party shall receive, through the secretary, certified copies of any minutes of the meetings at which it was represented.

3. Each party shall receive, through the secretary, certified copies of any documentary evidence received and of experts' reports, records of investigations and statements by witnesses.

Article 26

1. Except with regard to certified copies referred to in article 25, paragraph 3, the obligation to respect the confidentiality of the proceedings and of the deliberations shall remain in effect for the parties and for members of the commission, expert advisers and secretariat staff after the proceedings are concluded and shall extend to recommendations and proposals which have not been accepted.

2. Notwithstanding the foregoing, the parties may, upon conclusion of the proceedings and by mutual agreement, make available to the public all or some of the documents that in accordance with the preceding paragraph are to remain confidential, or authorize the publication of all or some of those documents.

CHAPTER VIII

OBLIGATION NOT TO ACT IN A MANNER WHICH MIGHT HAVE AN ADVERSE EFFECT ON THE CONCILIATION

Article 27

The parties shall refrain during the conciliation proceedings from any measure which might aggravate or widen the dispute. They shall, in particular, refrain from any measures which might have an adverse effect on the recommendations submitted by the commission, so long as those recommendations have not been explicitly rejected by either of the parties.

CHAPTER IX

PRESERVATION OF THE LEGAL POSITION OF THE PARTIES

Article 28

1. Except as the parties may otherwise agree, neither party shall be entitled in any other proceedings, whether in a court of law or before arbitrators or before any other body, entity or person, to invoke any views expressed or statements, admissions or proposals made by the other party in the conciliation proceedings, but not accepted, or the report of the commission, the recommendations submitted by the commission or any proposal made by the commission, unless agreed to by both parties.

12. Acceptance by a party of recommendations submitted by the commission in no way implies any admission by it of the considerations of law or of fact which may have inspired the recommendations.

CHAPTER X

COSTS

Article 29

The costs of the conciliation proceedings and the emoluments of expert
advisers appointed in accordance with article 15 shall be borne by the parties in equal shares.
2005 World Summit Outcome
(United Nations General Assembly resolution 60/1
of 16 September 2005)
Resolution adopted by the General Assembly

[without reference to a Main Committee (A/60/L.1)]

60/1. 2005 World Summit Outcome

The General Assembly
Adopts the following 2005 World Summit Outcome:

2005 World Summit Outcome

I. Values and principles
1. We, Heads of State and Government, have gathered at United Nations Headquarters in New York from 14 to 16 September 2005.

2. We reaffirm our faith in the United Nations and our commitment to the purposes and principles of the Charter of the United Nations and international law, which are indispensable foundations of a more peaceful, prosperous and just world, and reiterate our determination to foster strict respect for them.

3. We reaffirm the United Nations Millennium Declaration, which we adopted at the dawn of the twenty-first century. We recognize the valuable role of the major United Nations conferences and summits in the economic, social and related fields, including the Millennium Summit, in mobilizing the international community at the local, national, regional and global levels and in guiding the work of the United Nations.

4. We reaffirm that our common fundamental values, including freedom, equality, solidarity, tolerance, respect for all human rights, respect for nature and shared responsibility, are essential to international relations.

5. We are determined to establish a just and lasting peace all over the world in accordance with the purposes and principles of the Charter. We re dedicate ourselves to support all efforts to uphold the sovereign equality of all States, respect their territorial integrity and political independence, to refrain in our international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the United Nations, to uphold resolution of disputes by peaceful means and in conformity with the principles of justice and international law, the right to self-determination of peoples which remain under colonial domination and foreign occupation, non-interference in the internal affairs of States, respect for human rights and fundamental freedoms, respect for the equal rights of all without distinction as to race, sex, language or religion, international cooperation in solving international problems of an economic, social, cultural or humanitarian character and the fulfillment in good faith of the obligations assumed in accordance with the Charter.

6. We reaffirm the vital importance of an effective multilateral system, in accordance with international law, in order to better address the multifaceted and interconnected challenges and threats confronting our world and to achieve progress in the areas of peace and security, development and human rights, underlining the central role of the United Nations, and commit ourselves to promoting and strengthening the effectiveness of the Organization through the implementation of its decisions and resolutions.

7. We believe that today, more than ever before, we live in a global and interdependent world. No State can stand wholly alone. We acknowledge that collective security depends on effective cooperation, in accordance with international law, against transnational threats.

8. We recognize that current developments and circumstances require that we urgently build consensus on major threats and challenges. We commit ourselves to translating that consensus into concrete action, including addressing the root causes of those threats and challenges with resolve and determination.

9. We acknowledge that peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being. We recognize that development, peace and security and human rights are interlinked and mutually reinforcing.

10. We reaffirm that development is a central goal in itself and that sustainable development in its economic, social and environmental aspects constitutes a key element of the overarching framework of United Nations activities.

11. We acknowledge that good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger.

12. We reaffirm that gender equality and the promotion and protection of the full enjoyment of all human rights and fundamental freedoms for all are essential to advance development and peace and security. We are committed to creating a world fit for future generations, which takes into account the best interests of the child.

13. We reaffirm the universality, indivisibility, interdependence and interrelatedness of all human rights.

14. Acknowledging the diversity of the world, we recognize that all cultures and civilizations contribute to the enrichment of humankind. We acknowledge the importance of respect and understanding for religious and cultural diversity throughout the world. In order to promote international peace and security, we commit ourselves to advancing human welfare, freedom and progress everywhere, as well as to encouraging tolerance, respect, dialogue and cooperation among different cultures, civilizations and peoples.
15. We pledge to enhance the relevance, effectiveness, efficiency, accountability and credibility of the United Nations system. This is our shared responsibility and interest.

16. We therefore resolve to create a more peaceful, prosperous and democratic world and to undertake concrete measures to continue finding ways to implement the outcome of the Millennium Summit and the other major United Nations conferences and summits so as to provide multilateral solutions to problems in the four following areas:

- Development
- Peace and collective security
- Human rights and the rule of law
- Strengthening of the United Nations

II. Development

17. We strongly reiterate our determination to ensure the timely and full realization of the development goals and objectives agreed at the major United Nations conferences and summits, including those agreed at the Millennium Summit that are described as the Millennium Development Goals, which have helped to galvanize efforts towards poverty eradication.

18. We emphasize the vital role played by the major United Nations conferences and summits in the economic, social and related fields in shaping a broad development vision and in identifying commonly agreed objectives, which have contributed to improving human life in different parts of the world.

19. We reaffirm our commitment to eradicate poverty and promote sustained economic growth, sustainable development and global prosperity for all. We are encouraged by reductions in poverty in some countries in the recent past and are determined to reinforce and extend this trend to benefit people worldwide. We remain concerned, however, about the slow and uneven progress towards poverty eradication and the realization of other development goals in some regions. We call on ourselves to promoting the development of the productive sectors in developing countries to enable them to participate more effectively in and benefit from the process of globalization. We underline the need for urgent action on all sides, including more ambitious national development strategies and efforts backed by increased international support.

Global partnership for development

20. We reaffirm our commitment to the global partnership for development set out in the Millennium Declaration, 1 the Monterrey Consensus 2 and the Johannesburg Plan of Implementation. 3

21. We further reaffirm our commitment to sound policies, good governance at all levels and the rule of law, and to mobilize domestic resources, attract international flows, promote international trade as an engine for development and increase international financial and technical cooperation for development, sustainable debt financing and external debt relief and to enhance the coherence and consistency of the international monetary, financial and trading systems.

22. We reaffirm that each country must take primary responsibility for its own development and that the role of national policies and development strategies cannot be overemphasized in the achievement of sustainable development. We also recognize that national efforts should be complemented by supportive global programmes, measures and policies aimed at expanding the development opportunities of developing countries, while taking into account national conditions and ensuring respect for national ownership, strategies and sovereignty. To this end, we resolve:

(a) To adopt, by 2006, and implement comprehensive national development strategies to achieve the internationally agreed development goals and objectives, including the Millennium Development Goals;

(b) To manage public finances effectively to achieve and maintain macroeconomic stability and long-term growth and to make effective and transparent use of public funds and ensure that development assistance is used to build national capacities;

(c) To support efforts by developing countries to adopt and implement national development policies and strategies through increased development assistance, the promotion of international trade as an engine for development, the transfer of technology on mutually agreed terms, increased investment flows and wider and deeper debt relief, and to support developing countries by providing a substantial increase in aid of sufficient quality and arriving in a timely manner to assist them in achieving the internationally agreed development goals, including the Millennium Development Goals;

(d) That the increasing interdependence of national economies in a globalizing world and the emergence of rule-based regimes for international economic relations have meant that the space for national economic policy, that is, the scope for domestic policies, especially in the areas of trade, investment and industrial development, is now often framed by international disciplines, commitments and global market considerations. It is for each Government to evaluate the trade-off between the benefits of accepting international rules and commitments and the constraints posed by the loss of policy space. It is particularly important for developing countries, bearing in mind development goals and objectives, that all countries take into account the need for appropriate balance between national policy space and international disciplines and commitments;

(e) To enhance the contribution of non-governmental organizations, civil society, the private sector and other stakeholders in national development efforts, as well as in the promotion of the global partnership for development;

(f) To ensure that the United Nations funds and programmes and the specialized agencies support the efforts of developing countries through the common country assessment and United Nations Development Assistance Framework process, enhancing their support for capacity-building;

(g) To protect our natural resource base in support of development.


Financing for development

23. We reaffirm the Monterrey Consensus and recognize that mobilizing financial resources for development and the effective use of those resources in developing countries and countries with economies in transition are central to a global partnership for development in support of the achievement of the internationally agreed development goals, including the Millennium Development Goals. In this regard:

(a) We are encouraged by recent commitments to substantial increases in official development assistance and the Organization for Economic Cooperation and Development estimate that official development assistance to all developing countries will now increase by around 50 billion United States dollars a year by 2010, while recognizing that a substantial increase in such assistance is required to achieve the internationally agreed goals, including the Millennium Development Goals, within their respective time frames;

(b) We welcome the increased resources that will become available as a result of the establishment of timetables by many developed countries to achieve the target of 0.7 per cent of gross national product for official development assistance by 2015 and to reach at least 0.5 per cent of gross national product for official development assistance by 2010 as well, pursuant to the Brussels Programme of Action for the Least Developed Countries for the Decade 2001-2010, 0.15 per cent to 0.20 per cent for the least developed countries no later than 2010, and urge those developed countries that have not yet done so to make concrete efforts in this regard in accordance with their commitments;

(c) We further welcome recent efforts and initiatives to enhance the quality of aid and to increase its impact, including the Paris Declaration on Aid Effectiveness, and resolve to take concrete, effective and timely action in implementing all agreed commitments on aid effectiveness, with clear monitoring and deadlines, including through further aligning assistance with countries’ strategies, building institutional capacities, reducing transaction costs and eliminating bureaucratic procedures, making progress on untying aid, enhancing the absorptive capacity and financial management of recipient countries and strengthening the focus on development results;

(d) We recognize the value of developing innovative sources of financing, provided those sources do not unduly burden developing countries. In that regard, we take note with interest of the international efforts, contributions and discussions, such as the Action against Hunger and Poverty, aimed at identifying innovative and additional sources of financing for development on a public, private, domestic or external basis to increase and supplement traditional sources of financing. Some countries will implement the International Finance Facility. Other countries are considering whether and to what extent they will participate in these initiatives;

(e) We acknowledge the vital role the private sector can play in generating new investments, employment and financing for development;

(f) We resolve to address the development needs of low-income developing countries by working in competent multilateral and international forums, to help them meet, inter alia, their financial, technical and technological requirements;

(g) We resolve to continue to support the development efforts of middle-income developing countries by working, in competent multilateral and international forums and also through bilateral arrangements, on measures to help them meet, inter alia, their financial, technical and technological requirements;

(h) We resolve to operationalize the World Solidarity Fund established by the General Assembly and invite those countries in a position to do so to make voluntary contributions to the Fund;

(i) We recognize the need for access to financial services, in particular for the poor, including through microfinance and microcredit.

Domestic resource mobilization

24. In our common pursuit of growth, poverty eradication and sustainable development, a critical challenge is to ensure the necessary internal conditions for mobilizing domestic savings, both public and private, sustaining adequate levels of productive investment, increasing human capacity, reducing capital flight, curbing the illicit transfer of funds and enhancing international cooperation for creating an enabling domestic environment. We undertake to support the efforts of developing countries to create a domestic enabling environment for mobilizing domestic resources. To this end, we therefore resolve:

(a) To pursue good governance and sound macroeconomic policies at all levels and support developing countries in their efforts to put in place the policies and investments to drive sustained economic growth, promote small and medium-sized enterprises, promote employment generation and stimulate the private sector;

(b) To reaffirm that good governance is essential for sustainable development; that sound economic policies, solid democratic institutions responsive to the needs of the people and improved infrastructure are the basis for sustained economic growth, poverty eradication and employment creation; and that freedom, peace and security, domestic stability, respect for human rights, including the right to development, the rule of law, gender equality and market-oriented policies and an overall commitment to just and democratic societies are also essential and mutually reinforcing;

(c) To make the fight against corruption a priority at all levels and welcome all actions taken in this regard at the national and international levels, including the adoption of policies that emphasize accountability, transparent public sector management and corporate responsibility and accountability, including efforts to return assets transferred through corruption, consistent with the United Nations Convention against Corruption. We urge all States that have not done so to consider signing, ratifying and implementing the Convention;

(d) To channel private capabilities and resources into stimulating the private sector in developing countries through actions in the public, public/private and
private spheres to create an enabling environment for partnership and innovation that contributes to accelerated economic development and hunger and poverty eradication;

(e) To support efforts to reduce capital flight and measures to curb the illicit transfer of funds.

Investment

25. We resolve to encourage greater direct investment, including foreign investment, in developing countries and countries with economies in transition to support their development activities and to enhance the benefits they can derive from such investments. In this regard:

(a) We continue to support efforts by developing countries and countries with economies in transition to create a domestic environment conducive to attracting investments through, inter alia, achieving a transparent, stable and predictable investment climate with proper contract enforcement and respect for property rights and the rule of law and pursuing appropriate policy and regulatory frameworks that encourage business formation;

(b) We will put into place policies to ensure adequate investment in a sustainable manner in health, clean water and sanitation, housing and education and in the provision of public goods and social safety nets to protect vulnerable and disadvantaged sectors of society;

(c) We invite national Governments seeking to develop infrastructure projects and generate foreign direct investment to pursue strategies with the involvement of both the public and private sectors and, where appropriate, international donors;

(d) We call upon international financial and banking institutions to consider enhancing the transparency of risk rating mechanisms. Sovereign risk assessments, made by the private sector should maximize the use of strict, objective and transparent parameters, which can be facilitated by high-quality data and analysis;

(e) We underscore the need to sustain sufficient and stable private financial flows to developing countries and countries with economies in transition. It is important to promote measures in source and destination countries to improve transparency and the information about financial flows to developing countries, particularly countries in Africa, the least developed countries, small island developing States and landlocked developing countries. Measures that mitigate the impact of excessive volatility of short-term capital flows are important and must be considered.

Debt

26. We emphasize the high importance of a timely, effective, comprehensive and durable solution to the debt problems of developing countries, since debt financing and relief can be an important source of capital for development. To this end:

(a) We welcome the recent proposals of the Group of Eight to cancel 100 per cent of the outstanding debt of eligible heavily indebted poor countries owed to the International Monetary Fund, the International Development Association and African Development Fund and to provide additional resources to ensure that the financing capacity of the international financial institutions is not reduced;

(b) We emphasize that debt sustainability is essential for underpinning growth and underline the importance of debt sustainability to the efforts to achieve national development goals, including the Millennium Development Goals, recognizing the key role that debt relief can play in liberating resources that can be directed towards activities consistent with poverty eradication, sustained economic growth and sustainable development;

(c) We further stress the need to consider additional measures and initiatives aimed at ensuring long-term debt sustainability through increased grant-based financing, cancellation of 100 per cent of the official multilateral and bilateral debt of heavily indebted poor countries and, where appropriate, and on a case-by-case basis, to consider significant debt relief or restructuring for low- and middle-income developing countries with an unsustainable debt burden that are not part of the Heavily Indebted Poor Countries Initiative, as well as the exploration of mechanisms to comprehensively address the debt problems of those countries. Such mechanisms may include debt for sustainable development swaps or multicreditors debt swap arrangements, as appropriate. These initiatives could include further efforts by the International Monetary Fund and the World Bank to develop the debt sustainability framework for low-income countries. This should be achieved in a fashion that does not detract from official development assistance resources, while maintaining the financial integrity of the multilateral financial institutions.

Trade

27. A universal, rule-based, open, non-discriminatory and equitable multilateral trading system, as well as meaningful trade liberalization, can substantially stimulate development worldwide, benefiting countries at all stages of development. In that regard, we reaffirm our commitment to trade liberalization and to ensure that trade plays its full part in promoting economic growth, employment and development for all.

28. We are committed to efforts designed to ensure that developing countries, especially the least-developed countries, participate fully in the world trading system in order to meet their economic development needs, and reaffirm our commitment to enhanced and predictable market access for the exports of developing countries.

29. We will work towards the objective, in accordance with the Brussels Programme of Action, of duty-free and quota-free market access for all least developed countries' products to the markets of developed countries, as well as to the markets of developing countries in a position to do so, and support their efforts to overcome their supply-side constraints.

30. We are committed to supporting and promoting increased aid to build productive and trade capacities of developing countries and to taking further steps in that regard, while welcoming the substantial support already provided.

31. We will work to accelerate and facilitate the accession of developing countries and countries with economies in transition to the World Trade Organization consistent with its criteria, recognizing the importance of universal integration in the rules-based global trading system.
32. We will work expeditiously towards implementing the development dimensions of the Doha work programme.6

Commodities
33. We emphasize the need to address the impact of weak and volatile commodity prices and support the efforts of commodity-dependent countries to restructure, diversify and strengthen the competitiveness of their commodity sectors.

Quick-impact initiatives
34. Given the need to accelerate progress immediately in countries where current trends make the achievement of the internationally agreed development goals unlikely, we resolve to urgently identify and implement country-led initiatives with adequate international support, consistent with long-term national development strategies, that promise immediate and durable improvements in the lives of people and renewed hope for the achievement of the development goals. In this regard, we will take such actions as the distribution of malaria bed nets, including free distribution, where appropriate, and effective anti-malarial treatments, the expansion of local school meal programmes, using home-grown foods where possible, and the elimination of user fees for primary education and, where appropriate, health-care services.

Systemic issues and global economic decision-making
35. We reaffirm the commitment to broaden and strengthen the participation of developing countries and countries with economies in transition in international economic decision-making and norm-setting, and to that end stress the importance of continuing efforts to reform the international financial architecture, noting that enhancing the voice and participation of developing countries and countries with economies in transition in the Bretton Woods institutions remains a continuous concern.

36. We reaffirm our commitment to governance, equity and transparency in the financial, monetary and trading systems. We are also committed to open, equitable, rule-based, predictable and non-discriminatory multilateral trading and financial systems.

37. We also underscore our commitment to sound domestic financial sectors, which make a vital contribution to national development efforts, as an important component of an international financial architecture that is supportive of development.

38. We further reaffirm the need for the United Nations to play a fundamental role in the promotion of international cooperation for development and the coherence, coordination and implementation of development goals and actions agreed upon by the international community, and we resolve to strengthen coordination within the United Nations system in close cooperation with all other multilateral financial, trade and development institutions in order to support sustained economic growth, poverty eradication and sustainable development.

39. Good governance at the international level is fundamental for achieving sustainable development. In order to ensure a dynamic and enabling international economic environment, it is important to promote global economic governance through addressing the international finance, trade, technology and investment patterns that have an impact on the development prospects of developing countries. To this effect, the international community should take all necessary and appropriate measures, including ensuring support for structural and macroeconomic reform, a comprehensive solution to the external debt problem and increasing the market access of developing countries.

South-South cooperation
40. We recognize the achievements and great potential of South-South cooperation and encourage the promotion of such cooperation, which complements North-South cooperation as an effective contribution to development and as a means to share best practices and provide enhanced technical cooperation. In this context, we note the recent decision of the leaders of the South, adopted at the Second South Summit and contained in the Doha Declaration7 and the Doha Plan of Action,8 to intensify their efforts at South-South cooperation, including through the establishment of the New Asian-African Strategic Partnership and other regional cooperation mechanisms, and encourage the international community, including the international financial institutions, to support the efforts of developing countries, inter alia, through triangular cooperation. We also take note with appreciation of the launching of the third round of negotiations on the Global System of Trade Preferences among Developing Countries as an important instrument to stimulate South-South cooperation.

41. We welcome the work of the United Nations High-Level Committee on South-South Cooperation and invite countries to consider supporting the Special Unit for South-South Cooperation within the United Nations Development Programme in order to respond effectively to the development needs of developing countries.

42. We recognize the considerable contribution of arrangements such as the Organization of Petroleum Exporting Countries Fund initiated by a group of developing countries, as well as the potential contribution of the South Fund for Development and Humanitarian Assistance, to development activities in developing countries.

Education
43. We emphasize the critical role of both formal and informal education in the achievement of poverty eradication and other development goals as envisaged in the Millennium Declaration,1 in particular basic education and training for eradicating illiteracy, and strive for expanded secondary and higher education as well as vocational education and technical training, especially for girls and women, the creation of human resources and infrastructure capabilities and the empowerment of those living in poverty. In this context, we reaffirm the Dakar Framework for Action adopted at the World Education Forum in 20009 and recognize the importance of the United Nations Educational, Scientific and Cultural Organization strategy for the eradication of poverty, especially extreme poverty, in supporting the Education for

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6 See A/C.2/56/7, annex.
7 A/60/111, annex I.
8 Ibid., annex II.
All programmes as a tool to achieve the millennium development goal of universal primary education by 2015.

44. We reaffirm our commitment to support developing country efforts to ensure that all children have access to and complete free and compulsory primary education of good quality, to eliminate gender inequality and imbalance and to renew efforts to improve girls’ education. We also commit ourselves to continuing to support the efforts of developing countries in the implementation of the Education for All initiative, including with enhanced resources of all types through the Education for All fast-track initiative in support of country-led national education plans.

45. We commit ourselves to promoting education for peace and human development.

Rural and agricultural development

46. We reaffirm that food security and rural and agricultural development must be adequately and urgently addressed in the context of national development and response strategies and, in this context, will enhance the contributions of indigenous and local communities, as appropriate. We are convinced that the eradication of poverty, hunger and malnutrition, particularly as they affect children, is crucial for the achievement of the Millennium Development Goals. Rural and agricultural development should be an integral part of national and international development policies. We deem it necessary to increase productive investment in rural and agricultural development to achieve food security. We commit ourselves to increasing support for agricultural development and trade capacity-building in the agricultural sector in developing countries. Support for commodity development projects, especially market-based projects, and for their preparation under the Second Account of the Common Fund for Commodities should be encouraged.

Employment

47. We strongly support fair globalization and resolve to make the goals of full and productive employment and decent work for all, including for women and young people, a central objective of our relevant national and international policies as well as our national development strategies, including poverty reduction strategies, as part of our efforts to achieve the Millennium Development Goals. These measures should also encompass the elimination of the worst forms of child labour, as defined in International Labour Organization Convention No. 182, and forced labour. We also resolve to ensure full respect for the fundamental principles and rights at work.

Sustainable development: managing and protecting our common environment

48. We reaffirm our commitment to achieve the goal of sustainable development, including through the implementation of Agenda 21 and the Johannesburg Plan of Implementation. To this end, we commit ourselves to undertaking concrete actions and measures at all levels and to enhancing international cooperation, taking into account the Rio principles.11 These efforts will also promote the integration of the three components of sustainable development — economic development, social development and environmental protection — as interdependent and mutually reinforcing pillars. Poverty eradication, changing unsustainable patterns of production and consumption and protecting and managing the natural resource base of economic and social development are overarching objectives of and essential requirements for sustainable development.

49. We will promote sustainable consumption and production patterns, with the developed countries taking the lead and all countries benefiting from the process, as called for in the Johannesburg Plan of Implementation. In that context, we support developing countries in their efforts to promote a recycling economy.

50. We face serious and multiple challenges in tackling climate change, promoting clean energy, meeting energy needs and achieving sustainable development, and we will act with resolve and urgency in this regard.

51. We recognize that climate change is a serious and long-term challenge that has the potential to affect every part of the globe. We emphasize the need to meet all the commitments and obligations we have undertaken in the United Nations Framework Convention on Climate Change12 and other relevant international agreements, including, for many of us, the Kyoto Protocol.13 The Convention is the appropriate framework for addressing future action on climate change at the global level.

52. We reaffirm our commitment to the ultimate objective of the Convention: to stabilize greenhouse gas concentrations in the atmosphere at a level that prevents dangerous anthropogenic interference with the climate system.

53. We acknowledge that the global nature of climate change calls for the widest possible cooperation and participation in an effective and appropriate international response, in accordance with the principles of the Convention. We are committed to moving forward the global discussion on long-term cooperative action to address climate change, in accordance with these principles. We stress the importance of the eleventh session of the Conference of the Parties to the Convention, to be held in Montreal in November 2005.

54. We acknowledge various partnerships that are under way to advance action on clean energy and climate change, including bilateral, regional and multilateral initiatives.

55. We are committed to taking further action through practical international cooperation, inter alia:

(a) To promote innovation, clean energy and energy efficiency and conservation; improve policy, regulatory and financing frameworks; and accelerate the deployment of cleaner technologies;

(b) To enhance private investment, transfer of technologies and capacity-building to developing countries, as called for in the Johannesburg Plan of Implementation, taking into account their own energy needs and priorities;

(c) To assist developing countries to improve their resilience and integrate adaptation goals into their sustainable development strategies, given that adaptation to the effects of climate change due to both natural and human factors is a high

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9 Ibid., annex I.
11 Ibid., annex I.
13 FCCC/CP/1997/7/Add.1, decision 1/CP.3, annex.
priority for all nations, particularly those most vulnerable, namely, those referred to in article 4.8 of the Convention;

(d) To continue to assist developing countries, in particular small island developing States, least developed countries and African countries, including those that are particularly vulnerable to climate change, in addressing their adaptation needs relating to the adverse effects of climate change.

56. In pursuance of our commitment to achieve sustainable development, we further resolve:

(a) To promote the United Nations Decade of Education for Sustainable Development and the International Decade for Action, “Water for Life”;

(b) To support and strengthen the implementation of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 10 to address causes of desertification and land degradation, as well as poverty resulting from land degradation, through, inter alia, the mobilization of adequate and predictable financial resources, the transfer of technology and capacity-building at all levels;

(c) That the States parties to the Convention on Biological Diversity 15 and the Cartagena Protocol on Biosafety, 16 should support the implementation of the Convention and the Protocol, as well as other biodiversity-related agreements and the Johannesburg commitment for a significant reduction in the rate of loss of biodiversity by 2010. The States parties will continue to negotiate within the framework of the Convention on Biological Diversity, bearing in mind the Bonn Guidelines, 17 an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources. All States will fulfill commitments and significantly reduce the rate of loss of biodiversity by 2010 and continue ongoing efforts towards elaborating and negotiating an international regime on access to genetic resources and benefit-sharing;

(d) To recognize that the sustainable development of indigenous peoples and their communities is crucial in our fight against hunger and poverty;

(e) To reaffirm our commitment, subject to national legislation, to respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant to the conservation and sustainable use of biological diversity, promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from their utilization;

(f) To work expeditiously towards the establishment of a worldwide early warning system for all natural hazards with regional nodes, building on existing national and regional capacity such as the newly established Indian Ocean Tsunami Warning and Mitigation System;

(g) To fully implement the Hyogo Declaration 18 and the Hyogo Framework for Action 2005–2015 19 adopted at the World Conference on Disaster Reduction, in particular those commitments related to assistance for developing countries that are prone to natural disasters and disaster-stricken States in the transition phase towards sustainable physical, social and economic recovery, for risk-reduction activities in post-disaster recovery and for rehabilitation processes;

(h) To assist developing countries’ efforts to prepare integrated water resources management and water efficiency plans as part of their national development strategies and to provide access to safe drinking water and basic sanitation in accordance with the Millennium Declaration and the Johannesburg Plan of Implementation, 20 including halving by 2015 the proportion of people who are unable to reach or afford safe drinking water and who do not have access to basic sanitation;

(i) To accelerate the development and dissemination of affordable and cleaner energy efficiency and energy conservation technologies, as well as the transfer of such technologies, in particular to developing countries, on favourable terms, including on concessional and preferential terms, as mutually agreed, bearing in mind that access to energy facilitates the eradication of poverty;

(j) To strengthen the conservation, sustainable management and development of all types of forests for the benefit of current and future generations, including through enhanced international cooperation, so that trees and forests may contribute fully to the achievement of the internationally agreed development goals, including those contained in the Millennium Declaration, taking full account of the linkages between the forest sector and other sectors. We look forward to the discussions at the sixth session of the United Nations Forum on Forests;

(k) To promote the sound management of chemicals and hazardous wastes throughout their life cycle, in accordance with Agenda 21 and the Johannesburg Plan of Implementation, aiming to achieve that by 2020 chemicals are used and produced in ways that lead to the minimization of significant adverse effects on human health and the environment using transparent and science-based risk assessment and risk management procedures, by adopting and implementing a voluntary strategic approach to international management of chemicals, and to support developing countries in strengthening their capacity for the sound management of chemicals and hazardous wastes by providing technical and financial assistance, as appropriate;

(l) To improve cooperation and coordination at all levels in order to address issues related to oceans and seas in an integrated manner and promote integrated management and sustainable development of the oceans and seas;

(m) To achieve significant improvement in the lives of at least 100 million slum-dwellers by 2020, recognizing the urgent need for the provision of increased resources for affordable housing and housing-related infrastructure, prioritizing slum prevention and slum upgrading, and to encourage support for the United Nations Habitat and Human Settlements Foundation and its Slum Upgrading Facility.

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15 Ibid., vol. 1760, No. 30619.
16 UNEP/CBD/ExCOP/13 and Corr 1, part two, annex.
17 UNEP/CBD/COP/6/20, annex I, decision VI/24A.
(n) To acknowledge the invaluable role of the Global Environment Facility in facilitating cooperation with developing countries; we look forward to a successful replenishment this year along with the successful conclusion of all outstanding commitments from the third replenishment;

(o) To note that cessation of the transport of radioactive materials through the regions of small island developing States is an ultimate desired goal of small island developing States and some other countries and recognize the right of freedom of navigation in accordance with international law. States should maintain dialogue and consultation, in particular under the aegis of the International Atomic Energy Agency and the International Maritime Organization, with the aim of improved mutual understanding, confidence-building and enhanced communication in relation to the safe maritime transport of radioactive materials. States involved in the transport of such materials are urged to continue to engage in dialogue with small island developing States and other States to address their concerns. These concerns include the further development and strengthening, within the appropriate forums, of international regulatory regimes to enhance safety, disclosure, liability, security and compensation in relation to such transport.

HIV/AIDS, malaria, tuberculosis and other health issues

57. We recognize that HIV/AIDS, malaria, tuberculosis and other infectious diseases pose severe risks for the entire world and serious challenges to the achievement of development goals. We acknowledge the substantial efforts and financial contributions made by the international community, while recognizing that these diseases and other emerging health challenges require a sustained international response. To this end, we commit ourselves to:

(a) Increasing investment, building on existing mechanisms and through partnership, to improve health systems in developing countries and those with economies in transition with the aim of providing sufficient health workers, infrastructure, management systems and supplies to achieve the health-related Millennium Development Goals by 2015;

(b) Implementing measures to increase the capacity of adults and adolescents to protect themselves from the risk of HIV infection;

(c) Fully implementing all commitments established by the Declaration of Commitment on HIV/AIDS through stronger leadership, the scaling up of a comprehensive response to achieve broad multilateral coverage for prevention, care, treatment and support, the mobilization of additional resources from national, bilateral, multilateral and private sources and the substantial funding of the Global Fund to Fight AIDS, Tuberculosis and Malaria as well as of the HIV/AIDS component of the work programmes of the United Nations system agencies and programmes engaged in the fight against HIV/AIDS;

(d) Developing and implementing a package for HIV prevention, treatment and care with the aim of coming as close as possible to the goal of universal access to treatment by 2010 for all those who need it, including through increased resources, and working towards the elimination of stigma and discrimination, enhanced access to affordable medicines and the reduction of vulnerability of persons affected by HIV/AIDS and other health issues, in particular orphaned and vulnerable children and older persons;

(e) Ensuring the full implementation of our obligations under the International Health Regulations adopted by the fifty-eighth World Health Assembly in May 2005, including the need to support the Global Outbreak Alert and Response Network of the World Health Organization;

(f) Working actively to implement the “Three Ones” principles in all countries, including by ensuring that multiple institutions and international partners all work under one agreed HIV/AIDS framework that provides the basis for coordinating the work of all partners, with one national AIDS coordinating authority having a broad-based multisectoral mandate, and under one agreed country-level monitoring and evaluation system. We welcome and support the important recommendations of the Global Task Team on Improving AIDS Coordination among Multilateral Institutions and International Donors;

(g) Achieving universal access to reproductive health by 2015, as set out at the International Conference on Population and Development, integrating this goal in strategies to attain the internationally agreed development goals, including those contained in the Millennium Declaration, aimed at reducing maternal mortality, improving maternal health, reducing child mortality, promoting gender equality, combating HIV/AIDS and eradicating poverty;

(h) Promoting long-term funding, including public-private partnerships where appropriate, for academic and industrial research as well as for the development of new vaccines and microbicides, diagnostic kits, drugs and treatments to address major pandemics, tropical diseases and other diseases, such as avian flu and severe acute respiratory syndrome, and taking forward work on market incentives, where appropriate through such mechanisms as advance purchase commitments;

(i) Stressing the need to urgently address malaria and tuberculosis, in particular in the most affected countries, and welcoming the scaling up, in this regard, of bilateral and multilateral initiatives.

Gender equality and empowerment of women

58. We remain convinced that progress for women is progress for all. We reaffirm that the full and effective implementation of the goals and objectives of the Beijing Declaration and Platform for Action and the outcome of the twenty-third special session of the General Assembly is an essential contribution to achieving the internationally agreed development goals, including those contained in the Millennium Declaration, and we resolve to promote gender equality and eliminate pervasive gender discrimination by:

(a) Eliminating gender inequalities in primary and secondary education by the earliest possible date and at all educational levels by 2015;

(b) Guaranteeing the free and equal right of women to own and inherit property and ensuring secure tenure of property and housing by women;

20 Resolution S-26/2, annex.

21 World Health Assembly resolution 58.3.

22 Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (United Nations publication, Sales No. E.96.IV.13), chap. I, resolution 1, annexes I and II.
(c) Ensuring equal access to reproductive health;
(d) Promoting women’s equal access to labour markets, sustainable employment and adequate labour protection;
(e) Ensuring equal access of women to productive assets and resources, including land, credit and technology;
(f) Eliminating all forms of discrimination and violence against women and the girl child, including by ending impunity and by ensuring the protection of civilians, in particular women and the girl child, during and after armed conflicts in accordance with the obligations of States under international humanitarian law and international human rights law;
(g) Promoting increased representation of women in Government decision-making bodies, including through ensuring their equal opportunity to participate fully in the political process.

59. We recognize the importance of gender mainstreaming as a tool for achieving gender equality. To that end, we undertake to actively promote the mainstreaming of a gender perspective in the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and social spheres, and further undertake to strengthen the capabilities of the United Nations system in the area of gender.

Science and technology for development

60. We recognize that science and technology, including information and communication technology, are vital for the achievement of the development goals and that international support can help developing countries to benefit from technological advancements and enhance their productive capacity. We therefore commit ourselves to:

(a) Strengthening and enhancing existing mechanisms and supporting initiatives for research and development, including through voluntary partnerships between the public and private sectors, to address the special needs of developing countries in the areas of health, agriculture, conservation, sustainable use of natural resources and environmental management, energy, forestry and the impact of climate change;

(b) Promoting and facilitating, as appropriate, access to and the development, transfer and diffusion of technologies, including environmentally sound technologies and corresponding know-how, to developing countries;

(c) Assisting developing countries in their efforts to promote and develop national strategies for human resources and science and technology, which are primary drivers of national capacity-building for development;

(d) Promoting and supporting greater efforts to develop renewable sources of energy, such as solar, wind and geothermal;

(e) Implementing policies at the national and international levels to attract both public and private investment, domestic and foreign, that enhances knowledge, transfers technology on mutually agreed terms and raises productivity;

(f) Supporting the efforts of developing countries, individually and collectively, to harness new agricultural technologies in order to increase agricultural productivity through environmentally sustainable means;

(g) Building a people-centred and inclusive information society so as to enhance digital opportunities for all people in order to help bridge the digital divide, putting the potential of information and communication technologies at the service of development and addressing new challenges of the information society by implementing the outcomes of the Geneva phase of the World Summit on the Information Society and ensuring the success of the second phase of the Summit, to be held in Tunis in November 2005; in this regard, we welcome the establishment of the Digital Solidarity Fund and encourage voluntary contributions to its financing.

Migration and development

61. We acknowledge the important nexus between international migration and development and the need to deal with the challenges and opportunities that migration presents to countries of origin, destination and transit. We recognize that international migration brings benefits as well as challenges to the global community. We look forward to the high-level dialogue of the General Assembly on international migration and development to be held in 2006, which will offer an opportunity to discuss the multidimensional aspects of international migration and development in order to identify appropriate ways and means to maximize their development benefits and minimize their negative impacts.

62. We reaffirm our resolve to take measures to ensure respect for and protection of the human rights of migrants, migrant workers and members of their families.

63. We reaffirm the need to adopt policies and undertake measures to reduce the cost of transferring migrant remittances to developing countries and welcome efforts by Governments and stakeholders in this regard.

Countries with special needs

64. We reaffirm our commitment to address the special needs of the least developed countries and urge all countries and all relevant organizations of the United Nations system, including the Bretton Woods institutions, to make concerted efforts and adopt speedy measures for meeting in a timely manner the goals and targets of the Brussels Programme of Action for the Least Developed Countries for the Decade 2001–2010.

65. We recognize the special needs of and challenges faced by landlocked developing countries and therefore reaffirm our commitment to urgently address those needs and challenges through the full, timely and effective implementation of the Almaty Programme of Action: Addressing the Special Needs of Landlocked Developing Countries within a New Global Framework for Transit Transport Cooperation for Landlocked and Transit Developing Countries and the São Paulo Consensus adopted at the eleventh session of the United Nations Conference on Trade and Development. We encourage the work undertaken by United Nations regional commissions and organizations towards establishing a time-cost methodology for indicators to measure the progress in implementation of the Almaty Programme of Action. We also recognize the special difficulties and concerns of landlocked developing countries in their efforts to integrate their economies into the...
multilateral trading system. In this regard, priority should be given to the full and timely implementation of the Almaty Declaration and the Almaty Programme of Action.  

66. We recognize the special needs and vulnerabilities of small island developing States and reaffirm our commitment to take urgent and concrete action to address those needs and vulnerabilities through the full and effective implementation of the Mauritius Strategy adopted by the International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States, the Barbados Programme of Action and the outcome of the twenty-second special session of the General Assembly. We further undertake to promote greater international cooperation and partnership for the implementation of the Mauritius Strategy through, inter alia, the mobilization of domestic and international resources, the promotion of international trade as an engine for development and increased international financial and technical cooperation.

67. We emphasize the need for continued, coordinated and effective international support for achieving the development goals in countries emerging from conflict and in those recovering from natural disasters.

Meeting the special needs of Africa

68. We welcome the substantial progress made by the African countries in fulfilling their commitments and emphasize the need to carry forward the implementation of the New Partnership for Africa's Development to promote sustainable growth and development and deepen democracy, human rights, good governance and sound economic management and gender equality and encourage African countries, with the participation of civil society and the private sector, to continue their efforts in this regard by developing and strengthening institutions for governance and the development of the region, and also welcome the recent decisions taken by Africa's partners, including the Group of Eight and the European Union, in support of Africa's development efforts, including commitments that will lead to an increase in official development assistance to Africa of 25 billion dollars per year by 2010. We reaffirm our commitment to address the special needs of Africa, which is the only continent not on track to meet any of the goals of the Millennium Declaration by 2015, to enable it to enter the mainstream of the world economy and development:

(a) To strengthen cooperation with the New Partnership for Africa's Development by providing coherent support for the programmes drawn up by African leaders within that framework, including by mobilizing internal and external financial resources and facilitating approval of such programmes by the multilateral financial institutions;

(b) To support the African commitment to ensure that by 2015 all children have access to complete, free and compulsory primary education of good quality, as well as to basic health care;

(c) To support the building of an international infrastructure consortium involving the African Union, the World Bank and the African Development Bank, with the New Partnership for Africa's Development as the main framework, to facilitate public and private infrastructure investment in Africa;

(d) To promote a comprehensive and durable solution to the external debt problems of African countries, including through the cancellation of 100 per cent of multilateral debt consistent with the recent Group of Eight proposal for the heavily indebted poor countries, and, on a case-by-case basis, where appropriate, significant debt relief, including, inter alia, cancellation or restructuring for heavily indebted African countries not part of the Heavily Indebted Poor Countries Initiative that have unsustainable debt burdens;

(e) To make efforts to fully integrate African countries in the international trading system, including through targeted trade capacity-building programmes;

(f) To support the efforts of commodity-dependent African countries to restructure, diversify and strengthen the competitiveness of their commodity sectors and decide to work towards market-based arrangements with the participation of the private sector for commodity price-risk management;

(g) To supplement the efforts of African countries, individually and collectively, to increase agricultural productivity, in a sustainable way, as set out in the Comprehensive Africa Agriculture Development Programme of the New Partnership for Africa's Development as part of an African "Green Revolution";

(h) To encourage and support the initiatives of the African Union and subregional organizations to prevent, mediate and resolve conflicts with the assistance of the United Nations, and in this regard welcomes the proposals from the Group of Eight countries to provide support for African peacekeeping;

(i) To provide, with the aim of an AIDS-, malaria- and tuberculosis-free generation in Africa, assistance for prevention and care and to come as close as possible to achieving the goal of universal access by 2010 to HIV/AIDS treatment in African countries, to encourage pharmaceutical companies to make drugs, including antiretroviral drugs, affordable and accessible in Africa and to ensure increased bilateral and multilateral assistance, where possible on a grant basis, to combat malaria, tuberculosis and other infectious diseases in Africa through the strengthening of health systems.

III. Peace and collective security

69. We recognize that we are facing a whole range of threats that require our urgent, collective and more determined response.

70. We also recognize that, in accordance with the Charter, addressing such threats requires cooperation among all the principal organs of the United Nations within their respective mandates.

71. We acknowledge that we are living in an interdependent and global world and that many of today's threats recognize no national boundaries, are interlinked and
must be tackled at the global, regional and national levels in accordance with the Charter and international law.

72. We therefore reaffirm our commitment to work towards a security consensus based on the recognition that many threats are interlinked, that development, peace, security and human rights are mutually reinforcing, that no State can best protect itself by acting entirely alone and that all States need an effective and efficient collective security system pursuant to the purposes and principles of the Charter.

Pacific settlement of disputes

73. We emphasize the obligation of States to settle their disputes by peaceful means in accordance with Chapter VI of the Charter, including, when appropriate, by the use of the International Court of Justice. All States should act in accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.30

74. We stress the importance of prevention of armed conflict in accordance with the purposes and principles of the Charter and solemnly renew our commitment to promote a culture of prevention of armed conflict as a means of effectively addressing the interconnected security and development challenges faced by peoples throughout the world, as well as to strengthen the capacity of the United Nations for the prevention of armed conflict.

75. We further stress the importance of a coherent and integrated approach to the prevention of armed conflicts and the settlement of disputes and the need for the Security Council, the General Assembly, the Economic and Social Council and the Secretary-General to coordinate their activities within their respective Charter mandates.

76. Recognizing the important role of the good offices of the Secretary-General, including in the mediation of disputes, we support the Secretary-General’s efforts to strengthen his capacity in this area.

Use of force under the Charter of the United Nations

77. We reiterate the obligation of all Member States to refrain in their international relations from the threat or use of force in any manner inconsistent with the Charter. We reaffirm that the purposes and principles guiding the United Nations are, inter alia, to maintain international peace and security, to develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples and to take other appropriate measures to strengthen universal peace, and to that end we are determined to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, in conformity with the principles of justice and international law, the adjustment or settlement of international disputes or situations that might lead to a breach of the peace.

78. We reiterate the importance of promoting and strengthening the multilateral process and of addressing international challenges and problems by strictly abiding by the Charter and the principles of international law, and further stress our commitment to multilateralism.

79. We reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the Charter.

80. We also reaffirm that the Security Council has primary responsibility in the maintenance of international peace and security. We also note the role of the General Assembly relating to the maintenance of international peace and security in accordance with the relevant provisions of the Charter.

Terrorism

81. We strongly condemn terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security.

82. We welcome the Secretary-General’s identification of elements of a counter-terrorism strategy. These elements should be developed by the General Assembly without delay with a view to adopting and implementing a strategy to promote comprehensive, coordinated and consistent responses, at the national, regional and international levels, to counter terrorism, which also takes into account the conditions conducive to the spread of terrorism. In this context, we commend the various initiatives to promote dialogue, tolerance and understanding among civilizations.

83. We stress the need to make every effort to reach an agreement on and conclude a comprehensive convention on international terrorism during the sixtieth session of the General Assembly.

84. We acknowledge that the question of convening a high-level conference under the auspices of the United Nations to formulate an international response to terrorism in all its forms and manifestations could be considered.

85. We recognize that international cooperation to fight terrorism must be conducted in conformity with international law, including the Charter and relevant international conventions and protocols. States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law.

86. We reiterate our call upon States to refrain from organizing, financing, encouraging, providing training for or otherwise supporting terrorist activities and to take appropriate measures to ensure that their territories are not used for such activities.

87. We acknowledge the important role played by the United Nations in combating terrorism and also stress the vital contribution of regional and bilateral cooperation, particularly at the practical level of law enforcement cooperation and technical exchange.

88. We urge the international community, including the United Nations, to assist States in building national and regional capacity to combat terrorism. We invite the Secretary-General to submit proposals to the General Assembly and the Security Council, within their respective mandates, to strengthen the capacity of the United

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30 Resolution 2625 (XXV), annex.
Nations system to assist States in combating terrorism and to enhance the coordination of United Nations activities in this regard.

89. We stress the importance of assisting victims of terrorism and of providing them and their families with support to cope with their loss and their grief.

90. We encourage the Security Council to consider ways to strengthen its monitoring and enforcement role in counter-terrorism, including by consolidating State reporting requirements, taking into account and respecting the different mandates of its counter-terrorism subsidiary bodies. We are committed to cooperating fully with the three competent subsidiary bodies in the fulfillment of their tasks, recognizing that many States continue to require assistance in implementing relevant Security Council resolutions.

91. We support efforts for the early entry into force of the International Convention for the Suppression of Acts of Nuclear Terrorism and strongly encourage States to consider becoming parties to it expeditiously and acceding without delay to the twelve other international conventions and protocols against terrorism and implementing them.

Peacekeeping

92. Recognizing that United Nations peacekeeping plays a vital role in helping parties to conflict end hostilities and commending the contribution of United Nations peacekeepers in that regard, noting improvements made in recent years in United Nations peacekeeping, including the deployment of integrated missions in complex situations, and stressing the need to mount operations with adequate capacity to counter hostilities and fulfill effectively their mandates, we urge further development of proposals for enhanced rapidly deployable capacities to reinforce peacekeeping operations in crises. We endorse the creation of an initial operating capability for a standing police capacity to provide coherent, effective and responsive start-up capability for the policing component of the United Nations peacekeeping missions and to assist existing missions through the provision of advice and expertise.

93. Recognizing the important contribution to peace and security by regional organizations as provided for under Chapter VIII of the Charter and the importance of forging predictable partnerships and arrangements between the United Nations and regional organizations, and noting in particular, given the special needs of Africa, the importance of a strong African Union:

(a) We support the efforts of the European Union and other regional entities to develop capacities such as for rapid deployment, standby and bridging arrangements;

(b) We support the development and implementation of a ten-year plan for capacity-building with the African Union.

94. We support implementation of the 2001 Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects.

95. We urge States parties to the Anti-Personnel Mine Ban Convention and Amended Protocol II to the Convention on Certain Conventional Weapons to fully implement their respective obligations. We call upon States in a position to do so to provide greater technical assistance to mine-affected States.

Peacebuilding

97. Emphasizing the need for a coordinated, coherent and integrated approach to post-conflict peacebuilding and reconciliation with a view to achieving sustainable peace, recognizing the need for a dedicated institutional mechanism to address the special needs of countries emerging from conflict towards recovery, reintegration and reconstruction and to assist them in laying the foundation for sustainable development, and recognizing the vital role of the United Nations in that regard, we decide to establish a Peacebuilding Commission as an intergovernmental advisory body.

98. The main purpose of the Peacebuilding Commission is to bring together all relevant actors to marshal resources and to advise on and propose integrated strategies for post-conflict peacebuilding and recovery. The Commission should focus attention on the reconstruction and institution-building efforts necessary for recovery from conflict and support the development of integrated strategies in order to lay the foundation for sustainable development. In addition, it should provide recommendations and information to improve the coordination of all relevant actors within and outside the United Nations, develop best practices, help to ensure predictable financing for early recovery activities and extend the period of attention by the international community to post-conflict recovery. The Commission should act in all matters on the basis of consensus of its members.

99. The Peacebuilding Commission should make the outcome of its discussions and recommendations publicly available as United Nations documents to all relevant bodies and actors, including the international financial institutions. The Peacebuilding Commission should submit an annual report to the General Assembly.

100. The Peacebuilding Commission should meet in various configurations. Country-specific meetings of the Commission, upon invitation of the Organizational
Committee referred to in paragraph 101 below, should include as members, in addition to members of the Organizational Committee, representatives from:

(a) The country under consideration;
(b) Countries in the region engaged in the post-conflict process and other countries that are involved in relief efforts and/or political dialogue, as well as relevant regional and subregional organizations;
(c) The major financial, troop and civilian police contributors involved in the recovery effort;
(d) The senior United Nations representative in the field and other relevant United Nations representatives;
(e) Such regional and international financial institutions as may be relevant.

101. The Peacebuilding Commission should have a standing Organizational Committee, responsible for developing its procedures and organizational matters, comprising:

(a) Members of the Security Council, including permanent members;
(b) Members of the Economic and Social Council, elected from regional groups, giving due consideration to those countries that have experienced post-conflict recovery;
(c) Top providers of assessed contributions to the United Nations budgets and voluntary contributions to the United Nations funds, programmes and agencies, including the standing Peacebuilding Fund, that are not among those selected in (a) or (b) above;
(d) Top providers of military personnel and civilian police to United Nations missions that are not among those selected in (a), (b) or (c) above.

102. Representatives from the World Bank, the International Monetary Fund and other institutional donors should be invited to participate in all meetings of the Peacebuilding Commission in a manner suitable to their governing arrangements, in addition to a representative of the Secretary-General.

103. We request the Secretary-General to establish a multi-year standing Peacebuilding Fund for post-conflict peacebuilding, funded by voluntary contributions and taking due account of existing instruments. The objectives of the Peacebuilding Fund will include ensuring the immediate release of resources needed to launch peacebuilding activities and the availability of appropriate financing for recovery.

104. We also request the Secretary-General to establish, within the Secretariat and from within existing resources, a small peacebuilding support office staffed by qualified experts to assist and support the Peacebuilding Commission. The office should draw on the best expertise available.

105. The Peacebuilding Commission should begin its work no later than 31 December 2005.

Sanctions

106. We underscore that sanctions remain an important tool under the Charter in our efforts to maintain international peace and security without recourse to the use of force, and resolve to ensure that sanctions are carefully targeted in support of clear objectives, to comply with sanctions established by the Security Council and to ensure that sanctions are implemented in ways that balance effectiveness to achieve the desired results against the possible adverse consequences, including socio-economic and humanitarian consequences, for populations and third States.

107. Sanctions should be implemented and monitored effectively with clear benchmarks and should be periodically reviewed, as appropriate, and remain for as limited a period as necessary to achieve their objectives and should be terminated once the objectives have been achieved.

108. We call upon the Security Council, with the support of the Secretary-General, to improve its monitoring of the implementation and effects of sanctions, to ensure that sanctions are implemented in an accountable manner, to review regularly the results of such monitoring and to develop a mechanism to address special economic problems arising from the application of sanctions in accordance with the Charter.

109. We also call upon the Security Council, with the support of the Secretary-General, to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions.

110. We support efforts through the United Nations to strengthen State capacity to implement sanctions provisions.

Transnational crime

111. We express our grave concern at the negative effects on development, peace and security and human rights posed by transnational crime, including the smuggling of and trafficking in human beings, the world narcotic drug problem and the illicit trade in small arms and light weapons, and at the increasing vulnerability of States to such crime. We reaffirm the need to work collectively to combat transnational crime.

112. We recognize that trafficking in persons continues to pose a serious challenge to humanity and requires a concerted international response. To that end, we urge all States to devise, enforce and strengthen effective measures to combat and eliminate all forms of trafficking in persons to counter the demand for trafficked victims and to protect the victims.

113. We urge all States that have not yet done so to consider becoming parties to the relevant international conventions on organized crime and corruption and, following their entry into force, to implement them effectively, including by incorporating the provisions of those conventions into national legislation and by strengthening criminal justice systems.

114. We reaffirm our unwavering determination and commitment to overcome the world narcotic drug problem through international cooperation and national strategies to eliminate both the illicit supply of and demand for illicit drugs.

115. We resolve to strengthen the capacity of the United Nations Office on Drugs and Crime, within its existing mandates, to provide assistance to Member States in those tasks upon request.

Women in the prevention and resolution of conflicts

116. We stress the important role of women in the prevention and resolution of conflicts and in peacebuilding. We reaffirm our commitment to the full and effective implementation of Security Council resolution 1325 (2000) of 31 October 2000 on
women and peace and security. We also underline the importance of integrating a gender perspective and of women having the opportunity for equal participation and full involvement in all efforts to maintain and promote peace and security, as well as the need to increase their role in decision-making at all levels. We strongly condemn all violations of the human rights of women and girls in situations of armed conflict and the use of sexual exploitation, violence and abuse, and we commit ourselves to elaborating and implementing strategies to report on, prevent and punish gender-based violence.

Protecting children in situations of armed conflict

117. We reaffirm our commitment to promote and protect the rights and welfare of children in armed conflicts. We welcome the significant advances and innovations that have been achieved over the past several years. We welcome in particular the adoption of Security Council resolution 1612 (2005) of 26 July 2005. We call upon States to consider ratifying the Convention on the Rights of the Child\(^3\) and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.\(^3\) We also call upon States to take effective measures, as appropriate, to prevent the recruitment and use of children in armed conflict, contrary to international law, by armed forces and groups, and to prohibit and criminalize such practices.

118. We therefore call upon all States concerned to take concrete measures to ensure accountability and compliance by those responsible for grave abuses against children. We also reaffirm our commitment to ensure that children in armed conflicts receive timely and effective humanitarian assistance, including education, for their rehabilitation and reintegration into society.

IV. Human rights and the rule of law

119. We recommit ourselves to actively protecting and promoting all human rights, the rule of law and democracy and recognize that they are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations, and call upon all parts of the United Nations to promote human rights and fundamental freedoms in accordance with their mandates.

120. We reaffirm the solemn commitment of our States to fulfill their obligations to promote universal respect for and the observance and protection of all human rights and fundamental freedoms for all in accordance with the Charter, the Universal Declaration of Human Rights\(^3\) and other instruments relating to human rights and international law. The universal nature of these rights and freedoms is beyond question.

Human rights

121. We reaffirm that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing and that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, all States, regardless of their political, economic and cultural systems, have the duty to promote and protect all human rights and fundamental freedoms.

122. We emphasize the responsibilities of all States, in conformity with the Charter, to respect human rights and fundamental freedoms for all, without distinction of any kind as to race, colour, sex, language or religion, political or other opinion, national or social origin, property, birth or other status.

123. We resolve further to strengthen the United Nations human rights machinery with the aim of ensuring effective enjoyment by all of all human rights and civil, political, economic, social and cultural rights, including the right to development.

124. We resolve to strengthen the Office of the United Nations High Commissioner for Human Rights, taking note of the High Commissioner's plan of action, to enable it to effectively carry out its mandate to respond to the broad range of human rights challenges facing the international community, particularly in the areas of technical assistance and capacity-building, through the doubling of its regular budget resources over the next five years with a view to progressively setting a balance between regular budget and voluntary contributions to its resources, keeping in mind other priority programmes for developing countries and the recruitment of highly competent staff on a broad geographical basis and with gender balance, under the regular budget, and we support its closer cooperation with all relevant United Nations bodies, including the General Assembly, the Economic and Social Council and the Security Council.

125. We resolve to improve the effectiveness of the human rights treaty bodies, including through more timely reporting, improved and streamlined reporting procedures and technical assistance to States to enhance their reporting capacities and further enhance the implementation of their recommendations.

126. We resolve to integrate the promotion and protection of human rights into national policies and to support the further mainstreaming of human rights throughout the United Nations system, as well as closer cooperation between the Office of the United Nations High Commissioner for Human Rights and all relevant United Nations bodies.

127. We reaffirm our commitment to continue making progress in the advancement of the human rights of the world's indigenous peoples at the local, national, regional and international levels, including through consultation and collaboration with them, and to present for adoption a final draft United Nations declaration on the rights of indigenous peoples as soon as possible.

128. We recognize the need to pay special attention to the human rights of women and children and undertake to advance them in every possible way, including by bringing gender and child-protection perspectives into the human rights agenda.

129. We recognize the need for persons with disabilities to be guaranteed full enjoyment of their rights without discrimination. We also affirm the need to finalize a comprehensive draft convention on the rights of persons with disabilities.

130. We note that the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to political and social stability and peace and enrich the cultural diversity and heritage of society.

131. We support the promotion of human rights education and learning at all levels, including through the implementation of the World Programme for Human Rights Education, as appropriate, and encourage all States to develop initiatives in this regard.

A/RES/60/1

132. We recognize the Guiding Principles on Internal Displacement as an important international framework for the protection of internally displaced persons and resolve to take effective measures to increase the protection of internally displaced persons.

133. We commit ourselves to safeguarding the principle of refugee protection and to upholding our responsibility in case of need to assist Member States upon their request. We encourage and help States to exercise this responsibility through appropriate and necessary means. We accept that responsibility and will not seek to evade it, and we call on the United Nations to provide technical assistance and capacity-building for the deployment of this responsibility.

134. Recognizing the need for universal adherence to and implementation of the principles of the rule of law and international law, we:
   (a) Reaffirm our commitment to the purposes and principles of the Charter and international law, which is essential for peaceful coexistence and cooperation among States;
   (b) Support the annual treaty event;
   (c) Encourage States that have not yet done so to consider becoming parties to all treaties that relate to the protection of civilians;
   (d) Call upon States to combat terrorism and to support the United Nations in preventing and combating it;
   (e) Support the idea of establishing a rule of law assistance unit within the United Nations Secretariat, in accordance with relevant procedures, subject to a report by the Secretary-General to the General Assembly, so as to strengthen United Nations activities to promote the rule of law, including through technical assistance and capacity-building;
   (f) Recognize the important role of the International Court of Justice, the principal judicial organ of the United Nations, in resolving disputes among States and the value of its work, and call upon States that have not yet done so to consider accepting the jurisdiction of the Court on a case-by-case basis and in cooperation with the Security Council.

135. We reaffirm that democracy is a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. We also reaffirm that while democracies share common features, there is no single model of democracy, that it does not belong to any country or region, and reaffirm the necessity of due respect for sovereignty and the right of self-determination. We stress that the independence and integrity of elections are essential for a democratic process.

136. We reaffirm the Guiding Principles on Internal Displacement as an important international framework for the protection of internally displaced persons and resolve to take effective measures to increase the protection of internally displaced persons.

137. We invite interested Member States to give serious consideration to contributing to the Fund.

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, crimes against humanity and other serious violations of international human rights law and international humanitarian law within its territory or subject to its control. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapter VII of the Charter, to protect populations from genocide, war crimes, crimes against humanity and other serious violations of international human rights and international humanitarian law when the State concerned is manifestly failing to protect its populations. In discharging this responsibility, the international community shall act in accordance with the principles of the Charter, international law, and the United Nations Charter and relevant resolutions. We recognize the importance of preventing and ending all acts of impunity and the need for practical arrangements for the establishment of a special fund to assist States in the settlement of disputes through the International Court of Justice.
Children’s rights

141. We express dismay at the increasing number of children involved in and affected by armed conflict, as well as all other forms of violence, including domestic violence, sexual abuse and exploitation and trafficking. We support cooperation policies aimed at strengthening national capacities to improve the situation of those children and to assist in their rehabilitation and reintegration into society.

142. We commit ourselves to respecting and ensuring the rights of each child without discrimination of any kind, irrespective of the race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status of the child or his or her parent(s) or legal guardian(s). We call upon States to consider as a priority becoming a party to the Convention on the Rights of the Child.40

Human security

143. We stress the right of people to live in freedom and dignity, free from poverty and despair. We recognize that all individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential. To this end, we commit ourselves to discussing and defining the notion of human security in the General Assembly.

Culture of peace and initiatives on dialogue among cultures, civilizations and religions

144. We reaffirm the Declaration and Programme of Action on a Culture of Peace41 as well as the Global Agenda for Dialogue among Civilizations and its Programme of Action42 adopted by the General Assembly and the value of different initiatives on dialogue among cultures and civilizations, including the dialogue on interfaith cooperation. We commit ourselves to taking action to promote a culture of peace and dialogue at the local, national, regional and international levels and request the Secretary-General to explore enhancing implementation mechanisms and to follow up on these initiatives. In this regard, we also welcome the Alliance of Civilizations initiative announced by the Secretary-General on 14 July 2005.

145. We underline that sports can foster peace and development and can contribute to an atmosphere of tolerance and understanding, and we encourage discussions in the General Assembly for proposals leading to a plan of action on sport and development.

V. Strengthening the United Nations

146. We reaffirm our commitment to strengthen the United Nations with a view to enhancing its authority and efficiency, as well as its capacity to address effectively, and in accordance with the purposes and principles of the Charter, the full range of challenges of our time. We are determined to reinvigorate the intergovernmental organs of the United Nations and to adapt them to the needs of the twenty-first century.

147. We stress that, in order to efficiently perform their respective mandates as provided under the Charter, United Nations bodies should develop good cooperation and coordination in the common endeavour of building a more effective United Nations.

148. We emphasize the need to provide the United Nations with adequate and timely resources with a view to enabling it to carry out its mandates. A reformed United Nations must be responsive to the entire membership, faithful to its founding principles and adapted to carrying out its mandate.

General Assembly

149. We reaffirm the central position of the General Assembly as the chief deliberative, policymaking and representative organ of the United Nations, as well as the role of the Assembly in the process of standard-setting and the codification of international law.

150. We welcome the measures adopted by the General Assembly with a view to strengthening its role and authority and the role and leadership of the President of the Assembly and, to that end, we call for their full and speedy implementation.

151. We call for strengthening the relationship between the General Assembly and the other principal organs to ensure better coordination on topical issues that require coordinated action by the United Nations, in accordance with their respective mandates.

Security Council

152. We reaffirm that Member States have conferred on the Security Council primary responsibility for the maintenance of international peace and security, acting on their behalf, as provided for by the Charter.

153. We support early reform of the Security Council - an essential element of our overall effort to reform the United Nations - in order to make it more broadly representative, efficient and transparent and thus to further enhance its effectiveness and the legitimacy and implementation of its decisions. We commit ourselves to continuing our efforts to achieve a decision to this end and request the General Assembly to review progress on the reform set out above by the end of 2005.

154. We recommend that the Security Council continue to adapt its working methods so as to increase the involvement of States not members of the Council in its work, as appropriate, enhance its accountability to the membership and increase the transparency of its work.

Economic and Social Council

155. We reaffirm that the Charter and the General Assembly have vested in the Economic and Social Council the responsibility for the maintenance of international peace and security, acting on their behalf, as provided for by the Charter.

156. We support early reform of the Economic and Social Council as an essential element of our overall effort to reform the United Nations, in order to make it more broadly representative, efficient and transparent and thus to further enhance its effectiveness and the legitimacy and implementation of its decisions. We commit ourselves to continuing our efforts to achieve a decision to this end and request the General Assembly to review progress on the reform set out above by the end of 2005.

157. We recommend that the Economic and Social Council continue to adapt its working methods so as to increase the involvement of States not members of the Council in its work, as appropriate, enhance its accountability to the membership and increase the transparency of its work.

40 Resolutions 53/243 A and B.
41 See resolution 56/6.
Member States and with the international financial institutions, the private sector and civil society on emerging global trends, policies and action and develop its ability to respond better and more rapidly to developments in the international economic, environmental and social fields;

(b) Hold a biennial high-level Development Cooperation Forum to review trends in international development cooperation, including strategies, policies and financing, promote greater coherence among the development activities of different development partners and strengthen the links between the normative and operational work of the United Nations;

(c) Ensure follow-up of the outcomes of the major United Nations conferences and summits, including the internationally agreed development goals, and hold annual ministerial-level substantive reviews to assess progress, drawing on its functional and regional commissions and other international institutions, in accordance with their respective mandates;

(d) Support and complement international efforts aimed at addressing humanitarian emergencies, including natural disasters, in order to promote an improved, coordinated response from the United Nations;

(e) Play a major role in the overall coordination of funds, programmes and agencies, ensuring coherence among them and avoiding duplication of mandates and activities.

156. We stress that in order to fully perform the above functions, the organization of work, the agenda and the current methods of work of the Economic and Social Council should be adapted.

Human Rights Council

157. Pursuant to our commitment to further strengthen the United Nations human rights machinery, we resolve to create a Human Rights Council.

158. The Council will be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner.

159. The Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon. It should also promote effective coordination and the mainstreaming of human rights within the United Nations system.

160. We request the President of the General Assembly to conduct open, transparent and inclusive negotiations, to be completed as soon as possible during the sixtieth session, with the aim of establishing the mandate, modalities, functions, size, composition, membership, working methods and procedures of the Council.

Secretariat and management reform

161. We recognize that in order to effectively comply with the principles and objectives of the Charter, we need an efficient, effective and accountable Secretariat. Its staff shall act in accordance with Article 100 of the Charter, in a culture of organizational accountability, transparency and integrity. Consequently we:

(a) Recognize the ongoing reform measures carried out by the Secretary-General to strengthen accountability and oversight, improve management performance and transparency and reinforce ethical conduct, and invite him to report to the General Assembly on the progress made in their implementation;

(b) Emphasize the importance of establishing effective and efficient mechanisms for responsibility and accountability of the Secretariat;

(c) Urge the Secretary-General to ensure that the highest standards of efficiency, competence, and integrity shall be the paramount consideration in the employment of the staff, with due regard to the principle of equitable geographical distribution, in accordance with Article 101 of the Charter;

(d) Welcome the Secretary-General’s efforts to ensure ethical conduct, more extensive financial disclosure for United Nations officials and enhanced protection for those who reveal wrongdoing within the Organization. We urge the Secretary-General to scrupulously apply the existing standards of conduct and develop a system-wide code of ethics for all United Nations personnel. In this regard, we request the Secretary-General to submit details on an ethics office with independent status, which he intends to create, to the General Assembly at its sixtieth session;

(e) Pledge to provide the United Nations with adequate resources, on a timely basis, to enable the Organization to implement its mandates and achieve its objectives, having regard to the priorities agreed by the General Assembly and the need to respect budget discipline. We stress that all Member States should meet their obligations with regard to the expenses of the Organization;

(f) Strongly urge the Secretary-General to make the best and most efficient use of resources in accordance with clear rules and procedures agreed by the General Assembly, in the interest of all Member States, by adopting the best management practices, including effective use of information and communication technologies, with a view to increasing efficiency and enhancing organizational capacity, concentrating on those tasks that reflect the agreed priorities of the Organization.

162. We reaffirm the role of the Secretary-General as the chief administrative officer of the Organization, in accordance with Article 97 of the Charter. We request the Secretary-General to make proposals to the General Assembly for its consideration on the conditions and measures necessary for him to carry out his managerial responsibilities effectively.

163. We commend the Secretary-General’s previous and ongoing efforts to enhance the effective management of the United Nations and his commitment to update the Organization. Bearing in mind our responsibility as Member States, we emphasize the need to decide on additional reforms in order to make more efficient use of the financial and human resources available to the Organization and thus better comply with its principles, objectives and mandates. We call on the Secretary-General to submit proposals for implementing management reforms to the General Assembly for consideration and decision in the first quarter of 2006, which will include the following elements:

(a) We will ensure that the United Nations budgetary, financial and human resource policies, regulations and rules respond to the current needs of the Organization and enable the efficient and effective conduct of its work, and request the Secretary-General to provide an assessment and recommendations to the General Assembly for decision during the first quarter of 2006. The assessment and recommendations of the Secretary-General should take account of the measures already under way for the reform of human resources management and the budget process;
(b) We resolve to strengthen and update the programme of work of the United Nations so that it responds to the contemporary requirements of Member States. To this end, the General Assembly and other relevant organs will review all mandates older than five years originating from resolutions of the General Assembly and other organs, which would be complementary to the existing periodic reviews of activities. The General Assembly and the other organs should complete and take the necessary decisions arising from this review during 2006. We request the Secretary-General to facilitate this review with analysis and recommendations, including on the opportunities for programmatic shifts that could be considered for early General Assembly consideration;

(c) A detailed proposal on the framework for a one-time staff buyout to improve personnel structure and quality, including an indication of costs involved and mechanisms to ensure that it achieves its intended purpose.

164. We recognize the urgent need to substantially improve the United Nations oversight and management processes. We emphasize the importance of ensuring the operational independence of the Office of Internal Oversight Services. Therefore:

(a) The expertise, capacity and resources of the Office of Internal Oversight Services in respect of audit and investigations will be significantly strengthened as a matter of urgency;

(b) We request the Secretary-General to submit an independent external evaluation of the auditing and oversight system of the United Nations, including the specialized agencies, including the roles and responsibilities of management, with due regard to the nature of the auditing and oversight bodies in question. This evaluation will take place within the context of the comprehensive review of the governance arrangements. We ask the General Assembly to adopt measures during its sixtieth session at the earliest possible stage, based on the consideration of recommendations of the evaluation and those made by the Secretary-General;

(c) We recognize that additional measures are needed to enhance the independence of the oversight structures. We therefore request the Secretary-General to submit detailed proposals to the General Assembly at its sixtieth session for its early consideration on the creation of an independent oversight advisory committee, including its mandate, composition, selection process and qualification of experts;

(d) We authorize the Office of Internal Oversight Services to examine the feasibility of expanding its services to provide internal oversight to United Nations agencies that request such services in such a way as to ensure that the provision of internal oversight services to the Secretariat will not be compromised.

165. We insist on the highest standards of behaviour from all United Nations personnel and support the considerable efforts under way with respect to the implementation of the Secretary-General’s policy of zero tolerance regarding sexual exploitation and abuse by United Nations personnel, both at Headquarters and in the field. We encourage the Secretary-General to submit proposals to the General Assembly leading to a comprehensive approach to victims’ assistance by 31 December 2005.

166. We encourage the Secretary-General and all decision-making bodies to take further steps in mainstreaming a gender perspective in the policies and decisions of the Organization.

167. We strongly condemn all attacks against the safety and security of personnel engaged in United Nations activities. We call upon States to consider becoming parties to the Convention on the Safety of United Nations and Associated Personnel and stress the need to conclude negotiations on a protocol expanding the scope of legal protection during the sixtieth session of the General Assembly.

System-wide coherence

168. We recognize that the United Nations brings together a unique wealth of expertise and resources on global issues. We commend the extensive experience and expertise of the various development-related organizations, agencies, funds and programmes of the United Nations system in their diverse and complementary fields of activity and their important contributions to the achievement of the Millennium Development Goals and the other development objectives established by various United Nations conferences.

169. We support stronger system-wide coherence by implementing the following measures:

Policy

• Strengthening linkages between the normative work of the United Nations system and its operational activities
• Coordinating our representation on the governing boards of the various development and humanitarian agencies so as to ensure that they pursue a coherent policy in assigning mandates and allocating resources throughout the system
• Ensuring that the main horizontal policy themes, such as sustainable development, human rights and gender, are taken into account in decision-making throughout the United Nations

Operational activities

• Implementing current reforms aimed at a more effective, efficient, coherent, coordinated and better-performing United Nations country presence with a strengthened role for the senior resident official, whether special representative, resident coordinator or humanitarian coordinator, including appropriate authority, resources and accountability, and a common management, programming and monitoring framework
• Inviting the Secretary-General to launch work to further strengthen the management and coordination of United Nations operational activities so that they can make an even more effective contribution to the achievement of the internationally agreed development goals, including the Millennium Development Goals, including proposals for consideration by Member States for more tightly managed entities in the fields of development, humanitarian assistance and the environment

Humanitarian assistance

- Upholding and respecting the humanitarian principles of humanity, neutrality, impartiality and independence and ensuring that humanitarian actors have safe and unhindered access to populations in need in conformity with the relevant provisions of international law and national laws
- Supporting the efforts of countries, in particular developing countries, to strengthen their capacities at all levels in order to prepare for and respond rapidly to natural disasters and mitigate their impact
- Strengthening the effectiveness of the United Nations humanitarian response, inter alia, by improving the timeliness and predictability of humanitarian funding, in part by improving the Central Emergency Revolving Fund
- Further developing and improving, as required, mechanisms for the use of emergency standby capacities, under the auspices of the United Nations, for a timely response to humanitarian emergencies

Environmental activities

- Recognizing the need for more efficient environmental activities in the United Nations system, with enhanced coordination, improved policy advice and guidance, strengthened scientific knowledge, assessment and cooperation, better treaty compliance, while respecting the legal autonomy of the treaties, and better integration of environmental activities in the broader sustainable development framework at the operational level, including through capacity-building, we agree to explore the possibility of a more coherent institutional framework to address this need, including a more integrated structure, building on existing institutions and internationally agreed instruments, as well as the treaty bodies and the specialized agencies

Regional organizations

170. We support a stronger relationship between the United Nations and regional and subregional organizations, pursuant to Chapter VIII of the Charter, and therefore resolve:

(a) To expand consultation and cooperation between the United Nations and regional and subregional organizations through formalized agreements between the respective secretariats and, as appropriate, involvement of regional organizations in the work of the Security Council;

(b) To ensure that regional organizations that have a capacity for the prevention of armed conflict or peacekeeping consider the option of placing such capacity in the framework of the United Nations Standby Arrangements System;

(c) To strengthen cooperation in the economic, social and cultural fields.

Participation of local authorities, the private sector and civil society, including non-governmental organizations

172. We welcome the positive contributions of the private sector and civil society, including non-governmental organizations, in the promotion and implementation of development and human rights programmes and stress the importance of their continued engagement with Governments, the United Nations and other international organizations in these key areas.

173. We welcome the dialogue between those organizations and Member States, as reflected in the first informal interactive hearings of the General Assembly with representatives of non-governmental organizations, civil society and the private sector.

174. We underline the important role of local authorities in contributing to the achievement of the internationally agreed development goals, including the Millennium Development Goals.

175. We encourage responsible business practices, such as those promoted by the Global Compact.

Charter of the United Nations

176. Considering that the Trusteeship Council no longer meets and has no remaining functions, we should delete Chapter XIII of the Charter and references to the Council in Chapter XII.

177. Taking into account General Assembly resolution 50/52 of 11 December 1995 and recalling the related discussions conducted in the General Assembly, bearing in mind the profound cause for the founding of the United Nations and looking to our common future, we resolve to delete references to “enemy States” in Articles 53, 77 and 107 of the Charter.

178. We request the Security Council to consider the composition, mandate and working methods of the Military Staff Committee.
Permanent Court of International Justice

Status of Eastern Carelia
Advisory Opinion of 23 July 1923

P.C.I.J., Series B, No. 5
application to the Court, together with all the documents relating to the question, to inform the Court of the action taken by the Council in the matter, to give all necessary assistance in the examination of the question, and to make arrangements to be represented, if necessary, at the Court.”

(French text.)

“Le Conseil de la Société des Nations prie la Cour permanente de Justice internationale de donner son avis consultatif, en prenant en considération les renseignements que pourraient lui adresser également les différents pays intéressés, sur la question suivante :

«Les articles 10 et 11 du Traité de Paix entre la Finlande et la Russie, signé à Dorpat le 14 octobre 1920, ainsi que la Déclaration y annexée de la délégation russe concernant l’autonomie de la Carelie orientale, constituent-ils des engagements d’ordre international obligeant la Russie vis-à-vis de la Finlande à l’exécution des dispositions y contenues ?»

«Le Secrétaire général est autorisé à soumettre cette requête à la Cour, ainsi que tous documents relatifs à la question, à exposer à la Cour l’action du Conseil dans la matière, à donner toute l’aide nécessaire à l’examen de l’affaire et à prendre, le cas échéant, des dispositions pour être représenté devant la Cour.»

On the 27th of the same month the Secretary-General of the League, by virtue of this Resolution, sent to the Permanent Court of International Justice the following request:

(English text.)

“In execution of the Resolution of the Council of the League of Nations adopted on April 21st, 1923, of which a certified true copy is annexed hereto,

“And by virtue of the authorization given by this Resolution,

“The Secretary-General of the League of Nations

“Has the honour to present to the Permanent Court of International Justice the request of the Council that the Court will, in accordance with Article 14 of the Cove-
nant of the League, give an advisory opinion upon the following question, taking into consideration the information which the various countries concerned may equally present to the Court:

"'Do Articles 10 and 11 of the Treaty of Peace between Finland and Russia, signed at Dorpat on October 14th, 1920, and the annexed Declaration of the Russian Delegation regarding the autonomy of Eastern Carelia, constitute engagements of an international character which place Russia under an obligation to Finland as to the carrying out of the provisions contained therein?'"

(French text.)

« Le Secrétaire général de la Société des Nations,
« en exécution de la Résolution adoptée par le Conseil le 21 avril 1923, dont copie conforme est annexée à la présente,
« et en vertu de l'autorisation à lui donnée par ladite Résolution,
« a l'honneur de présenter à la Cour permanente de justice internationale une requête du Conseil demandant à la Cour de bien vouloir, conformément à l'article 14 du Pacte, donner son avis consultatif, en prenant en considération les renseignements que pourraient lui adresser également les différents pays intéressés, sur la question suivante :

« Les articles 10 et 11 du Traité de Paix entre la Finlande et la Russie, signé à Dorpat le 14 octobre 1920, ainsi que la Déclaration y annexée de la délégation russe concernant l'autonomie de la Carelie orientale, constituent-ils des engagements d'ordre international obligeant la Russie vis-à-vis de la Finlande à l'exécution des dispositions y contenues ? »

In conformity with Article 73 of the Rules of Court, notice of the request was given to the Members of the League of Nations through the Secretary-General of the League, and to the States mentioned in the Annex to the Covenant.

Furthermore, the Registrar of the Court was directed to notify the Soviet Government of the request.

Together with the request were transmitted the documents, the list of which, as appended to the request itself, is as follows:

   Authenticated texts in Finnish, Russian and Swedish and French translation supplied by the Finnish Government.

   Authenticated texts in Finnish, Russian and Swedish, and French translation supplied by the Finnish Government.

3. Note by the Secretary-General to the Council submitting a letter from the Finnish Ministry for Foreign Affairs, dated November 26th, 1921. (Doc. C. 506. 1921. VII.)

4. Memorandum by the Secretary-General, dated December 29th, 1921, summarising the position of Carelia. (Doc. C. 545. 1921. VII.)

5. Note by the Secretary-General, dated December 31st, 1921, accompanying a letter from the Central Government of Carelia to the Council. (Doc. C. 555. 1921. VII.)

6. Minutes of the meeting of the Council held on January 13th and 14th, 1922, and declaration made to the Council by the representative of Finland.

7. Declaration made to the Assembly by the representative of Finland on September 6th, 1922.

8. Note by the Secretary-General submitting to the Council a letter of November 10th, 1922, from M. Enckell, Delegate of Finland. (Doc. C. 95. 1923. VII.)

9. Memorandum by the Secretary-General setting forth the results of the steps taken. (Doc. C. 83. 1923. VII.)
10. Memorandum by the Secretary-General to the Council, April 10th, 1923. (Doc. C. 251. 1923. V.)

11. Letter from M. Enckell, and memorandum of the Finnish Government of April 19th, 1923, accompanied by the memorandum of the three Finnish jurists. (Doc. C. 322. 1923. VII.)


13. Report by the representative of Italy dated April 21st, 1923. (Doc. C. 327, 1923. V.)


Furthermore, the Court had before it a certain number of documents transmitted to it on behalf of the Finnish Government, namely:

1. A paper by M. Erich, called “La question de la Carelie orientale.”

2. Final conclusions of the Finnish Government.

3. A paper by M. Erich, called “La question de la Carelie orientale soumise pour avis à la Cour permanente de Justice internationale.”

4. Additional note (to legal opinion previously given) by M. Charles de Visscher.

5. Minutes (in Finnish) of the sittings of the Conference of Peace between Finland and Russia, held at Dorpat June 12th—October 14th, 1920.

6. Minutes (extracts in French translation) of sittings of the said Conference held on June 15th and 16th, July 28th and October 4th and 5th, 1920.


The Court likewise had before it a note from the Polish Minister at the Hague, dated June 28th, 1923, and a telegram from the Estonian Government dated July 3rd, 1923.

The Court also heard, at the request of the Finnish Government, the statements of its representative, M. Rafael Erich, and received from him a document containing arguments supplementary to those statements. The Court had informed M. Erich before hearing his statement that it would be glad to have his views as to whether it had competence to give effect to the request for an advisory opinion upon the question of Eastern Carelia, submitted to it by the Council of the League of Nations.

The Secretary-General of the League was duly informed of the step taken by the Court in this respect.

M. Tchitchérin, the Russian People’s Commissary for Foreign Affairs, on the 11th June despatched to the Court a telegram, which has been read in Court in full, and which is as follows:

(Translation by the Registry.)

“June eleventh. Reply to your 3055 May 19th. The Russian Government finds it impossible to take any part in the proceedings, without legal value either in substance or in form, which the Permanent Court intends to institute as regards the Carelian question. Whereas the Workers’ Commune of Carelia is an autonomous portion of the Russian Federation; whereas its autonomy is based on the decree of the Pan-Russian Central Executive Council, dated June 8th, 1920, which was enacted before the examination of this question by the Russo-Finnish Peace Conference at Dorpat; furthermore, whereas the Treaty
of Dorpat, in connection with another matter, refers to the autonomous territory of Carelia as already existing without imposing any obligation in this respect upon Russia; whereas the Russian Delegation at Dorpat declared each time that this question was raised that it was an internal question affecting the Russian Federation; furthermore, whereas Berzine, the President of the Russian Delegation, at the meeting of October 14th, 1920, brought the fact that Carelia was autonomous to the knowledge of the Finnish Delegation solely for their information; furthermore, whereas in a Note dated December 5th, 1920, and addressed to the Finnish Chargé d’affaires, Tchtcherin, the Commissary of the People, protested categorically against the action taken by the Finnish Government in placing the Eastern Carelian question before the League of Nations, a course which in the view of the Russian Government constituted an act of hostility to the Russian Federation and an intervention in its domestic affairs; furthermore, whereas in an official communication published on June 18th, 1922, the Commissary of the People for Foreign Affairs declared that the Russian Government absolutely repudiated the claim of the so-called League of Nations to intervene in the question of the internal situation of Carelia and stated that any attempt on the part of any power to apply to Russia the article of the Covenant of the League relating to disputes between one of its Members and a non-participating State would be regarded by the Russian Government as an act of hostility to the Russian State: the Russian Government categorically refuses to take any part in the examination of this question by the League of Nations or by the Permanent Court. Apart from considerations of law, according to which the question of the status of Carelia is a matter of Russian domestic jurisdiction, the Soviet Government is compelled to affirm that it cannot consider the so-called League of Nations and the Permanent Court as impartial in this matter, having regard to the fact that the majority of the Powers belonging to the League of Nations have not yet accorded the Soviet Government de jure recognition, and several of them refuse even to enter into de facto relations with it. This situation is further borne out by the fact that the Council of the League of Nations or the Powers which control it, represented by the Council of Ambassadors, have often taken decisions obviously directed against the most vital interests of the Soviet Republics, and have done so without even asking the views of the Soviet Government. This occurred when the annexation of Bessarabia by Roumania was recognized by them and again when a regime was established at Memel which debarred Russia from any voice in the question of navigation on the Niemen, or again, when Eastern Galicia, the great majority of whose population is Ukrainian, was annexed to Poland. These are the reasons which render it quite impossible for the Russian Government to take any part in the discussion of the Carelia question before the Permanent Court. Stop N. 364. Tchtcherin.”

"Onze juin Stop Réponse à votre 3055 du 19 mai Stop Le Gouvernement russe trouve impossible de prendre une part quelconque à la procédure dénuée de valeur légale et dans le fond et dans la forme à laquelle la Cour permanente veut soumettre la question carélienne Stop Attendu que la Commune de travail carélienne est une partie autonome de la Fédération russe ne possédant point le droit de relations internationales indépendantes Vrg Attendu ensuite que son autonomie est basée sur le décret du Conseil exécutif central pan-russe du huit juin mil neuf cent vingt qui fut édicté avant l'examen de cette question par la Conférence de Paix russo-finlandaise de Yourief Vrg Attendu aussi que le Traité de Yourief mentionne en traitant un autre sujet la Carelie autonome comme déjà existante sans stipuler d'obligation à ce sujet pour la Russie Vrg Attendu"
aussi que la délégation russe à Yourief chaque fois que cette question surgissait a toujours déclaré que c'était une affaire intérieure de la Fédération russe Vrg Attendu aussi que le Président de la délégation russe Berzine à la séance du quatorze octobre mil neuf cent vingt porta uniquement à titre d'information à la connaissance de la délégation finlandaise le fait de l'autonomie de la Carélie Vrg Attendu aussi que par une note du cinq décembre mil neuf cent vingt et un au nom du Chargé d'affaires de Finlande le Commissaire du Peuple Tchitchéline protesta catégoriquement contre l'acte du Gouvernement finlandais qui avaitposé la question de la Carélie orientale devant la Société des Nations ce qui dans l'opinion du Gouvernement russe constituait un acte hostile à la Fédération russe et une intervention dans ses affaires intérieures Vrg Attendu aussi que dans une communication officielle publiée le dix huit juin mil neuf cent vingt et deux le Commissariat du Peuple pour les Affaires étrangères déclara que le Gouvernement russe repousse absolument la prétention de la soi-disant Société des Nations d'intervenir dans la question de la situation intérieure de la Carélie et fait savoir que toute tentative de quelque Puissance que ce soit d'appliquer à la Russie l'article des statuts de la Société des Nations relatif aux conflits entre un de ses Membres et une Puissance non participante serait considérée par le Gouvernement russe comme un acte hostile contre la République russe Vrg Le Gouvernement russe refuse absolument toute participation à l'examen de cette question par la Société des Nations ou la Cour permanente Stop Indépendamment des considérations de droit en vertu desquelles la question de la situation de la Carélie est une question intérieure de la Fédération russe le Gouvernement soviétique se voit obligé de déclarer qu'il ne peut considérer la prétendue Société des Nations et la Cour permanente comme impartiales en cette matière vu que la majorité des Puissances adhérent à la Société des Nations ne reconnaissent point encore de jure le Gouvernement soviétique et plusieurs d'entre elles refusent d'entrer avec lui même en des relations de fait Stop Cet état de choses est confirmé par le fait que le Conseil de la Société des Nations ou les Puissances qui le dirigent représentées par le Conseil des Ambassadeurs ont souvent adopté des décisions manifestement dirigées contre les intérêts élémentaires des Républiques soviétiques et cela sans même demander l'avis du Gouvernement comme cela fut le cas quand l'annexion de la Bessarabie à la Roumanie fut reconnue par eux ou quand à Memel un régime fut établi qui écarte la Russie de toute influence dans la question de navigation sur le Niemen ou bien encore quand la Galicie [d'] Orient dont la population est dans son immense majorité ukrainienne fut annexée à la Pologne Stop Telles sont les raisons qui écartent pour le Gouvernement russe toute possibilité de rapports avec la discussion de la question carélienne devant la Cour permanente Stop N. 364, Tchitchéline."

**II.**

Eastern Carelia is a territory of considerable extent, lying between the White Sea and Lake Onega on the east and Finland on the west.

Finland became entirely separated from Russia in 1917. War broke out between the Soviet Government and Finland, the two countries being in controversy as to boundaries and as to a great many other questions which are enumerated in the Treaty of Dorpat, which was concluded on the 14th October, 1920, and came into force on the 1st January, 1921. While the hostilities were going on two of the Communes of Eastern Carelia, Repola and Porajärvi were placed under the protection of Finland.

Articles 10 and 11 of the Treaty of Dorpat are as follows:

*(English translation by the Secretariat of the League of Nations.)*

**ARTICLE 10.**

"Finland shall, within a time limit of forty-five days, dating from the entry into force of the present Treaty, withdraw her troops from the Communes of Repola and
Porajärvi. These Communes shall be re-incorporated in the State of Russia and shall be attached to the autonomous territory of Eastern Carelia, which is to include the Carelian population of the Governments of Archangel and Olonetz, and which shall enjoy the national right of self-determination.”

ARTICLE II.

“The Contracting Powers have adopted the following provisions for the benefit of the local population of the Communes of Repola and Porajärvi, with a view to a more detailed regulation of the conditions under which the union of these Communes with the Autonomous Territory of Eastern Carelia referred to in the preceding article is to take place:

“1. The inhabitants of the Communes shall be accorded a complete amnesty, as provided in Article 35 of the present Treaty.

“2. The local maintenance of order in the territory of the Communes shall be undertaken by a militia organised by the local population for a period of two years, dating from the entry into force of the present Treaty.

“3. The inhabitants of these Communes shall be assured of the enjoyment of all their movable property situated in the territory of the Communes, also of the right to dispose and make unrestricted use of the fields which belong to or are cultivated by them and of all other immovable property in their possession, within the limits of the legislation in force in the Autonomous Territory of Eastern Carelia.

“4. All the inhabitants of these Communes shall be free, if they so desire, to leave Russia within a period of one month from the date upon which this Treaty comes into force. Those persons who leave Russia under these conditions shall be entitled to take with them all their personal possessions and shall retain, within the limits of the existing laws in the independent territory of Eastern Carelia, all their rights to any immovable property which they may leave in the territory of these Communes.

“5. Citizens of Finland and Finnish commercial and industrial associations shall be permitted, for the duration of one year from the date upon which this Treaty comes into force, to complete in these Communes the felling of forests to which they are entitled by contracts signed prior to June 1st, 1920, and to take away the wood felled.”

(French text.)

ARTICLE X.

“La Finlande retirera, dans un délai de quarante-cinq jours à partir de la mise en vigueur du présent Traité, ses troupees des communes de Répola et de Porajärvi. Ces communes seront réincorporées dans l’État russe et attachées au territoire autonome de la Cardie de l’Est, qui comprendra la population cardienne des gouvernements d’Arkhangelsk et d’Olonetz et jouira du droit des nations de disposer d’elles-mêmes.”

ARTICLE XI.

“Pour régler d’une manière plus précise les conditions de l’union des communes de Répola et de Porajärvi, citées dans l’article précédent, avec le Territoire autonome de la Cardie de l’Est, les dispositions suivantes ont été adoptées par les Puissances contractantes en faveur de la population locale:

“I. Les habitants des communes devront obtenir une amnistie entière, conformément aux stipulations de l’article 35 du présent Traité.

“2. Le maintien de l’ordre local sur le territoire des communes sera confié, pendant une durée de deux ans à partir
de la mise en vigueur du présent Traité, à une milice insti-
tuée par la population locale.

« 3. Il sera garanti aux habitants desdites communes la
possession intégrale de leurs biens meubles sur le territoire
de ces communes, ainsi que le droit de disposer et d'user
librement des champs qui leur appartiennent ou qu'ils
cultivent, ainsi que de tous les autres biens immeubles en
leur possession, dans les limites des lois en vigueur dans le
territoire autonome de la Cardélie de l'Est.

« 4. Tout habitant de ces communes sera autorisé, s'il le
désire, à quitter librement la Russie dans un délai d'un
an à partir de la mise en vigueur du présent Traité. Les
personnes quittant la Russie sous ces conditions seront
autorisées à emporter avec elles tous leurs biens meubles et
garderont, dans les limites des lois en vigueur dans le terri-
toire autonome de la Cardélie de l'Est, tous leurs droits aux
immeubles laissés par elles dans le territoire desdites com-
mmunes.

« 5. Il sera accordé aux citoyens finlandais et aux sociétés
commerciales et industrielles finlandaises le droit, durant un
an à partir de la mise en vigueur du présent Traité, de
terminer dans ces communes la coupe des forêts auxquelles
ils ont acquis droit en vertu de contrats conclus avant le
premier juin 1920, et d'en emporter le bois coupé. »

The Treaty contains also a number of provisions upon
other matters, e.g. boundaries, territorial waters, fishing,
right of transit, neutralisation of waters and islands, customs,
government property and debts, commercial relations and
traffic, railways, posts and telegraphs. Article 37 provides
for the appointment of a Russo-Finnish Mixed Commission,
to see to the execution of the Treaty and to questions of public
and private rights which might arise under it.

It will be observed that the Articles 10 and 11 describe
the territory of Eastern Carelia as "autonomous," but, except
as provided in these articles, there are not in the Treaty itself
any provisions as to the nature and extent of the autonomy.

Certain other documents described as "Declarations inserted
in the Procès-Verbal by the Finnish and Russian Peace Dele-
gations at Dorpat, October 14th, 1920, at the meeting for
the signature of the Treaty of Peace between the Republic
of Finland and the Socialist Federative Republic of the Russian
Soviets," were likewise presented to the Court; one of these
documents is as follows:

(French text.)

« Déclaration de la Délégation russe concernant l'autonomie
de la Cardélie de l'Est.

« A la séance générale du 14 octobre des délégations
de la Paix, la déclaration suivante fut faite au procès-
verbal au nom de la délégation russe :

« La République socialiste fédérale des Soviets de
Russie garantit à la population cardéienne des gouverne-
ments d' Arkhangel et d' Olonets (Aoums) les droits suivants :

« 1 ) La population cardéienne des gouvernements
d' Arkhangel et d' Olonets (Aoums) jouira du droit des
nations de disposer d'elles-mêmes.

« 2 ) La Cardélie de l' Est habiée par cette population
formerà, en ce qui concerne ses affaires intérieures, un
territoire autonome uni à la Russie sur base fédérale.

« 3) Les affaires concernant cette région seront traitées
par une représentation nationale due par la population
locale, et ayant le droit d'imposition pour les besoins
du territoire, le droit de rendre des ordonnances et règle-
ments concernant les besoins locaux, ainsi que de régler
l'administration interne.

« 4 ) La langue locale indigène sera la langue de l'admi-
nistration, de la législation et de l'instruction publique.

« 5 ) Le territoire autonome de la Cardélie de
l'Est aura le droit de régler sa vie économique selon ses
besoins locaux et selon l'organisation économique géné-
rale de la République.
"(6) En rapport avec la réorganisation des formations militaires défensives de la République russe, il sera organisé sur le Territoire autonome de la Carélie de l'Est un système de milice ayant pour but la suppression de l'armée permanente, et la création à sa place d'une milice nationale pour la défense locale."

(English translation by the permanent Secretariat of the League of Nations.)

"Declaration of the Russian Delegation with regard to the autonomy of Eastern Carelia.

"At the general meeting of Peace delegates on October 14th, the following declaration was inserted in the procès-verbal on behalf of the Russian Delegation:

"The Socialist Federative Republic of the Russian Soviets guarantees the following rights to the Karelian population of the Governments of Archangel and Olonetz (Aunus):

"(1) The Karelian population of the Governments of Archangel and Olonetz (Aunus) shall enjoy the right of self-determination.

"(2) That part of Eastern Carelia which is inhabited by the said population shall constitute, so far as its internal affairs are concerned, an autonomous territory united to Russia on a federal basis.

"(3) The affairs of this district shall be dealt with by national representatives elected by the local population, and having the right to levy taxes for the needs of the territory, to issue edicts and regulations with regard to local needs, and to regulate internal administration.

"(4) The local native language shall be used in matters of administration, legislation and public education.

"(5) The autonomous territory of Eastern Carelia shall have the right to regulate its economic life in accordance with its local needs, and in accordance with the general economic organization of the Republic.

"(6) In connection with the reorganization of the military defensive forces of the Russian Republic, there shall be organized in the autonomous territory of Eastern Carelia a militia system, having as its object the suppression of the permanent army and the creation in its place of a national militia for local defence."

III.

It appears from the documents which have been supplied to the Court that the Government of Finland and the Soviet Government are in acute controversy with regard to the above-mentioned Declaration. The Finnish Government maintain that it forms part of the contract between the two countries and that the Treaty was signed on the terms that the Declaration was as binding as the Treaty itself. The Soviet Government maintain that the Declaration was not by way of contract, but was only declaratory of an existing situation and made merely for information.

It appears from the letters and documents before the Court that disputes very early arose between the Finnish and Russian Governments as to alleged failure to carry out the Treaty obligations on a great number of points, one of which related to autonomy for Eastern Carelia.

An examination of the diplomatic correspondence between Finland and Russia, which constitutes the actual record of the controversy between the two countries concerning Eastern Carelia, clearly demonstrates:

1. That there is not, and never has been, any question between the two countries as to the legal existence of the Treaty of Dorpat and the obligatory force of its stipulations.

2. That both parties, while acknowledging the existence and obligatory force of the Treaty, differ as to the interpretation and legal effect of certain provisions, particularly Articles 10 and 11 relating to Eastern Carelia.
3. That Finland claims, while Russia denies, that the declaration, which, though not mentioned in the Treaty is inserted in the protocol of signature concerning it, constitutes part of the terms.

Finland asked the League of Nations to take the matter up, and after some discussion, the Council of the League adopted on January 14th, 1922, the following Resolution:

(English text.)

"The Council of the League of Nations, having heard the statement submitted by the Finnish Delegation on the situation in Eastern Carelia, contained in a letter from the Finnish Government, dated November 26th, 1921, and the statements submitted by the Estonian, Latvian, Polish and Lithuanian representatives, is willing to consider the question with a view to arriving at a satisfactory solution if the two parties concerned agree. The Council is of opinion that one of the interested States, Member of the League, which is in diplomatic relations with the Government of Moscow, might ascertain that Government's intentions in that respect.

"The Council could not but feel satisfaction if one of these States could lend its good offices as between the two parties, in order to assist in the solution of this question, in accordance with the high ideals of conciliation and humanity which animate the League of Nations.

"The Secretary-General is instructed to obtain all necessary information for the Council."

(French text.)

"Le Conseil de la Société des Nations, après avoir entendu les renseignements fournis par la délégation finlandaise sur la situation en Carelie orientale, qui a fait l'objet de la lettre du Gouvernement finlandais en date du 26 novembre 1921, ainsi que les déclarations des représentants de l’Estonie, de la Lettonie, de la Pologne et de la Lituanie, est disposé, s'il y a à ce sujet accord entre les deux parties intéressées, à examiner la question en vue de trouver une solution satisfaisante. Le Conseil estime qu'un des Etats intéressés, Membre de la Société, qui est en relations diplomatiques avec le Gouvernement de Moscou, pourrait s'informer de ses dispositions à cet égard.

« Si l'un de ces Etats pouvait aider, par ses bons offices entre les deux parties, à la solution de la question dans le haut esprit de conciliation et d'humanité qui est celui de la Société des Nations, le Conseil ne pourrait que s'en montrer satisfait.

« Le Secrétaire général est invité à recueillir tous renseignements utiles pour l'information du Conseil. »

In accordance with the wish expressed by the Council, the Estonian Government, which was in diplomatic relations with the Russian Government, invited the latter to submit the question of Eastern Carelia to the examination of the Council, "on the basis of Article 17 of the Covenant," a copy of which was annexed to the Estonian Government's note. In the same note the Estonian Government, referring to the Resolution of the Council, asked the Soviet Government whether it would, on its part, consent to submit the question to the Council in conformity with Article 17 of the Covenant "and to cause itself, for that purpose, to be represented on the Council."

The Russian Government, by its note of February 2nd, 1922, declined that request.

Eventually, the Finnish Government, having again brought the matter before the Council, the Council adopted the Resolution set forth at the outset of this Opinion.

IV.

The first observation to be made is that the question put to the Court relates to the obligation alleged to have been incurred by Russia under the Declaration and under Article 10 of the Treaty, that Eastern Carelia should enjoy autonomy, and to the other obligations in respect of the two Communes of Repola and Poraajärvi arising under Articles 10 and 11 of the Treaty. An answer to it one way or the other could have no
effect upon any of the other points on which Finland and Russia are in dispute as to the execution or non-execution of the Treaty. There is no request for any interpretation of any of the clauses bearing upon the question of execution.

In the second place, it is necessary to arrive at a clear conception of the exact nature of the question before the Court. The Court is asked to give an Advisory Opinion upon the question whether Articles 10 and 11 of the Treaty of Dorpat, and the above-mentioned Declaration of the Russian Delegation regarding the autonomy of Eastern Carelia, constitute engagements of an international character which place Russia under an obligation to Finland.

As already stated, the fact that the Treaty of Dorpat was entered into has never been in dispute.

It appears from the documents presented to the Court that:

(a) Finland’s contentions are:

(1) That Articles 10 and 11 of the Treaty of Dorpat and the Declaration inserted in the protocol relative thereto constitute executory obligations which Russia is bound to carry out.

(2) That Russia has not carried out those obligations.

(b) Russia’s contentions are:

(1) That Russia considers the question relating to the autonomy of Eastern Carelia as an internal matter, and that this was brought to the notice of the representatives of Finland at the time of the negotiation of the Treaty of Dorpat. The Declaration was given solely for information.

(2) That the autonomy mentioned under Articles 10 and 11 of the Treaty of Dorpat and in the Declaration refers only to the existing Workers’ Commune of Carelia, established by Decree of June 7th, 1920, prior to the conclusion of the Treaty.

A memorandum by the Secretary-General of the League, dated April 10th, 1923 (Doc. C. 351. 1923. V.), brings out with perfect clearness the point really in controversy. It says:

"From this point of view, the question which arises in international law is as follows: Is there or is there not a contractual obligation between Finland and Russia with regard to Eastern Carelia, and, if no such obligation exists, do the requests put forward by Finland constitute acts of interference in the internal affairs of Russia?"

And again, after stating the Russian position, it says:

"Finland maintains, on the other hand that the text of the Treaty of Dorpat is completed by the attached Declarations of the Russian Government; that in virtue of these Declarations the Soviet Government has entered into a contractual obligation based, in particular, on the fact that Finland has ceded afresh to Russia the two Communes of Repola and Porajärvi in exchange for the rights of autonomy promised by Russia to the Carelians; that the closest possible connection exists between the Declarations and the provisions of the Treaty, and indeed that the existence of the Russian Declarations had been a condition of her signing the Treaty; and that it therefore follows that the Finnish Government has the same right to insist upon the execution of the provisions of these Declarations—declarations obtained by it in favour of persons of Finnish race on the other side of the Finnish frontier—as in the case of the provisions of the Treaty itself."

The question whether this Declaration forms part of the obligations into which Russia entered, as Finland asserts, or was merely by way of information, as Russia contends, is, in the very nature of things, a question of fact. The question is, was such an engagement made? The real question put to the Court largely turns upon the Declaration as to autonomy inserted in the protocol of signature relative to the Treaty. If that Declaration forms part of the engagement between Finland and Russia, it would stand for this purpose on the same footing as the Treaty itself.

It has been suggested by the representative of the Finnish Government that the question submitted to the Court should be understood as a preliminary question relating to the nature
of the dispute by analogy to Article 15, par. 8 of the Covenant. For the reasons already stated and to be stated, the Court is unable to agree to this interpretation of the question submitted by the Council, an interpretation which, moreover, appears to the Court not to be warranted by the terms of the question.

There has been some discussion as to whether questions for an advisory opinion, if they relate to matters which form the subject of a pending dispute between nations, should be put to the Court without the consent of the parties. It is unnecessary in the present case to deal with this topic.

It follows from the above that the opinion which the Court has been requested to give bears on an actual dispute between Finland and Russia. As Russia is not a Member of the League of Nations, the case is one under Article 17 of the Covenant. According to this article, in the event of a dispute between a Member of the League and a State which is not a Member of the League, the State not a Member of the League shall be invited to accept the obligations of membership in the League for the purposes of such dispute, and, if this invitation is accepted, the provisions of Articles 12 to 16 inclusive shall be applied with such modifications as may be deemed necessary by the Council. This rule, moreover, only accepts and applies a principle which is a fundamental principle of international law, namely, the principle of the independence of States. It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement. Such consent can be given once and for all in the form of an obligation freely undertaken, but it can, on the contrary, also be given in a special case apart from any existing obligation. The first alternative applies to the Members of the League who, having accepted the Covenant, are under the obligation resulting from the provisions of this pact dealing with the pacific settlement of international disputes. As concerns States not members of the League, the situation is quite different; they are not bound by the Covenant. The submission, therefore, of a dispute between them and a Member of the League for solution according to the methods provided for in the Covenant, could take place only by virtue of their consent. Such consent, however, has never been given by Russia. On the contrary, Russia has, on several occasions, clearly declared that it accepts no intervention by the League of Nations in the dispute with Finland. The refusals which Russia had already opposed to the steps suggested by the Council have been renewed upon the receipt by it of the notification of the request for an advisory opinion. The Court therefore finds it impossible to give its opinion on a dispute of this kind.

It appears to the Court that there are other cogent reasons which render it very inexpedient that the Court should attempt to deal with the present question. The question whether Finland and Russia contracted on the terms of the Declaration as to the nature of the autonomy of Eastern Carelia is really one of fact. To answer it would involve the duty of ascertaining what evidence might throw light upon the contentions which have been put forward on this subject by Finland and Russia respectively, and of securing the attendance of such witnesses as might be necessary. The Court would, of course, be at a very great disadvantage in such an enquiry, owing to the fact that Russia refuses to take part in it. It appears now to be very doubtful whether there would be available to the Court materials sufficient to enable it to arrive at any judicial conclusion upon the question of fact: What did the parties agree to? The Court does not say that there is an absolute rule that the request for an advisory opinion may not involve some enquiry as to facts, but, under ordinary circumstances, it is certainly expedient that the facts upon which the opinion of the Court is desired should not be in controversy, and it should not be left to the Court itself to ascertain what they are.

The Court is aware of the fact that it is not requested to decide a dispute, but to give an advisory opinion. This circumstance, however, does not essentially modify the above considerations. The question put to the Court is not one of abstract law, but concerns directly the main point of the
controversy between Finland and Russia, and can only be decided by an investigation into the facts underlying the case. Answering the question would be substantially equivalent to deciding the dispute between the parties. The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court.

It is with regret that the Court, the Russian Government having refused their concurrence, finds itself unable to pursue the investigation which, as the terms of the Council's Resolution had foreshadowed, would require the consent and co-operation of both parties. There are also the other considerations already adverted to in this opinion, which point to the same conclusion.

The Court cannot regret that the question has been put, as all must now realize that the Council has spared no pains in exploring every avenue which might possibly lead to some solution with a view to settling a dispute between two nations.

Done in English and French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-third day of July, nineteen hundred and twenty-three, in two copies, one of which is to be deposited in the Archives of the Court and the other to be forwarded to the Council of the League of Nations.

(Signed) LODER,
President.

(Signed) Å. HAMMARSKJÖLD,
Registrar.

MM. Weiss, Vice-President, Nyholm, de Bostamante and Altamira, judges, declare that they are unable to share the views of the majority of the Court as to the impossibility of giving an advisory opinion on the Eastern Carelian question.

(Initialled) L.
(Initialled) Å. H.
Permanent Court of International Justice

Mavrommatis Palestine Concessions
Judgment of 30 August 1924

P.C.I.J., Series A, No. 2
PERMANENT COURT OF INTERNATIONAL JUSTICE.

FIFTH (ORDINARY) SESSION

On August 30th, 1924

Before:

MM. LODER, President,
    WEISS, Vice-President,
Lord FINLAY,
MM. NYBOLM,
    MOORE,
    DE BUSTAMANTE,
Altamira,
    ODA,
    ANZILOTTI,
Huber,
Pessôa,
Caloyanni, National Judge.

CASE OF THE MAVROMMATIS PALESTINE CONCESSIONS.

The Government of the Greek Republic, represented by H.E. M. Kapsambelis, Greek Minister at The Hague,

Applicant,

versus

The Government of His Britannic Majesty, represented by Sir Cecil J. B. Hurst, K.C.B., K.C., Legal Adviser to the Foreign Office,

Respondent.
OBJECTION TO THE JURISDICTION OF THE COURT MADE BY HIS BRITANNIC MAJESTY'S GOVERNMENT.

The Court, composed as above, having heard the observations and conclusions of the Parties, delivers the following judgment:

_The facts:_

The Government of the Greek Republic, by an application instituting proceedings filed with the Registry of the Court on May 13th, 1924, in conformity with Article 40 of the Statute and Article 35 of the Rules of Court, has submitted to the Permanent Court of International Justice a suit arising out of the alleged refusal on the part of the Government of Palestine, and consequently also on the part of His Britannic Majesty's Government, since the year 1921 to recognise to their full extent the rights acquired by M. Mavrommatis, a Greek subject, under contracts and agreements concluded by him with the Ottoman authorities in regard to concessions for certain public works to be constructed in Palestine.

This application concludes with a request that the Court may be pleased to give judgment to the effect that the Government of Palestine and consequently also the Government of His Britannic Majesty, have, since 1921, wrongfully refused to recognise to their full extent the rights acquired by M. Mavrommatis under the contracts and agreements concluded by him with the Ottoman authorities in regard to the works specified above, and that the Government of His Britannic Majesty shall make reparation for the consequent loss incurred by the said Greek subject, a loss which is estimated at £234,339 together with interest at six per cent as from July 20th, 1923, the date on which this estimate was made.

The considerations leading up to these conclusions have been developed in the Case filed with the Court by the claimant on May 23rd, 1924. It is therein specified that the Greek Government, abandoning a portion of its original claim relating to the irrigation works in the Jordan Valley, asks for judgment only in respect of two groups of concessions, namely: those relating to the construction and working of an electric tramway system, the supply of electric light and power and of drinking water in the city of Jerusalem, and those relating to the construction and working of an electric tramway system, the supply of electric light and power and of drinking water in the city of Jaffa and the irrigation of its gardens from the waters of El-Hodja.

On the grounds stated in the Case, the Greek Government asks the Court to give judgment as follows:

_The Jerusalem Concessions:_

(1) That, these concessions having begun to be put into operation, the British Government, in its capacity as Mandatory for Palestine, is bound to maintain them and to agree to their adaptation to the new economic conditions of the country, or to redeem them by paying to the claimant reasonable compensation;

(2) that, having in fact already made its choice, by rendering impossible, directly or indirectly, the carrying out of the works for which the claimant holds a concession, it must pay him compensation;

(3) that, taking into account all the various elements of the loss occasioned to the claimant, he shall receive fair and reasonable compensation by means of the payment to him of the sum of £121,045, together with interest at six per cent from July 20th, 1923, until the date on which judgment is given.

_The Jaffa Concessions:_

(1) that the fact that these were granted after October 29th, 1914, does not justify the British Government in refusing to recognise them;

(2) that the fact that they were not confirmed by Imperial iradé, which is a simple formality not to be withheld at discretion, does not deprive them of their international value;

(3) that, though the British Government, in its capacity as Mandatory for Palestine, is at liberty not to maintain them, it is nevertheless under an international obligation to compensate their holder for the loss which it has inflicted upon him by deciding—as it has done—not to allow him to proceed with them;

(4) that, taking into account all the elements of the loss thus sustained by the claimant, he shall receive fair and reasonable compensation by means of the payment to him of the sum of
Furthermore, the Court has heard, in the course of public sittings held on July 15th and 16th, 1924, the statements of H.E. M. Politis, counsel for the applicant Government, and of the Agent of the respondent Government.

* * *

The Law.

Before entering on the proceedings in the case of the Mavrommati concessions, the Permanent Court of International Justice has been made cognisant of an objection taken by His Britannic Majesty's Government to the effect that the Court cannot entertain the proceedings. The Court has not to ascertain what are, in the various codes of procedure and in the various legal terminologies, the specific characteristics of such an objection; in particular it need not consider whether "competence" and "jurisdiction", *incompétence* and *fin de non-recevoir* should invariably and in every connection be regarded as synonymous expressions. It will suffice to observe that the extremely wide bearing of the objection upon which, before the case can be argued on its merits, the Court has to take a decision (without, however, in so doing, in any way prejudging the final outcome of such argument) has been indicated by the Parties themselves in their preliminary counter-case and reply or in the course of the oral statements made on their behalf. It appears in fact from the documents before the Court and from the speeches of Sir Cecil Hurst and of H.E. M. Politis that the preliminary question to be decided is not merely whether the nature and subject of the dispute laid before the Court are such that the Court derives from them jurisdiction to entertain it, but also whether the conditions upon which the exercise of this jurisdiction is dependent are all fulfilled in the present case.

The general basis of the jurisdiction given to the Permanent Court of International Justice is set down in Articles 34 and 36 of the Statute, according to which, in the first place, only States or Members of the League of Nations may appear before it and, in the second place, it has jurisdiction to hear and determine "all cases which the Parties refer to it and all matters specially provided for in Treaties and Conventions in force". In the application instituting proceedings the Greek Government relies on the following:

£113,294, together with interest at six per cent from July 20th, 1923, until the date on which judgment is given.

The application instituting proceedings was, in accordance with Article 40 of the Statute, communicated to the Government of His Britannic Majesty on May 15th, 1924, and the Greek Case was transmitted to that Government on May 31st. On June 3rd, His Britannic Majesty's Government informed the Court that it found itself obliged to make a preliminary objection on the ground that the Court had no jurisdiction to entertain the proceedings in question. In agreement with His Britannic Majesty's Government, the President fixed June 26th as the date for the filing of the objection to the Court's jurisdiction.

On that date, the Agent of His Britannic Majesty's Government filed with the Registry of the Court a preliminary objection to the Court's jurisdiction and a preliminary counter-case in the proceedings respecting the Mavrommati Palestine Concessions.

The objection concludes with a request that the Court may be pleased to give judgment on the preliminary objection filed on behalf of His Britannic Majesty's Government and, without entering at the present stage upon the merits of the case, to dismiss the proceedings instituted by the Greek Government; whilst in conclusion of the preliminary counter-case it is submitted on behalf of His Britannic Majesty's Government that the proceedings instituted by the Government of the Greek Republic should be dismissed upon the ground that the Court has no jurisdiction to entertain them.

The Agent of the Government of the Greek Republic (having been informed of the filing of the objection made by the British Government) requested permission, on behalf of his Government, to make a written reply to this objection.

He was requested to submit his reply on June 30th.

Accordingly, on the day fixed, the Greek Agent filed his Government's reply to the British preliminary counter-case concerning the Court's jurisdiction.

This reply, in conclusion, requests the Court to declare that the objection to the jurisdiction of the Court has not been established and to dismiss it; and to reserve the suit for judgment on its merits.

In support of their conclusions, the Parties have handed in to the Court a number of documents as annexes to the case or preliminary counter-case.
Article 9 of Protocol XII annexed to the Peace Treaty of Lausanne of July 24th, 1923;

Articles 11 and 26 of the Mandate for Palestine conferred on His Britannic Majesty on July 24th, 1922;

Article 36, first paragraph, and Article 40 of the Statute of the Court and Article 35, paragraph 2, of the Rules of Court.

The Parties in the present case agree that Article 26 of the Mandate falls within the category of "matters specially provided for in Treaties and Conventions in force" under the terms of Article 36 of the Statute and the British Government does not dispute the fact that proceedings have been duly initiated in accordance with Article 40 of the Statute.

Article 26 of the Mandate contains the following clause:

"The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations."

The question therefore arises whether the conditions laid down by Article 26 in regard to the acceptance of the Court's jurisdiction, the absence of which would render such acceptance inoperative, are fulfilled in the case before the Court.

Before considering whether the case of the Mavrommatis concessions relates to the interpretation of application of the Mandate and whether consequently its nature and subject are such as to bring it within the jurisdiction of the Court as defined in the article quoted above, it is essential to ascertain whether the case fulfills all the other conditions laid down in this clause. Does the matter before the Court constitute a dispute between the Mandatory and another Member of the League of Nations? Is it a dispute which cannot be settled by negotiation?

I.

A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons. The present suit between Great Britain and Greece certainly possesses these characteristics. The latter Power is asserting its own rights by claiming from His Britannic Majesty's Government an indemnity on the ground that M. Mavrommatis, one of its subjects, has been treated by the Palestine or British authorities in a manner incompatible with certain international obligations which they were bound to observe.

In the case of the Mavrommatis concessions it is true that the dispute was at first between a private person and a State — i.e. between M. Mavrommatis and Great Britain. Subsequently, the Greek Government took up the case. The dispute then entered upon a new phase; it entered the domain of international law, and became a dispute between two States. Henceforward therefore it is a dispute which may or may not fall under the jurisdiction of the Permanent Court of International Justice.

Article 26 of the Mandate, in giving jurisdiction to the Permanent Court of International Justice does not, in fact, merely lay down that there must be a dispute which requires to be settled. It goes on to say that the dispute must be between the Mandatory and another Member of the League of Nations. This is undoubtedly the case in the present suit, since the claimant State Greece, like Great Britain, has from the outset belonged to the League of Nations. It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights — its right to ensure, in the person of its subjects, respect for the rules of international law.

The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant. The fact that Great Britain and Greece are the opposing Parties to the dispute arising out of the Mavrommatis concessions is sufficient to make it a dispute between two States within the meaning of Article 26 of the Palestine Mandate.
II.

The second condition by which this article defines and limits the jurisdiction of the Permanent Court in questions arising out of the interpretation and application of the Mandate, is that the dispute cannot be settled by negotiation. It has been contended that this condition is not fulfilled in the present case; and leaving out of account the correspondence previous to 1924 between Mavrommatis or his solicitors and the British Government, emphasis has been laid on the very small number and brevity of the subsequent communications exchanged between the two Governments, which communications appear to be irreconcilable with the idea of negotiations properly so-called. The true value of this objection will readily be seen if it be remembered that the question of the importance and chances of success of diplomatic negotiations is essentially a relative one. Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a deadlock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt: that the dispute cannot be settled by diplomatic negotiation. This will also be the case, in certain circumstances, if the conversations between the Governments are only the continuation of previous negotiations between a private individual and a government.

It is true that the State does not substitute itself for its subject; it is asserting its own rights and, consequently, factors foreign to the previous discussions between the individual and the competent authorities may enter into the diplomatic negotiations. But it is equally true that if the diplomatic negotiations between the Governments commence at the point where the previous discussions left off, it may well happen that the nature of the latter was such as to render superfluous renewed discussion of the opposing contentions in which the dispute originated. No general and absolute rule can be laid down in this respect. It is a matter for consideration in each case. In the case now before the Court, the negotiations between M. Mavrommatis or his representatives and the Palestine or British authorities had covered precisely the points on which the Greek Government decided to rely, and did in fact rely as against the British Government with regard to the recognition of the Mavrommatis concessions. And the negotiations between the concessions holder and the authorities were throughout conducted on the basis of international instruments subsequently relied on by the Greek Government when it approached His Britannic Majesty’s Government. That this is the case appears from the whole of the correspondence placed before the Court and more especially from the letter sent by the Foreign Office on April 1st, 1924 to the Greek Legation in London, in which all the questions which had previously been discussed between the interested person and the Colonial Office were recapitulated. One proof that the Greek Government took this view is the fact that it had associated itself with the steps taken by its subject by transmitting to the Foreign Office the letter sent to the Greek Legation by M. Mavrommatis on December 18th, 1922. The Greek Government moreover had already realised from two letters, dated January 22nd and February 2nd, 1923, sent by Mr. G. Agar Robartes of the Foreign Office to M. Melas, Secretary of the Greek Legation in London, that the British Government was indisposed to enter into direct negotiation with it regarding the claim of its subject. A year later, on January 26th, 1924, the Greek Legation in London wrote to the Foreign Office in order to ascertain whether in the opinion of the British Government, “M. Mavrommatis’ claims could not be satisfactorily met” or submitted to arbitration either by a member of the High Court of Justice or by a tribunal of which the president, failing agreement between the Parties, should be appointed by the British Government itself; and the note of His Britannic Majesty’s Secretary of State for Foreign Affairs, dated April 1st, 1924, was regarded by Greece as a definitely negative reply.

This note moreover is also of great importance from another point of view. For it tends to show the official character of the correspondence which had taken place regarding the Mavrommatis concessions between the Greek Legation in London and the Foreign Office or certain of their officials. Thus the note of the Secretary of State refers expressly to the note—above mentioned—signed by M. Collas on January 26th, 1924; and the latter in its turn refers to the letter sent by Mr. Robartes to M. Melas on February 2nd, 1923. It should also be observed that all this correspondence bears the registration numbers of the Legation and of the Foreign Office.
The matter had reached this stage when the Greek Government, considering that there was no hope of effecting a settlement by further negotiation and acting upon a suggestion made by M. Mavrommatis' solicitors in their letter of April 1st, 1924, to the Greek Legation in London, sent to the Foreign Office a dispatch dated May 12th, 1924, informing His Britannic Majesty's Government of its decision to refer the dispute to the Court, a decision which—doubtless in view of the approaching opening of the Court's ordinary Session—it proceeded to carry out on the following day, when it filed the application instituting proceedings with the Registry.

The Court realises to the full the importance of the rule laying down that only disputes which cannot be settled by negotiation should be brought before it. It recognises, in fact, that before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by means of diplomatic negotiations. Nevertheless, in applying this rule, the Court cannot disregard, amongst other considerations, the views of the States concerned, who are in the best position to judge as to political reasons which may prevent the settlement of a given dispute by diplomatic negotiation. When negotiations between the private person and the authorities have already—as in the present case—defined all the points at issue between the two Governments, it would be incompatible with the flexibility which should characterise international relations to require the two Governments to reopen a discussion which has in fact already taken place and on which they rely. It should be observed in this connection that the Foreign Office, in its reply of April 1st, states that the competent department to which the negotiations had been entrusted had fully and carefully examined the question.

III.

The Court has now to consider the condition which Article 26 of the Mandate imposes upon its jurisdiction when laying down that the dispute must relate "to the interpretation or the application of the provisions of the Mandate". The dispute may be of any nature; the language of the article in this respect is as comprehensive as possible (any dispute whatever — tout différend, quel qu'il
tain categories of disputes, which are determined according to a legal criterion (the interpretation and application of the terms of the Mandate), and tends therefore to assert the general rule that States may or may not submit their disputes to the Court at their discretion.

The dispute brought before the Court by the Greek Government’s application relates to the question whether the Government of Palestine and consequently also the British Government have, since 1921, wrongfully refused to recognise to their full extent the rights acquired by M. Mavrommatis under the contracts and agreements concluded by him with the Ottoman authorities in regard to certain public works.

In support of its application, the Greek Government cites Article XI of the Mandate, which runs as follows:

“The Administration of Palestine shall take all necessary measures to safeguard the interests of the community in connection with the development of the country, and, subject to any international obligations accepted by the Mandatory, shall have full power to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be established therein. It shall introduce a land system appropriate to the needs of the country, having regard among other things to the desirability of promoting the close settlement and intensive cultivation of the land.

“The Administration may arrange with the Jewish Agency mentioned in Article 4 to construct or operate, upon fair and equitable terms, any public works, services and utilities, and to develop any of the natural resources of the country, in so far as these matters are not directly undertaken by the Administration. Any such arrangements shall provide that no profits distributed by such agency, directly or indirectly, shall exceed a reasonable rate of interest on the capital, and any further profits shall be utilised by it for the benefit of the country in a manner approved by the Administration.”

The question to be solved is whether the dispute above mentioned should be dealt with on the basis of this clause. Taken as a whole, Article XI purports to regulate the powers of the Palestine Administration as regards: a) public ownership or control of the natural resources of the country or of the public works, services and utilities; b) the introduction of a land system appropriate to the needs of the country and, c) arrangements with the Jewish agency to construct or operate, upon fair and equitable terms, any public works, services and utilities and to develop any of the natural resources of the country.

The Court feels that the present judgment should be based principally on the first part of paragraph 1 of Article XI.

After an introductory phrase laying down in general terms the fundamental duty of the Administration, namely to “take all necessary measures to safeguard the interests of the community in connection with the development of the country”, Article XI continues to the effect that the Administration of Palestine “shall have full power to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be established therein” — aura pleins pouvoirs pour décider quant à la propriété ou au contrôle public de toutes les ressources naturelles du pays, ou des travaux et services d’utilité publique déjà établis ou à y établir.

The Court considers that, according to the French version, the powers thus attributed to the Palestine Administration may cover every kind of decision regarding public ownership and every form of “contrôle” which the Administration may exercise either as regards the development of the natural resources of the country or over public works, services and utilities. An interpretation restricting these powers to certain only of the measures which the Administration may take in regard to public ownership or to certain only of the ways in which public “contrôle” may be exercised over the activities in question, though not completely excluded by the very general wording of the French text, is not the natural interpretation of its terms: that is to say that the right to grant concessions with a view to the development of the natural resources of the country or of public works, services and utilities, as also the right to annul or cancel existing concessions, might fall within the terms of the French version of the clause under consideration.

The English version, however, seems to have a more restricted meaning. It contemplates the acquisition of “public ownership” or “public control” over any of the natural resources of the country
or over the public works, services and utilities established or to be established therein.

Since no question of “public ownership” is raised in the present case, the Court has devoted its whole attention to the meaning of the expression “public control”. It has ascertained that the word “control” may have a very wide sense but that, used in conjunction with the expression “public ownership”, it would appear rather to mean the various methods whereby the public administration may take over, or dictate the policy of, undertakings not publicly owned.

The Court is of opinion that, where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonise with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties. In the present case this conclusion is indicated with especial force because the question concerns an instrument laying down the obligations of Great Britain in her capacity as Mandatory for Palestine and because the original draft of this instrument was probably made in English.

The Mavrommatis concessions in themselves are outside the scope of Article II, but the question before the Court is whether, by granting the Rutenberg concessions—which cover at least a part of the same ground—the Palestine and British authorities have disregarded international obligations assumed by the Mandatory, by which obligations Greece is entitled to benefit.

The connection between the Rutenberg and Mavrommatis concessions arising out of the fact that they partially overlap, may be considered as admitted because the Palestine and British authorities, when the question of the validity of the latter concessions was brought up, invited the interested party to come to an understanding with the Zionist organisation and with Mr. Rutenberg.

If the Rutenberg concessions fall within the scope of Article II, the dispute undoubtedly relates to that article.

In this connection, the Court has to decide whether the grant of the Rutenberg concessions has given rise to the acquisition or exercise of “public control” in the sense contemplated above.

If the expression “public control” is contrasted with “private control” in the very restricted sense of a public undertaking as opposed to a private undertaking controlled by the public authori-

ities, the Rutenberg concessions cannot be considered as having conferred upon the Palestine Administration “public control” over the services under concession.

But it does not appear to be correct to maintain that the English expression “public control” only covers cases where the Government takes over and itself directs undertakings of one kind or another. The expression is also used to indicate certain forms of action taken by the State with regard to otherwise private undertakings. Even in such cases, the word “control”, in the sense in which it is generally used, cannot be employed to describe practically all acts of public authority; “control” always means measures of a special character in connection with an economic policy consisting in subordinating, in one way or another, private enterprise to public authority. This wider meaning of the English expression appears to be the only one which does not nullify the expression contrôle public in the French version: it seems hardly possible to read the latter as referring exclusively to cases where a public administration itself takes in hand an undertaking. It is in this sense that even the grant of a concession of public utility to an individual or to a company may be accompanied by measures which amount to an exercise of “public control”.

In this respect it should be observed that Article 28 of the Rutenberg concessions expressly lays down that “the undertaking of the company under this concession shall be recognised as a public utility Body under Government control” : it would not be correct to interpret this clause as reserving to the Government the right, should it see fit, to assume control of the undertaking. This “Government control” appears rather to be connected with the recognition of the undertaking as a public utility body. Moreover, it is clearly of a different nature to the supervision which the Palestine Administration may exercise over the financial operations of the company under Article 36 of the concessions.

Again it may be remarked that the concessions in question have been granted to a company which Mr. Rutenberg undertakes to form and the statutes of which, according to Article 2 of the agreement concerning the grant of the concession for the Jordan and Article 34 of the Jaffa concession, were to be approved by the High Commissioner for Palestine in agreement with the Jewish agency mentioned in the Mandate.
In order to form an idea of the significance of this clause, it must be remembered that this Jewish agency is described as follows in Article 4 of the Mandate:

"An appropriate Jewish agency shall be recognised as a public body for the purpose of advising and cooperating with the Administration of Palestine in such economic, social and other matters as may affect the establishment of the Jewish national home and the interests of the Jewish population in Palestine, and, subject always to the control of the Administration, to assist and take part in the development of the country.

"The Zionist organisation shall be recognised as such agency."

Un organisme juif convenable sera officiellement reconnu et aura le droit de donner des avis à l'Administration de la Palestine et de coopérer avec elle dans toutes questions économiques, sociales et autres, susceptibles d'affaécter l'établissement du foyer national juif et les intérêts de la population juive en Palestine, et, toujours sous réserve du contrôle de l'Administration, d'aider et de participer au développement du pays.

L'organisation sioniste sera reconnue comme étant l'organisation visée ci-dessus ... ."

This clause shows that the Jewish agency is in reality a public body, closely connected with the Palestine Administration and that its task is to cooperate, with that Administration and under its control, in the development of the country. The words used in paragraph 2 of Article II to indicate the action of the Jewish agency are the same as those used in the first paragraph to indicate the use to be made of the powers granted to the Palestine Administration. It is obviously a program of economic policy which the Administration may carry out, either directly, or through a public body acting under its control.

The conclusion which appears to follow from the preceding argument is that the Rutenberg concessions constitute an application by the Administration of Palestine of the system of "public control" with the object of developing the natural resources of the country and of operating public works, services and utilities. Thus envisaged, these concessions may fall within the scope of Article II of the Mandate.

But even if any doubt on this point remained, the Court believes that it should disregard it in view of a passage in the Preliminary Counter-case filed by His Britannic Majesty's Government on June 16th, 1924, containing a declaration which, no matter in what connection it was made, refers directly to the relations between the Rutenberg concessions and Article II of the Mandate. This passage runs as follows:

"The concessions granted to Mr. Rutenberg in September, 1921, for the development of electrical energy and water-power in Palestine (Annex to the Greek Case, pp. 21-52) were obliged to conform to this Article II, and it would have been open to any Member of the League to question provisions in those concessions which infringed the international obligations which His Britannic Majesty as Mandatory for Palestine had accepted."

Les concessions accordées en septembre 1921 à M. Rutenberg pour le développement de l'énergie électrique et de la force hydraulique en Palestine (Annexe au Mémoire grec, pages 21 à 52) ont obligatoirement dû être faites en conformité de l'article II et il eût été loisible à tout Membre de la Société de mettre en question toute stipulation de ces concessions qui eût porté atteinte aux obligations internationales assumées par Sa Majesté britannique en qualité de Mandataire pour la Palestine."

The express reference to the "international obligations accepted by the Mandatory" makes it clear that this statement refers to paragraph 1 of Article II.

Again the British Agent's oral pleading contains the following:

"Article II provides in the first part which I have read, that the Government of Palestine may itself develop these natural resources. It shall have full power to provide for public ownership or control of any of the natural resources of the country, subject to the international obligations accepted by the Mandatory. Then comes a second paragraph which enables the Administration to "arrange with the Jewish agency"—that is the Zionist Organisation which had been mentioned in an earlier portion—"to construct or operate, upon fair and equitable terms, any public works, services and utilities, and to develop any of the natural resources of the country", in so far as these
matters are not directly undertaken by the Administration. It will be noticed that there is no repetition in that second paragraph of those words "subject to any international obligations accepted by the Mandatory", but I think it is a limitation upon the powers of the Mandatory which is so obvious that it is implied in the second paragraph just as much as in the first. The Mandatory cannot, in making his arrangements for the development of the natural resources of the country, ignore the international obligations which he has accepted."

* * *

The powers accorded under Article II to the Administration of Palestine must, as has been seen, be exercised "subject to any international obligations accepted by the Mandatory". This qualification was a necessary one, for the international obligations of the Mandatory are not, ipso facto, international obligations of Palestine. Since Article I of the Mandate gives the Palestine Administration a wide measure of autonomy, it was necessary to make absolutely certain that the powers granted could not be exercised in a manner incompatible with certain international engagements of the Mandatory. The obligations resulting from these engagements are therefore obligations which the Administration of Palestine must respect; the Mandatory is internationally responsible for any breach of them since, under Article I2 of the Mandate, the external relations of Palestine are handled by it. It has been contended on behalf of the Greek Government that the Administration of Palestine, by arranging with the Jewish agency for the construction or operation of the works or of a portion of the works for which M. Mavrommatis already held concessions and not paying the latter compensation, had disregarded the international obligations of the Mandatory. At the present stage of the proceedings the question whether there really has been a breach of these obligations can clearly not be gone into; to do so would involve a decision as to the responsibility of the respondent, a thing which the two Governments concerned do not at the moment ask the Court to do. But, in accordance with the principles set out above, the Court is constrained at once to ascertain whether the international obligations mentioned in Article II affect the merits of the case and whether any breach of them would involve a breach of the provisions of this article.

There has been much discussion as to what international obligations of the Mandatory's must be respected by the Administration of Palestine. The Greek Government appears to hold that these are all international obligations in general; on the other hand the submission of the British Government in its preliminary Counter-case is that only various beneficent principles are intended, to the maintenance of which the League of Nations, on whose behalf His Britannic Majesty exercises the mandate over Palestine, is pledged, such as freedom of transit and communications, equality of commercial opportunity for all Members of the League, suppression of the arms traffic, etc. It is not however certain whether this submission was maintained in the oral proceedings.

The Court, whilst abstaining from giving an opinion on these opposing contentions, feels constrained at once to make certain reservations in regard to them. The former does not appear to take sufficient account of the peculiar importance attaching to the words "accepted by the Mandatory", which obviously contemplate obligations contracted, even though, in a sense, it may be said that the whole body of international law has been accepted by States. Moreover, there would appear to be no reason for such a clause in this connection. The second interpretation is also unsupported by any argument and it is not easy to see any connection between it and the subject matter of the clause of which it forms part. In the opinion of the Court, the international obligations mentioned in Article II are obligations contracted having some relation to the powers granted to the Palestine Administration under the same article.

The Court has been informed that in the draft of the Mandate, prepared when it was thought that the Treaty of Sèvres would shortly be ratified, the clause under discussion was worded as follows: "subject to Article 311 of the Treaty of Peace with Turkey", the article of the Mandate being in other respects identical with the final text. Later, when it became clear that the Treaty of Sèvres would never come into force, whilst the new Peace Treaty with Turkey had not yet been drafted, in order to avoid delay in the adoption of the Mandate, the reference to the Treaty of Sèvres was replaced by the words "international obligations accepted by the Mandatory". This phrase therefore—whatever its scope may be in other directions—includes at all events
the provisions which, in the future Peace Treaty with Turkey, were to take the place of the provisions of Article 311 of the Treaty of Sèvres.

This article which is the second of Section VI (Companies and Concessions) of Part IX (Economic Clauses) of that Treaty, is worded as follows:

"In territories detached from Turkey to be placed under the authority or tutelage of one of the Principal Allied Powers, Allied nationals and companies controlled by Allied groups or nationals holding concessions granted before October 29th, 1914, by the Turkish Government or by any Turkish local authority shall continue in complete enjoyment of their duly acquired rights, and the Power concerned shall maintain the guarantee granted or shall assign equivalent ones.

"Nevertheless, any such Power, if it considers that the maintenance of any of these concessions should be contrary to the public interest, shall be entitled, within a period of six months from the date on which the territory is placed under its authority or tutelage, to buy out such concession or to propose modifications therein; in that event it shall be bound to pay to the concessionnaire equitable compensation in accordance with the following provisions.

"If the Parties cannot agree on the amount of such compensation, it will be determined by Arbitral Tribunals composed of three members, one designated by the State of which the concessionnaire or the holders of the majority of the capital in the case of a company is or are nationals, one by the Government exercising authority in the territory in question, and the third designated, failing agreement between the Parties, by the Council of the League of Nations.

"The Tribunal shall take into account, from both the legal and equitable standpoints, all relevant matters, on the basis of the maintenance of the contract adapted as indicated in the following paragraph.

"The holder of a concession which is maintained in force shall have the right, within a period of six months after the expiration of the period specified in the second paragraph of this article, to demand the adaptation of his contract to the new economic conditions, and in the absence of agreement direct with the Government concerned, the decision shall be referred to the Arbitral Commission provided for above."

As Article 311 of the Treaty of Sèvres dealt with concessions in territories detached from Turkey and as that article is now replaced by Protocol XII of the Treaty of Lausanne, it follows that "the international obligations accepted by the Mandatory", referred to in Article 11 of the Mandate, certainly include the obligations arising out of Protocol XII of the Lausanne Treaty.

These obligations limit the powers of the Palestine Administration to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be established therein. Since—as has been already stated—the Rutenberg concessions fall within the scope of Article 11 of the Mandate, it is obvious that the Palestine Administration is, as regards these concessions, bound to respect obligations which Great Britain has accepted under Protocol XII. If the Administration has, by granting the Rutenberg concessions, committed a breach of these obligations, there has been an infringement of the terms of Article 11 of the Mandate which may be made the subject of an action before the Court under Article 26.

The Court considers that the reservation made in Article 11 regarding international obligations is not a mere statement of fact devoid of immediate legal value, but that, on the contrary, it is intended to afford these obligations within the limits fixed in the article, the same measure of protection as all other provisions of the Mandate.

It now only remains to consider whether there are any international obligations arising out of Protocol XII of Lausanne—hereinafter called "Protocol XII"—which affect the Mavrommatis concessions.

The instrument in question which is entitled "Protocol relating to certain Concessions granted in the Ottoman Empire", concerns
concessionary contracts duly entered into before October 29th, 1914, between the Ottoman Government or any local authority, on the one hand, and nationals (including Companies) of the Contracting Powers, other than Turkey, on the other. Greece is one of these Powers. The Protocol includes two sections, the first of which (Articles 1 to 8) concerns concessions in territories which continue to form part of the Ottoman Empire, whereas the second (Articles 9 to 13) concerns concessions in territories which have been detached. The fundamental principle of the Protocol is the maintenance of concessionary contracts concluded before October 29th, 1914. In territories detached from Turkey, the State which acquires the territory is subrogated as regards the rights and the obligations of Turkey; the greater part of the provisions of Section I also apply to the contracts dealt with in Section II. Beneficiaries under concessionary contracts entered into before October 29th, 1914, which, at the time of the coming into force of the Treaty of Peace, have begun to be put into operation, are entitled to have their contracts readapted to the new economic conditions; other beneficiaries are not entitled to such readaptation, but their contracts may be dissolved at their request and in this case they are entitled, if there is ground for it, to an equitable indemnity in respect of survey and investigation work.

It is not disputed that the Jerusalem concessions dated from before October 29th, 1914, and must therefore be dealt with in accordance with the terms of Protocol XII. On the other hand, the parties do not agree on the question whether the holder of these concessions is entitled to benefit by the provisions of Article 4 of the Protocol and consequently to claim that they should be readapted to the new economic conditions; or whether, in accordance with Article 6, he is only entitled to request that the contract may be dissolved with reasonable compensation for survey and investigation work. In accordance with the principles enunciated above, the question whether the Administration of Palestine can withhold from M. Mavrommatis the readaptation of his Jerusalem concessions, is a question concerning the interpretation of Article 11 of the Mandate, and consequently the provisions of Article 26 are applicable to it.

With regard to the Jaffa concessions, the position is as follows: The preliminary agreements are dated January 27th, 1914, and on March 6th of the same year, the Ministry of Public Works at Constantinople authorised the District of Palestine to grant the proposed concessions. They were not however converted into concessions duly signed by the Ottoman authorities until January 28th, 1916. According to an Ottoman law promulgated in the meantime, they had to be confirmed by Imperial Firman; but this condition was never fulfilled.

It appears from the documents placed before the Court by the Greek Government and dealing with the negotiations which had taken place between those interested, that the Parties do not agree on the question whether Protocol XII has the effect of depriving concessions obtained in Turkey after October 29th, 1914, of any value as against States acquiring former Ottoman territory, or whether, on the contrary, "concessions granted between October 29th, 1914, and the restoration of peace in countries where Turkey continued to exercise sovereign power, hold good, in principle, as against the successor States, though the latter cannot be compelled to maintain them."

The Court has not to give an opinion on the merits of this contention. It will suffice to observe that if on the one hand, Protocol XII being silent regarding concessions subsequent to October 29th, 1914, leaves intact the general principle of subrogation, it is, on the other hand, impossible to maintain that this principle falls within the international obligations contemplated in Article 11 of the Mandate as interpreted in this judgment. The Administration of Palestine would be bound to recognise the Jaffa concessions, not in consequence of an obligation undertaken by the Mandatory, but in virtue of a general principle of international law to the application of which the obligations entered into by the Mandatory created no exception.

Though it is true that for the purpose of the settlement of a dispute of this kind the extent and effect of the international obligations arising out of Protocol XII must be ascertained, it is equally the fact that the Court is not competent to interpret and apply, upon a unilateral application, that Protocol as such, for it contains no clause submitting to the Court disputes on this subject.

On the other hand, the Court has jurisdiction to apply the Protocol of Lausanne in so far as this is made necessary by Article 11 of the Mandate.
The foregoing reasoning leads to the following conclusions:

(a) That the dispute between the British and Greek Governments concerning M. Mavrommatis' claim in respect of the Jerusalem concessions must be decided on the basis of the provisions of Article II of the Mandate and that consequently it is within the category of disputes for which the Mandatory has accepted the jurisdiction of the Court;

(b) that, on the other hand, the dispute between these Governments concerning M. Mavrommatis' claims in respect of the Jaffa concessions has no connection with Article II of the Mandate and consequently does not fall within the category of disputes for which the Mandatory has accepted the jurisdiction of the Court.

Although a single application has been filed with the Court for the payment by Great Britain of a lump sum; and although the case of the Mavrommatis concessions, throughout the negotiations preceding the present action, has, all things considered, been dealt with as one single question, the fact remains that, in its Case, the Greek Government submitted its claim under three different headings. One of these—that relating to the Jordan works—has been abandoned in the Case itself; the other two relating to Jerusalem and Jaffa respectively are dealt with separately and separate claims for compensation are submitted. The Court therefore, having ascertained that it only has jurisdiction to entertain the claim relating to Jerusalem, reserves this claim for judgment on its merits and declares that its jurisdiction does not extend to the claim relating to the works at Jaffa.

IV

Having thus established its jurisdiction under Articles 26 and 11 of the Palestine Mandate, the Court has to consider whether as concerns the dispute regarding the Jerusalem concessions, this jurisdiction may not be limited by another international instrument which might overrule the provisions of the Mandate.

If a State has recourse to the Court under a clause establishing the latter's compulsory jurisdiction, it must be prepared for the contingency that the other Party may cite agreements entered into between the opposing Parties which may prevent the exercise of the Court's jurisdiction. Now His Britannic Majesty's Agent in his "Preliminary Objection to the Jurisdiction of the Court", introducing the "Preliminary Counter-Case", bases his request for the dismissal of the proceedings instituted by the Greek Government, firstly on the contention that Article 26 of the Mandate is not applicable in this case and, secondly on the contention that the only international instrument dealing with the recognition of concessions in Palestine is Protocol XII, and that this instrument contains no provision giving the Permanent Court of International Justice jurisdiction to decide disputes relating to the interpretation or application of that Protocol.

Though His Britannic Majesty's Agent does not expressly contend that the Court's jurisdiction under the Mandate—which he disputes—is incompatible with the provisions of Protocol XII, the Court considers that the citation of this document by the British Agent must be regarded as one of the grounds for the objection to the Court's jurisdiction. In the circumstances, it will therefore not be necessary to consider whether the Court, whose jurisdiction is dependent on the will of the States concerned in the dispute, would be entitled, when giving judgment in regard to its jurisdiction, to consider arguments other than those advanced by the Parties.

It is certain that Protocol XII is an international instrument, quite distinct from and independent of the Mandate for Palestine. It deals specifically and in explicit terms with concessions such as those of M. Mavrommatis, whereas Article 11 of the Mandate deals with them only implicitly. Furthermore it is more recent in date than the Mandate. All the conditions therefore are fulfilled which might make the clauses of the Protocol overrule those of the Mandate. Although the provisions of the Mandate possess a special character by reason of the fact that they have been drawn up by the Council of the League of Nations, neither of the Parties has attempted to argue that a Member of the League of Nations cannot renounce rights which he possesses under the terms of the Mandate.

Before considering whether, and, if so, to what extent, the jurisdiction of the Court under Article 26 might be affected by Protocol XII, it should be observed that, as has already been established, Article 11 refers to Protocol XII. This international instrument
must be examined by the Court not merely as a body of rules which may limit its jurisdiction, but also and above all as applicable under the terms of Article II of the Mandate which is the very clause from which the Court derives its jurisdiction. In this respect, the Protocol is the complement of the provisions of the Mandate in the same way as a set of regulations alluded to in a law indirectly form part of it. Nevertheless, from whichever of the two aspects it is regarded, Protocol XII remains the same and has the same effect.

The fact that Article II only refers to the Protocol in general terms, and that the Protocol is more recent in date than the Mandate, does not justify the conclusion that the Protocol would only be applicable in Palestine in so far as it is compatible with the Mandate. On the contrary, in cases of doubt, the Protocol, being a special and more recent agreement, should prevail.

If this is true, it is equally true that the provisions of the Mandate and more particularly those regarding the jurisdiction of the Court are applicable in so far as they are compatible with the Protocol. The reservation in Article II regarding international obligations makes it quite clear that the intention is that these are to be respected in their entirety but that they are not to have any general limiting effect as regards the provisions of Article II. The silence of Protocol XII concerning the Mandate and the jurisdiction of the Permanent Court of International Justice, does not justify the conclusion that the Parties intended to exclude such jurisdiction; for the Protocol does not only deal with mandated territories, and it includes amongst its signatories a State which is not a Member of the League of Nations. Though respect for Protocol XII, in so far as it constitutes a body of rules applicable in Palestine as concerns any Member of the League of Nations, is assured by Article II of the Mandate, the provision of Article 26 definitely establishing the jurisdiction of the Court in disputes relating to Article II cannot be in any way affected by the silence of the Protocol regarding this jurisdiction.

The Protocol XII and Article II of the Mandate are in no way incompatible. This may clearly be seen by a comparison of the two documents. Article II does not expressly mention concessions; it is confined to a definition of certain powers of the Mandatory and of certain of the objects of the economic policy of the Palestine Administration. On the other hand, the Protocol deals exclusively and in detail with concessions; it establishes tests according to which certain concessions must be recognised; it lays down rules for the subrogation of the successor States as regards the rights and obligations of the Turkish authorities. This is substantive law. But the Protocol also contains clauses concerning the procedure to be followed: provision is made for administrative negotiations regarding the readaptation of certain concessions; times are fixed within which these negotiations may take place or certain declarations on the part of concession holders may be made; lastly it lays down a special procedure for the valuation by experts of the indemnities to be granted to concession holders.

It is these provisions of the Protocol concerning procedure which may be regarded as incompatible, not with Article II of the Mandate, but with the jurisdiction derived by the Court from that article. This incompatibility is twofold. In so far as the Protocol establishes in Article 5 a special jurisdiction for the assessment of indemnities, this special jurisdiction—provided that it operates under the conditions laid down—excludes as regards these matters the general jurisdiction given to the Court in disputes concerning the interpretation and application of the Mandate. On the other hand, the provisions regarding administrative negotiations and time limits in no way exclude the jurisdiction of the Court; their effect is merely to suspend the exercise of this jurisdiction until negotiations have proved fruitless and the times have expired. Subject to the special powers given to the experts, and to the time limits and the declarations provided for, the Court’s jurisdiction remains intact in so far as it is based on Article II. In particular, this is the case as regards disputes relating to the interpretation and application of the provisions of the Protocol itself.

Now in the present case it would appear that the dispute between the two Parties relates to points which are preliminary points as regards the application of Articles 9, 1 and 4 to 6 of the Protocol. Whilst a difference of opinion prevails regarding the question whether the Mavrommatis concessions at Jerusalem fall under the terms of Article 4 or Article 6 of the Protocol, the provisions relating to the procedure to be followed in either event cannot be used in argument against the Court’s jurisdiction. For these reasons, neither the jurisdiction of the Court, nor the exercise of its jurisdiction, is, at the present stage of the dispute, affected by the
provisions of Protocol XII regarding the special tribunal provided for in Article 5 of the time limits mentioned in Articles 4 and 6. Nor can the argument that the concession holder has not exercised the right of option provided for in Article 4 be used against the Greek Government. The British Government cannot insist on the exercise of this right so long as it denies that the concession fall under the terms of that article. The question remains to be considered whether the negotiations which have taken place with regard to the application of the Protocol in anticipation of its coming into force can exert any influence as regards the expiration of the times in question. This question however cannot arise until it has been decided whether the time limits applicable to the concession are those laid down in Article 4 or in Article 6.

V.

The Treaty of Lausanne and Protocol XII were signed by Great Britain and Greece on July 24th, 1923. When the final negotiations between Greece and Great Britain in regard to the Mavrommatis concessions took place (January to April 1924), and at the moment when Greece filed its application (May 13th, 1924) the deposit of ratifications, which was provided for in Article 143 of the Treaty of Lausanne, had not taken place. This condition had to be fulfilled before the Treaty and its supplementary instruments could come into effect as regards signatories having then ratified it. The deposit was effected on August 6th, 1924. Already before that date Greece Greek law of August 25th, 1923: Greek official Gazette of the same date; and Great Britain (Treaty of Peace — Turkey — Act of April 15th, 1924) had taken the necessary steps for ratification of the Treaty. Since the Treaty is now in force and Protocol XII has become applicable as regards Great Britain and Greece, it is not necessary to consider what the legal position would have been if the Treaty had not been ratified at the time of the Court’s judgment.

As His Britannic Majesty’s Agent relied on the fact that the Protocol was not in force, the Court is constrained to state its opinion on the question whether its jurisdiction may be affected by the fact that this Protocol is only effective as from August 6th, 1924.

Protocol XII was drawn up in order to fix the conditions governing the recognition and treatment by the contracting Parties of certain concessions granted by the Ottoman authorities before the conclusion of the Protocol. An essential characteristic therefore of Protocol XII if that its effects extend to legal situations dating from a time previous to its own existence. If provision were not made in the clauses of the Protocol for the protection of the rights recognised therein as against infringements before the coming into force of that instrument, the Protocol would be ineffective as regards the very period at which the rights in question are most in need of protection. The Court therefore considers that the Protocol guarantees the rights recognised in it against any violation regardless of the date at which it may have taken place.

In the same connection it must also be considered whether the validity of the institution of proceedings can be disputed on the ground that the application was filed before Protocol XII had become applicable. This is not the case. Even assuming that before that time the Court had no jurisdiction because the international obligation referred to in Article IX was not yet effective, it would always have been possible for the applicant to re-submit his application in the same terms after the coming into force of the Treaty of Lausanne, and in that case, the argument in question could not have been advanced. Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant’s suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications.

As has been explained above, the dispute relates to points preliminary to the application of certain provisions of Protocol XII, namely those dealing with negotiations to be undertaken and time limits to be observed. For this reason it cannot be argued against the applicant that he is under an immediate obligation to conform to these provisions. This conclusion is, in the present case, also pointed to for another reason: the Parties, and before them, the
persons interested, have by mutual consent and at the instance of His Britannic Majesty's Government, conducted their negotiations, since the signature of the Treaty of Lausanne, on the basis of Protocol XII. There would appear to be precedents for this.

Finally one last point remains which concerns the question of retrospective effect raised by His Britannic Majesty's Agent. If the Court's jurisdiction is based on Article XI of the Mandate, this clause must be applicable to the dispute, not merely ratione materiae, but also ratione temporis.

It must in the first place be remembered that at the time when the opposing views of the two Governments took definite shape (April 1924), and at the time when proceedings were instituted, the Mandate for Palestine was in force. The Court is of opinion that, in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment. In the present case, this interpretation appears to be indicated by the terms of Article 26 itself where it is laid down that "any dispute whatsoever . . . which may arise" shall be submitted to the Court. The reservation made in many arbitration treaties regarding disputes arising out of events previous to the conclusion of the treaty seems to prove the necessity for an explicit limitation of jurisdiction and, consequently, the correctness of the rule of interpretation enunciated above. The fact of a dispute having arisen at a given moment between two States is a sufficient basis for determining whether as regards tests of time, jurisdiction exists, whereas any definition of the events leading up to a dispute is in many cases inextricably bound up with the actual merits of the dispute.

Nevertheless, even supposing that it were admitted as essential that the act alleged by the Applicant to be contrary to the provisions of the Mandate should have taken place at a period when the Mandate was in force, the Court believes that this condition is fulfilled in the present case. If the grant of the Rutenberg Concessions, in so far as they may be regarded as incompatible, at least in part, with those of Mavrommatis, constitutes the alleged breach of the terms of the Mandate, this breach, no matter on what date it was first committed, still subsists, and the provisions of the Mandate are therefore applicable to it. There is no doubt that the Manda- tory régime was in force when the British Government, in its letter of April 1st, 1924, adopted the attitude which, in the opinion of the Greek Government, rendered it impossible to continue negotiations with a view to a settlement and, by so doing, imparted to the breach of the Mandate, alleged by Greece to have occurred, a definitive character.

For these reasons the Court does not feel called to consider whether the provisions of the Mandate, once they are in force, apply retrospectively to the period when, according to the Greek application, the British Armies utilised, after 1918, certain of M. Mavrommatis' surveys, and when the Palestine Authorities and the Colonial Office, in 1921, failed to regard themselves as bound to respect the concessions in question to the extent claimed by M. Mavrommatis.

Without dwelling further on this aspect of the problem, the Court feels constrained to observe that the Mandate system including the Mandates to be established for territories formerly belonging to the Ottoman Empire, dates back to Article 22 of the Covenant of the League of Nations; furthermore that the Mandate for Palestine was entrusted to Great Britain by the Principal Allied Powers in 1920, and, finally, that in 1921 the draft of the Mandate for Palestine contained a reservation regarding Articles 311 and 312 of the Treaty of Sèvres.

**FOR THESE REASONS**

The Court, having heard both Parties,

Upholds the preliminary objection submitted by His Britannic Majesty's Government in so far as it relates to the claim in respect of the works at Jaffa and dismisses it in so far as it relates to the claim in respect of the works at Jerusalem;

Reserves this part of the suit for judgment on the merits;

And instructs the President to fix, in accordance with Article 33 of the Rules of Court, the times for the deposit of further documents of the written proceedings.

Done in French and English, the French text being authoritative.
At the Peace Palace, The Hague, this thirtieth day of August one thousand nine hundred and twenty four, in three 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 and of the Greek Republic respectively.

(Signed) LODER,
President.

(Signed) Å. HAMMARSJÖLD,
Registrar.

Lord Finlay and MM. Moore, de Bustamante, Oda and Pessôa, declaring that they are unable to concur in the judgment delivered by the Court, and availing themselves of the right conferred on them by Article 57 of the Court Statute, have delivered the separate opinions which follow hereafter.

(Initialled) L.

(Initialled) Å. H.
Island of Palmas (Netherlands, USA), 4 April 1928

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Island of Palmas case (Netherlands, USA)

4 April 1928

VOLUME II pp. 829-871

PARTIES: Netherlands, U.S.A.

SPECIAL AGREEMENT: January 23, 1925.

ARBITRATOR: Max Huber (Switzerland).

AWARD: The Hague, April, 1928.

Territorial sovereignty.—Contiguity and title to territory.—Continuous and peaceful display of sovereignty.—The “inter temporal” law.—Rules of evidence in international proceedings.—Maps as evidence.—Inchoate title.—Passivity in relation to occupation.—Dutch East India Company as subject of international law.—Treaties with native princes.—Subsequent practice as an element of interpretation.

* For bibliography, index and tables, see Volume III.
Special Agreement.
[See beginning of Award below.]

AWARD OF THE TRIBUNAL.

Award of the tribunal of arbitration rendered in conformity with the special agreement concluded on January 23, 1925, between the United States of America and the Netherlands relating to the arbitration of differences respecting sovereignty over the Island of Palmas (or Miangas).—The Hague, April 4, 1928.

An agreement relating to the arbitration of differences respecting sovereignty over the Island of Palmas (or Miangas) was signed by the United States of America and the Netherlands on January 23rd, 1925. The text of the agreement runs as follows:

The United States of America and Her Majesty the Queen of the Netherlands,

Desiring to terminate in accordance with the principles of International Law and any applicable treaty provisions the differences which have arisen and now subsist between them with respect to the sovereignty over the Island of Palmas (or Miangas) situated approximately fifty miles south-east from Cape San Augustin, Island of Mindanao, at about five degrees and thirty-five minutes (5° 35') north latitude, one hundred and twenty-six degrees and thirty-six minutes (126° 36') longitude east from Greenwich;

Considering that these differences belong to those which, pursuant to Article I of the Arbitration Convention concluded by the two high contracting parties on May 2, 1908, and renewed by agreements, dated May 9, 1914, March 8, 1919, and February 13, 1924, respectively, might well be submitted to arbitration,

Have appointed as their respective plenipotentiaries for the purpose of concluding the following special agreement:

The President of the United States of America: Charles Evans Hughes, Secretary of State of the United States of America, and

Her Majesty the Queen of the Netherlands: Jonkheer Dr. A. C. D. de Graeff, Her Majesty's Envoy Extraordinary and Minister Plenipotentiary at Washington,

Who, after exhibiting to each other their respective full powers, which were found to be in due and proper form, have agreed upon the following articles:

Article I.

The United States of America and Her Majesty the Queen of the Netherlands hereby agree to refer the decision of the above-mentioned
differences to the Permanent Court of Arbitration at The Hague. The arbitral tribunal shall consist of one arbitrator.

The sole duty of the Arbitrator shall be to determine whether the Island of Palmas (or Miangas) in its entirety forms a part of territory belonging to the United States of America or of Netherlands territory. The two Governments shall designate the Arbitrator from the members of the Permanent Court of Arbitration. If they shall be unable to agree on such designation, they shall unite in requesting the President of the Swiss Confederation to designate the Arbitrator.

Article II.

Within six months after the exchange of ratifications of this special agreement, each Government shall present to the other party two printed copies of a memorandum containing a statement of its contentions and the documents in support thereof. It shall be sufficient for this purpose if the copies aforesaid are delivered by the Government of the United States at the Netherlands Legation at Washington and by the Netherlands Government at the American Legation at The Hague, for transmission. As soon thereafter as possible and within thirty days, each party shall transmit two printed copies of its memorandum to the International Bureau of the Permanent Court of Arbitration for delivery to the Arbitrator.

Within six months after the expiration of the period above fixed for the delivery of the memoranda to the parties, each party may, if it is deemed advisable, transmit to the other two printed copies of a counter-memorandum and any documents in support thereof in answer to the memorandum of the other party. The copies of the counter-memorandum shall be delivered to the parties, and within thirty days thereafter to the Arbitrator, in the manner provided for in the foregoing paragraph respecting the delivery of memoranda.

At the instance of one or both of the parties, the Arbitrator shall have authority, after hearing both parties and for good cause shown, to extend the above-mentioned periods.

Article III.

After the exchange of the counter-memoranda, the case shall be deemed closed unless the Arbitrator applies to either or both of the parties for further written explanations.

In case the Arbitrator makes such a request on either party, he shall do so through the International Bureau of the Permanent Court of Arbitration which shall communicate a copy of his request to the other party. The party addressed shall be allowed for reply three months from the date of the receipt of the Arbitrator's request, which date shall be at once communicated to the other party and to the International Bureau. Such reply shall be communicated to the other party and within thirty days thereafter to the Arbitrator in the manner provided for above for the delivery of memoranda, and the opposite party may if it is deemed advisable, have a further period of three months to make rejoinder thereto, which shall be communicated in like manner.

The Arbitrator shall notify both parties through the International Bureau of the date upon which, in accordance with the foregoing pro-

visions, the case is closed, so far as the presentation of memoranda and evidence by either party is concerned.

Article IV.

The parties shall be at liberty to use, in the course of arbitration, the English or Dutch language or the native language of the Arbitrator. If either party uses the English or Dutch language, a translation into the native language of the Arbitrator shall be furnished if desired by him.

The Arbitrator shall be at liberty to use his native language or the English or Dutch language in the course of the arbitration and the award and opinion accompanying it may be in any one of those languages.

Article V.

The Arbitrator shall decide any questions of procedure which may arise during the course of the arbitration.

Article VI.

Immediately after the exchange of ratifications of this special agreement each party shall place in the hands of the Arbitrator the sum of one hundred pounds sterling by way of advance of costs.

Article VII.

The Arbitrator shall, within three months after the date upon which he declares the case closed for the presentation of memoranda and evidence, render his award in writing and deposit three signed copies thereof with the International Bureau at The Hague, one copy to be retained by the Bureau and one to be transmitted to each party, as soon as this may be done.

The award shall be accompanied by a statement of the grounds upon which it is based.

The Arbitrator shall fix the amount of the costs of procedure in his award. Each party shall defray, its own expenses and half of said costs of procedure and of the honorarium of the Arbitrator.

Article VIII.

The parties undertake to accept the award rendered by the Arbitrator within the limitations of this special agreement, as final and conclusive and without appeal.

All disputes connected with the interpretation and execution of the award shall be submitted to the decision of the Arbitrator.

Article IX.

This special 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 as soon as possible at Washington.
In witness whereof the respective plenipotentiaries have signed this special agreement and have hereunto affixed their seals.

Done in duplicate in the City of Washington in the English and Netherlands languages this 23rd day of January, 1925.

(L. S.) CHARLES EVANS HUGHES.
(L. S.) de GRAEFF.

I.

The ratifications of the above agreement (hereafter called the Special Agreement) were exchanged at Washington on April 1st, 1925. By letters dated September 29th, 1925, the Ministry of Foreign Affairs of Her Majesty the Queen of the Netherlands and the Minister of the United States of America at The Hague asked the undersigned, Max Huber, of Zurich (Switzerland), member of the Permanent Court of Arbitration, whether he would be disposed to accept the mandate to act as sole arbitrator under the Special Agreement of January 23rd, 1925. The undersigned informed the Minister of Foreign Affairs of the Netherlands and the Minister of the United States of America at The Hague that he was willing to accept the task.

On October 16th and 18th, 1925, the International Bureau of the Permanent Court of Arbitration transmitted to the Arbitrator the Memorandum of the United States of America and the Netherlands with the documents in support thereof. On April 23rd and 24th, 1926, the Counter-Memorandum of the Netherlands and the United States of America with documents in support thereof were transmitted to the Arbitrator through the International Bureau.

Availing himself of the authority given him under Article III of the Special Agreement, the Arbitrator transmitted through the intermediary of the International Bureau of the Permanent Court of Arbitration to each party a list of points upon which he was desirous to obtain further written Explanations. This request was obtained by the Netherlands on December 24th, 1926, and by the United States of America on January 6th, 1927. The Arbitrator received through the intermediary of the International Bureau the Explanations of the Netherlands, with documents in support thereof, on March 24th, 1927, and those of the United States of America on April 22nd, 1927.

On May 19th, 1927, the Arbitrator received through the International Bureau a memorandum of the American Government, dated May 2nd, 1927.

1. Memorandum of the United States, with appendix, 219 pages and 12 maps in folder.
2. Memorandum of the Netherlands, with appendices, 35 pages, 4 maps and sketches and reproduction of photos in folder, British Admiralty Chart 2575, with inscriptions, six copies of diplomatic correspondence between the United States Department of State and the Netherlands Legation in Washington.
3. Counter-Memorandum of the United States, with appendices, 95 pages and 1 map.
4. Counter-Memorandum of the United States, with appendix, 121 pages, 3 photos and 3 maps.
5. Explanations of the Netherlands, 146 pages and XX annexes (25 maps and sketches, reproduction of Dampier's Journal, copies of entries of log-books and biographical notice concerning the late Dr. Adran).

The United States expressed the desire to make a Rejoinder as provided for in Article III of the Special Agreement "unless the Arbitrator prefers not to receive it, in which case none will be filed, unless one is filed by the Netherlands Government". At the same time the United States Government made an application for an extension of three months beyond the period mentioned in Article III for the filing of a Rejoinder, and invoked in support of this application the fact that the Explanations of the Netherlands were considerably more voluminous than the Memorandum, and contained a large mass of untranslated Dutch documents, and more than 25 maps.

The Netherlands Government had already on May 9th, 1927, declared that they renounced the right to submit a Rejoinder, making however the express reservation that they maintained the points of view which the American Explanations contended.

The Arbitrator, on the analogy of the rule laid down in the last paragraph of Article II, invited the Netherlands Government by a letter dated May 13th, 1927, and addressed to the International Bureau, to state their point of view in regard to the American application.

The Netherlands Government having declared that they had no objection to the extension of the time-limit in conformity with the American application, the Arbitrator, in a letter to the International Bureau dated May 23rd, 1927, informed the Parties that the extension of three months beyond the period provided for in Article III for the filing of a Rejoinder was granted.

On October 21st, 1927, the Rejoinder of the United States was transmitted by the International Bureau to the Arbitrator.

No objection by either Party was made during the proceedings in regard to the fact that one of the documents provided for in the Agreement of January 23rd, 1925, was not filed within the time-limits fixed in the said Agreement.

On March 3rd, 1928, the Arbitrator informed the Parties through the International Bureau of the Permanent Court of Arbitration, that, in conformity with the last paragraph of Article III, the case was closed.

On this fourth day of April, 1928, i.e. within the period fixed by Article VII, the three copies of the award are deposited with the International Bureau of the Permanent Court of Arbitration, at The Hague.

In conformity with the second paragraph of Article IV of the Special Agreement, the Arbitrator selected the English language. Having regard to the fact that geographical names are differently spelled in different documents and on different maps, the Arbitrator gives geographical names as shown on the British Admiralty Chart 2575, as being the most modern of the large scale maps laid before him. Other names and, if necessary, their variations, are given in bracket or parenthesis.

In accordance with Article VIII, paragraph 3, the costs of procedure are fixed at £140.

II.

The subject of the dispute is the sovereignty over the Island of Palmas (or Miangas). The Island in question is indicated with precision in the preamble to the Special Agreement, its latitude and longitude being specified. The fact that in the diplomatic correspondence prior to the conclusion of the Special Agreement, and in the documents of the arbitration proceedings, the United States refer to the "Island of Palmas" and the Netherlands to the
"Island of Mianga", does not therefore concern the identity of the subject of the dispute. Such difference concerns only the question whether certain assertions made by the Netherlands Government really relate to the island described in the Special Agreement or another island or group of islands which might be designated by the name of Mianga or a similar name.

It results from the evidence produced by either side that Palmas (or Mianga) is a group of islands, not one of several islands clustered together. It lies about halfway between Cape San Augustin (Mindanao, Philippine Islands) and the most northerly island of the Nanusa (Nanoasa) group (Netherlands East Indies).

The origin of the dispute is to be found in the visit paid to the Island of Palmas (or Mianga) on January 21st, 1906, by General Leonard Wood, who was then Governor of the Province of Moro. It is true that according to information contained in the Counter-Memorandum of the United States the same General Wood had already visited the island "about the year 1903", but as this previous visit appears to have had little effect, and it seems even doubtful whether it took place, that of January 21st, 1906, is to be regarded as the first entry into contact by the American authorities with the island. The report of General Wood to the Military Secretary, United States Army, dated January 26th, 1906, and the certificate delivered on January 21st by First Lieutenant Gordon Johnson to the native interrogated by the controller of the Sangi (Sanghi) and Talauer (Talaut) Islands clearly show that the visit of January 21st relates to the island in dispute.

This visit led to the statement that the Island of Palmas (or Mianga), undoubtedly included in the "archipelago known as the Philippine Islands", as delimited by Article IV of the Treaty of Peace between the United States and Spain, dated December 10th, 1898 (hereinafter also called "Treaty of Paris"), and ceded in virtue of the said article to the United States, was considered by the Netherlands as forming part of the territory of their possessions in the East Indies. There followed a diplomatic correspondence, beginning on March 31st, 1906, and leading up to the conclusion of the Special Agreement of January 23rd, 1925.

Before beginning to consider the arguments of the Parties, we may at the outset take as established certain facts which, according to the pleadings, are not contested.

1. The Treaty of Peace of December 10th, 1898, and the Special Agreement of January 23rd, 1925, are the only international instruments laid before the Arbitrator which refer precisely, that is, by mathematical location or by express and unequivocal mention, to the island in dispute, or include it in or exclude it from a zone delimited by a geographical frontier-line. Thus the scope of the international treaties which relate to the "Philippines" and of conventions entered into with native Princes shall be considered in connection with the arguments of the Party relying on a particular act.

2. Before 1906 no dispute had arisen between the United States or Spain, on the one hand, and the Netherlands, on the other, in regard specifically to the Island of Palmas (or Mianga), on the ground that these Powers put forward conflicting claims to sovereignty over the said island.

3. The two Parties claim the island in question as a territory attached for a very long period to territories relatively close at hand which are incontestably under the sovereignty of the one or the other of them.

4. It results from the terms of the Special Agreement (Article 1) that the Parties adopt the view that for the purposes of the present arbitration the island in question can belong only to one or the other of them. Rights of the Powers only come into account as far as the rights of the Parties to the dispute may be derived from them.

* * *

The dispute having been submitted to arbitration by Special Agreement, each Party is called upon to establish the arguments on which it relies in support of its claim to sovereignty over the object in dispute. As regards the order in which the Parties' arguments should be considered, it appears right to examine first the title put forward by the United States, arising out of a treaty and itself derived, according to the American arguments, from an original title which would date back to a period prior to the birth of the title put forward by the Netherlands; in the second place, the arguments invoked by the Netherlands in favour of their title to sovereignty will be considered; finally the result of the examination of the titles alleged by the two Parties must be judged in the light of the mandate conferred on the Arbitrator by Article 1, paragraph 2, of the Special Agreement.

* * *

In the absence of an international instrument recognized by both Parties and explicitly determining the legal position of the Island of Palmas (or Mianga), the arguments of the Parties may in a general way be summed up as follows:

The United States, as successor to the rights of Spain over the Philippines, bases its title in the first place on discovery. The existence of sovereignty thus acquired is, in the American view, confirmed not merely by the most reliable cartographers and authors, but also by treaty, in particular by the Treaty of Munster, of 1648, to which Spain and the Netherlands are themselves Contracting Parties. As, according to the same argument, nothing has occurred of a nature, in international law, to cause the acquired title to disappear, this latter title was intact at the moment when, by the Treaty of December 10th, 1898, Spain ceded the Philippines to the United States. In these circumstances, it is in the American view, unnecessary to establish facts showing the actual display of sovereignty precisely over the Island of Palmas (or Mianga). The United States Government finally maintains that Palmas (or Mianga) forms a geographical part of the Philippine group and in virtue of the principle of contiguity belongs to the Power having the sovereignty over the Philippines.

According to the Netherlands Government, on the other hand, the fact of discovery by Spain is not proved, nor yet any other form of acquisition, and even if Spain had at any moment had a title, such title had been lost. The principle of contiguity is contested.

The Netherlands Government's main argument endeavours to show that the Netherlands, represented for this purpose in the first period of colonisation by the East India Company, have possessed and exercised rights of sovereignty from 1677, or probably from a date prior even to 1648, to the present day. This sovereignty arose out of conventions entered into with
native princes of the Island of Sangi (the main island of the Talautse (Sangi) Isles), establishing the suzerainty of the Netherlands over the territories of these princes, including Palmas (or Miangas). The state of affairs thus set up is claimed to be validated by international treaties.

The facts alleged in support of the Netherlands' arguments are, in the United States Government's view, not proved, and, even if they were proved, they would not create a title of sovereignty, or would not concern the Island of Palmas.

* * *

Before considering the Parties' arguments, two points of a general character are to be dealt with, one relating to the substantive law to be applied, namely the rules on territorial sovereignty which underlie the present case, and the other relating to the rules of procedure, namely the conditions under which the Parties may, under the Special Agreement, substantiate their claims.

In the first place the Arbitrator deems it necessary to make some general remarks on sovereignty in its relation to territory.

The Arbitrator will as far as possible keep to the terminology employed in the Special Agreement. The preamble refers to 'sovereignty over the Island of Palmas (or Miangas)', and under Article 1, paragraph 2, the Arbitrator's task is to determine whether the Island of Palmas (or Miangas) in its entirety forms a part of Netherlands territory or of territory belonging to the United States of America'. It appears to follow that sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular State. Sovereignty in relation to territory is in the present award called 'territorial sovereignty'.

Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries, and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations. The special cases of the composite State, of collective sovereignty, etc., do not fall to be considered here and do not, for that matter, throw any doubt upon the principle which has just been enunciated. Under this reservation it may be stated that territorial sovereignty belongs always to one, or in exceptional circumstances to several States, to the exclusion of all others. The fact that the functions of a State can be performed by any State within a given zone is, on the other hand, precisely the characteristic feature of the legal situation pertaining in those parts of the globe which, like the high seas or lands without a master, cannot or do not yet form the territory of a State.

Territorial sovereignty is, in general, a situation recognized and delimited in space, either by so-called natural frontiers as recognised by international law or by outward signs of delimitation that are undisputed, or else by legal engagements entered into between interested neighbours, such as frontier conventions, or by acts of recognition of States within fixed boundaries. If a dispute arises as to the sovereignty over a portion of territory, it is custom-
The principle that continuous and peaceful display of the functions of State within a given region is a constituent element of territorial sovereignty is not only based on the conditions of the formation of independent States and their boundaries (as shown by the experience of political history) as well as on international jurisprudence and doctrine widely accepted; this principle has further been recognized in more than one federal State, where a jurisdiction is established in order to apply, as need arises, rules of international law to the interstate relations of the States members. This is the more significant, in that it might well be conceived that in a federal State possessing a complete judicial system for interstate matters—far more than in the domain of international relations properly so-called—there should be applied to territorial questions the principle that, failing any specific provision of law to the contrary, a jus in re once lawfully acquired shall prevail over de facto possession however well established.

It may suffice to quote among several non-parallel decisions of the Supreme Court of the United States of America that in the case of the State of Indiana v. State of Kentucky (136 U.S. 479) 1890, where the precedent of the case of Rhode Island v. Massachusetts (4 Haw. 591, 639) is supported by quotations from Vattel and Wheaton, both who admit prescription founded on length of time as a valid and incontestable title.

Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions accessible from, for instance, the high seas. It is true that neighbouring States may by convention fix limits to their own sovereignty, even in regions such as the interior of sparsely inhabited continents where such sovereignty is scarcely manifested, and in this way each may prevent the other from any penetration of its territory. The delimitation of Hinterland may also be mentioned in this connection.

If, however, no conventional line of sufficient topographical precision exists or if there are gaps in the lines otherwise established, or if a conventional line leaves room for doubt, or if, as e.g. in the case of an island situated in the high seas, the question arises whether a title is valid in rem, the actual continuous and peaceful display of State functions is in case of dispute the sound and natural criterion of territorial sovereignty.

The United States in their Counter-Memorandum and their Rejoinder maintain the view that statements without evidence to support them cannot be taken into consideration in an international arbitration, and that evidence is not only to be referred to, but is to be laid before the tribunal. The United States further hold that, since the Memorandum is the only document necessary to be filed by the Parties under the Special Agreement, evidence in support of the statements therein made should have been filed at the same time. The Netherlands Government, particularly in the Explanations furnished at the request of the Arbitrator, maintains that no formal rules of evidence exist in international arbitrations and that no rule limiting the freedom of the tribunal in forming its conclusions has been established by the Special Agreement of January 23rd, 1925. They hold further that state-
of the above-mentioned articles of the Hague Convention or the taking into consideration of allegations not supported by evidence filed at the same time. No documents which are not on record have been relied upon, with the exception of the Treaty of Utrecht—invoked however in the Netherlands Counter-Memorandum—the text of which is of public notoriety and accessible to the Parties, and no allegation not supported by evidence is taken as foundation for the award. The possibility to make a Rejoinder to the Explanations furnished at the request of the Arbitrator on points contained in the Memoranda and Counter-Memoranda and the extension of the time-limits for filing a Rejoinder have put both Parties in a position to state—under fair conditions—their view in regard to that evidence which came forth only at a subsequent stage of the proceedings.

III.

The title alleged by the United States of America as constituting the immediate foundation of its claim is that of cession, brought about by the Treaty of Paris, which cession transferred all rights of sovereignty which Spain may have possessed in the region indicated in Article III of the said Treaty and therefore also those concerning the Island of Palmas (or Miangas).

It is evident that Spain could not transfer more rights than she herself possessed. This principle of law is expressly recognized in a letter dated April 7th, 1900, from the Secretary of State of the United States to the Spanish Minister at Washington concerning a divergence of opinion which arose about the question whether two islands claimed by Spain as Spanish territory and lying just outside the limits traced by the Treaty of Paris were to be considered as included in, or excluded from the cession. This letter, reproduced in the Explanations of the United States Government, contains the following passage:

The metes and bounds defined in the treaty were not understood by either party to limit or extend Spain's right of cession. Were any island within those described bounds ascertained to belong in fact to Japan, China, Great Britain or Holland, the United States could derive no valid title from its ostensible inclusion in the Spanish cession. The compact upon which the United States negotiators insisted was that all Spanish title to the archipelago known as the Philippine Islands should pass to the United States—no less or more than Spain's actual holdings therein, but all. This Government must consequently hold that the only competent and equitable test of fact by which the title to a disputed cession in that quarter may be determined is simply this: "Was it Spain's to give? If valid title belonged to Spain, it passed; if Spain had no valid title, she could convey none."

Whilst there existed a divergence of views as to the extension of the cession to certain Spanish islands outside the treaty limits, it would seem that the cessionary Power never envisaged that the cession, in spite of the sweeping terms of Article III, should comprise territories on which Spain had not a valid title, though falling within the limits traced by the Treaty. It is evident that whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers. One observation, however, is to be made. Article III of the Treaty of Paris, which is drafted differently from the preceding Article concerning Porto Rico, is so worded that it seems as though the Philippine Archipelago, within the limits fixed by that Article, was at the moment of cession under Spanish sovereignty. As already stated the Island of Palmas lies within the lines traced by the Treaty. Article III may therefore be considered as an affirmation of sovereignty on the part of Spain as regards the Island of Palmas (or Miangas), and this right or claim of right would have been ceded to the United States, though the negotiations of 1898, as far as they are on the record of the present case, do not disclose that the situation of Palmas had been specifically examined.

It is recognized that the United States communicated, on February 3rd, 1899, the Treaty of Paris to the Netherlands, and that no reservations were made by the latter in respect to the delimitation of the Philippines in Article III. The question whether the silence of a third Power, in regard to a treaty notified to it, can exercise any influence on the rights of this Power, or on those of the Powers signatories of the treaty, is a question the answer to which may depend on the nature of such rights. Whilst it is conceivable that a conventional delimitation duly notified to third Powers and left without contestation on their part may have some bearing on an inchoate title not supported by any actual display of sovereignty, it would be entirely contrary to the principles laid down above as to territorial sovereignty to suppose that such sovereignty could be affected by the mere silence of the territorial sovereign as regards a treaty which has been notified to him and which seems to dispose of a part of his territory.

The essential point is therefore whether the Island of Palmas (or Miangas) at the moment of the conclusion and coming into force of the Treaty of Paris formed a part of the Spanish or Netherlands territory. The United States declares that Palmas (or Miangas) was Spanish territory and denies the existence of Dutch sovereignty; the Netherlands maintain the existence of their sovereignty and deny that of Spain. Only if the examination of the arguments of both Parties should lead to the conclusion that the Island of Palmas (or Miangas) was at the critical moment neither Spanish nor Netherlands territory, would the question arise whether—and, if so, how—the conclusion of the Treaty of Paris and its notification to the Netherlands might have interfered with the rights which the Netherlands or the United States of America may claim over the island in dispute.

As pointed out above, the United States bases its claim, as successor of Spain, in the first place on discovery. In this connection a distinction must be made between the discovery of the Island of Palmas (or Miangas) as such, or as a part of the Philippines, which, beyond doubt, were discovered and even occupied and colonised by the Spaniards. This latter point, however, will be considered with the argument relating to contiguity; the problem of discovery is considered only in relation to the island itself which forms the subject of the dispute.

The documents supplied to the Arbitrator with regard to the discovery of the Island in question consist in the first place of a communication made by the Spanish Government to the United States Government as to researches in the archives concerning expeditions and discoveries in the Moluccas, the "Taloa" Islands, the Puloons and the Marianeas. The United States Government, in its Rejoinder, however states that it does not specifically rely on the papers mentioned in the Spanish note.
It is probable that the island seen when the Palaos Islands were discovered, and reported as situated at latitude 5° 48' North, to the East of Sarangani and Cape San Augustin, was identical with the Island of Palmas (or Miangas). The Island "Meeguis" mentioned by the Spanish Government and presumed by them to be identical with the Talas—probably Tal routed or Talauer Islands—seems in reality to be an island lying more to the south, to which, perhaps by error, the name of "Mangias" or "Mangares" has been transferred or which may be identical with the island Tanganuland (Taotao or Tahaolian) just south of Siau (Siaoe), the latter island being probably identical with "Suar" mentioned in the same report as lying close by. Tanganuland is also the southernmost of the islands situated between Celebes and Mindanao, whilst Palmas (or Miangas) is the northernmost. On Tanganuland there is a place called Minangan, the only name, as it would seem, to be found on maps of the region in question which is closely similar to "Mangias" and the different variations of this word. The name of "Mangias" appears as that of a place on "Tagulanda" in official documents of 1678, 1779, 1896 and 1905, but is never applied to the island itself; it is therefore not probable that there exists a confusion between Palmas (Miangas) and Minangan (Manangan) in spite of the fact that both islands belonged to Tabukan. However, there may exist some connection between Minangan and the island "Meeguis", reported by the Spanish navigators.

The above-mentioned communication of the Spanish Government does not give any details as to the date of the expedition, the navigators or the circumstances in which the observations were made; it is not supported by extracts from the original reports on which it is based, nor accompanied by reproductions of the maps therein mentioned.

In its Rejoinder the United States Government gives quotations (translations) from a report of the voyages of Garcia de Loaisa which point to the fact that the Spanish explorer saw the Island of Palmas (Miangas) in October 1526.

The fact that an island marked as "I (Iba) de (or das) Palmeiras", or by similar names (Poluanas, Palmas), appears on maps at any rate as early as 1595 (or 1596) (the date of the earliest map filed in the dossier), approximates on the site of the Island of Palmas (or Miangas), shows that that island was known and therefore already discovered in the 16th century. According to the Netherlands memorandum, the same indications are found already on maps of 1554, 1558 and 1590. The Portuguese name (Iba das Palmeiras) could not in itself decide the question whether the discovery was made on behalf of Portugal or of Spain; Linschoten's map, which includes the name "I. das Palmeiras", applies Portuguese names for most of the Philippine Islands, which from the beginning were discovered and occupied by Spain.

It does not seem that the discovery of the Island of Palmas (or Miangas) would have been made on behalf of a Power other than Spain or Portugal. In any case for the purpose of the present affair it may be admitted that the original title derived from discovery belonged to Spain: for the relations between Spain and Portugal in the Celebes Sea during the first three quarters of the 16th century may be disregarded for the following reasons. In 1581, i.e. prior to the appearance of the Dutch in the regions in question, the crowns of Spain and Portugal were united. Though the struggle for separation of Portugal from Spain had already begun in December 1640, Spain had not yet recognized the separation when it concluded in 1648 with the Netherlands the Treaty of Münster—the earliest Treaty, as will be seen thereafter, to define the relations between Spain and the Netherlands in the regions in question. This Treaty contains special provisions as to Portuguese possessions, but alone in regard to such places as were taken from the Netherlands by the Portuguese in and after 1641. It seems necessary to draw from this fact the conclusion that, for the relations inter se of the two signatories of the Treaty of Münster, the same rules had to be applied both to the possessions originally Spanish and to those originally Portuguese. This conclusion is corroborated by the wording of Article X of the Treaty of Utrecht of June 26th, 1714, which expressly maintains Article V of the Treaty of Münster, but not as far as Spain and the Netherlands are concerned. It is therefore not necessary to find out which of the two nations acquired the original title, nor what the possible effects of subsequent conquests and cessions may have been on such title before 1648.

The fact that the island was originally called, not as customarily, by a native name, but by a name borrowed from a European language, and referring to the vegetation, serves perhaps to show that no landing was made or that the island was uninhabited at the time of discovery. Indeed, the reports on record which concern the discovery of the Island of Palmas state only that an island was "seen", which island, according to the geographical data, is probably identical with that in dispute. No mention is made of landing or of contact with the natives. And in any case no signs of taking possession or of administration by Spain have been shown or even alleged to exist until the very recent date to which the reports of Captain Malone and M. Alvarado of 1916, contained in the United States Memorandum, refer.

It is admitted by both sides that international law underwent profound modifications between the end of the Middle-Ages and the end of the 19th century, as regards the rights of discovery and acquisition of uninhabited regions or regions inhabited by savages or semi-civilized peoples. Both Parties are also agreed that a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled. The effect of discovery by Spain is therefore to be determined by the rules of the law in force in the first half of the 16th century—or (to take the earliest date) in the first quarter of it, i.e. at the time when the Portuguese or Spaniards made their appearance in the Sea of Celebes.

If the view most favourable to the American arguments is adopted—with every reservation as to the soundness of such view—that is to say, if we consider as positive law at the period in question the rule that discovery as such, i.e. the mere fact of seeing land, without any act, even symbolical, of taking possession, involved the title to the right of sovereignty and not merely an "inchoate title", a jus ad rem, to be completed eventually by an actual and durable taking of possession within a reasonable time, the question arises whether sovereignty yet existed at the critical date, i.e. the moment of conclusion and coming into force of the Treaty of Paris.

As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act of creation of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of the law. International law in the 19th century, having regard to the fact that most parts of the globe were under the sovereignty of States members of the community of nations, and
that territories without a master had become relatively few, took account of a tendency already existing and especially developed since the middle of the 18th century, and laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other States and their nationals. It seems therefore incompatible with this rule of positive law that there should be regions which are neither under the effective sovereignty of a State, nor without a master, but which are reserved for the exclusive influence of one State, in virtue solely of a title of acquisition which is no longer recognized by existing law, even if such a title ever conferred territorial sovereignty. For these reasons, discovery alone, without any subsequent act, cannot, at the present time suffice to prove sovereignty over the Island of Palmas (or Miangas); and in so far as there is no sovereignty, the question of an abandonment properly speaking of sovereignty by one State in order that the sovereignty of another may take its place does not arise.

If, on the other hand, the view is adopted that discovery does not create a definitive title of sovereignty, but only an "inchoate" title, such a title exists, it is true, without external manifestation. However, according to the view that has prevailed at any rate since the 19th century, an inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered. This principle must be applied in the present case, for the reasons given above in regard to the manner in which of successive legal systems is to be applied (the so-called intertemporal law). Now, no act of occupation is, except as to a recent period, any exercise of sovereignty at Palmas by Spain has been alleged. But even admitting that the Spanish title still existed as inchoate in 1898 and must be considered as included in the cession under Article III of the Treaty of Paris, an inchoate title could not prevail over the continuous and peaceful display of authority by another State; for such display may prevail even over a prior, definitive title put forward by another State. This point will be considered, when the Netherlands argument has been examined and the allegations of either Party as to the display of their authority can be compared.

In the second place the United States claim sovereignty over the Island of Palmas on the ground of recognition by Treaty. The Treaty of Peace of January 30th, 1648, called hereafter, in accordance with the practice of the Parties, the "Treaty of Münster", which established a state of peace between Spain and the States General of the United Provinces of the Netherlands, in Article V, deals with territorial relations between the two Powers as regards the East and West Indies (Article VI concerns solely the latter).

Article V, quoted in the French text published in the "Corps Universel Diplomatique du Droit des Gens", by J. Du Mont, Volume VI, Part I, 1726, page 430, runs as follows: 1

The English translation given in the Memorandum of the United States runs as follows: "Treaty of Peace between Philip IV, Catholic King of Spain, and their Lordships the States General of the United Provinces of the Netherlands. Anno 1648, January 30th.

Article V.

The navigation and trade to the East and West Indies shall be kept up and conformably to the grants made or to be made for that effect; for the security

whereof the present treaty shall serve, and the Ratification thereof on both sides, which shall be obtained; and in the said treaty shall be comprehended all potencies, nations, and people, with whom the said Lords the States, or members of the East and West India Companies, have treated, within the limits of their said grants, are in friendship and alliance. And each one of them, that is to say, the said Lords the King and States, respectively, shall remain in possession of and enjoy such lordships, towns, castles, fortresses, commerce and countries of the East and West Indies, as well as of Brazil, and on the coasts of Asia, Africa, and America, respectively, which the said Lords the King and States, respectively, hold and possess, in this being specially comprised the spots and places which the Portuguese since the year 1641 have taken from the said Lords the States and occupied, comprising also the spots and places which the said Lords the States hereafter without infraction of the present treaty shall come to conquer and possess.

The said States the General of the East and West India Companies of the United Provinces, as also the servants and officers, high and low, the soldiers and seamen actually in the service of either of the said Companies, or such as have been in their service, as also such who in this country, or within the district of the said two companies, continue yet out of the service, but who may be employed afterwards, shall be and remain to be free and unmolested in all the countries under the obedience of the said Lord the King in Europe; and may sail, traffic and resort, like all the other inhabitants of the countries of the said Lords and States. Moreover it has been agreed and stipulated, that the Spaniards shall keep their navigation to the East Indies, in the same manner they hold it at present, without being at liberty to go further; and the inhabitants of those Low Countries shall not frequent the places which the Casililains have in the East Indies."
plus avant, comme aussi les Habits de ce Pays-Bas s'abstienrent de la frequensation des Places, que les Castillans ont et Indes Orientales.

This article prescribes no frontiers and appoints no definite regions as belonging to one Power or the other. On the other hand, it establishes as a criterion the principle of possession ("demeureront en possession et jouiront de telles seigneuries,... que lesdits Seigneurs Roy et Estats tiennent et posséderont"). However liberal be the interpretation given, for the period in question, to the notions of "tenir" (hold) and "posséder" (possess), it is hardly possible to comprise within these terms the right arising out of mere discovery; i.e., out of the fact that the island had been sighted. If title arising from discovery, well-known and already a matter of controversy at the period in question, were meant to be recognized by the treaty, it would probably have been mentioned in express terms. The view here taken appears to be supported by other provisions in the same article. It is stipulated therein that "les Lieux & Places qu‘ieux Seigneurs Estats cy-apres sans infraction du present Traicté viendront à conquérir et posséder" shall be placed on the same footing as those which they possessed at the time the treaty was concluded. In view of the interpretation given by Spain and Portugal to the right of discovery, and to the Bull Inter Caetera of Alexander VI, 1493, it seems that the regions which the Treaty of Munster does not consider as definitely acquired by the two Powers in the East and West Indies, and which may in certain circumstances be capable of subsequent acquisition by the Netherlands, cannot fail to include regions claimed as discovered, but not possessed. It must further be remembered that Article V provides not merely a solution of the territorial question on the basis of possession, but also a solution of the Spanish navigation question on the basis of the status quo. Whilst Spain may not extend the limits of her navigation in the East Indies, nationals of the Netherlands are not excluded from "places" which the Spaniards hold in the East Indies. Without navigation there is no possibility of occupying and colonizing regions as yet only discovered; on the other hand, the exclusion from Spanish "places" of Netherlands navigation and commerce does not admit of an extensive interpretation, a "place", which moreover in the French of that period often means a fortified place, is in any case an actual settlement implying an actual radius of activity; Article VI, for instance, of the same treaty speaks of "lieux et places garnies de Forts, Loges et Chateaux" (harbours, places, forts, lodgements or castles). For these reasons a title based on mere discovery cannot apply to the situation considered in Article V as already established.

Since the Treaty of Munster does not divide the territories by means of a geographical distribution, and since it indirectly refuses to recognize title based on discovery as such, the bearing of the treaty on the present case is to be determined by the proof of possession on the critical epoch.

In connection herewith no precise elements of proof based on historical facts as to the display or even the mere affirmation of sovereignty by Spain over the Island of Palmes have been put forward by the United States. There is, however, one point to be considered in connection with the Treaty of Munster. According to a report, reproduced in the United States Explanations and made on February 7th, 1927, by the Provincial Prelacy of the Franciscan Order of Minors of the Province of St. Gregory the Great of the Philippines, the "Islands Miangis" ("Las Islas Miangis"), situated to the north-east of the "Island of Karekelan" (most likely identical with the Nanusa N.E. of Karakelang, one of the Talauer Islands), after having been first in Portuguese, and then in Dutch possession, were taken by the Spaniards in 1606. The Spanish rule under which the Spanish Franciscan Fathers of the Philippines exercised the spiritual administration in the said islands, ended in 1666, when the Captain general of the Spanish Royal Armada dismantled the fortified places in the Miangis, making however before the "Dutch Governor of Malayo" a formal declaration as to the continuance of the rights of the Spanish Crown over the places, forts and fortifications from which the Spaniards withdrew. There are further allegations as to historical facts in regard to the same region contained in a report of the Dutch Resident of Menado, dated August 12th, 1657, concerning the Talauer Islands (Talaua Islands). According to this report, in 1677 the Spaniards were driven by the Dutch from Tabukan, on the Talaua or Sangi Islands, and at that time— even "long before the coming of the Dutch to the Abundance of all the Miangis"—the Talauer Islands (Karekelang) had been conquered by the Refals of Tabukan.

According to the Dutch argument, considered heretofore, the Island of Palmes (or Miangas) together with the Nanusa and Talauer Islands (Talaua Islands) belonged to Tabukan. If this be exact, it may be considered as not unlikely that Miangas, in consequence of its ancient connection with the native State of Tabukan, was in 1648 in at least indirect possession of Spain. However this point has not been established by any specific proof. But the question whether the Dutch took possession of Tabukan in 1677 in conformity with or in violation of the Treaty of Munster can be disregarded, even if—in spite of the incompleteness of the evidence laid before the Arbitrator—it were admitted that the Talaua (Sangi) Islands with their dependencies in the Nanusa and Nanusa-Islands, Palmes (or Miangas) possibly included, were "held and possessed" by Spain in 1648. For on June 26th, 1714, a new Treaty of Peace was concluded at Utrecht, which, in its Article X, stipulates that the Treaty of Munster is maintained as far as not modified and that the above-quoted Article V remains in force as far as it concerns Spain and the Netherlands.

Article X. quoted in the French text published in "Actes, Mémoires et autres pièces authentiques concernant la Paix d‘Utrecht", Vol. 5, Utrecht, 1715, runs as follows:

Le Traité de Munster du 30 janvier 1648 fait enfeu Roi Philippe 4 & les Seigneurs Estats Généraux, servira de base au présent Traité, & aura lieu en tout, autant qu‘il ne sera pas changé par les Articles suivants, & pour autant qu‘il est applicable, & pour ce qui regarde les Articles 5 & 16 de ladite Paix de Munster, ils n‘auront lieu qu‘en ce qui concerne seulement lesdits deux hautes Puissances contractantes & leurs Sujets.

If—quite apart from the influence of an intervening state of war on treaty rights—this clause had not simply meant the confirmation of the principle of actual possession—at the time of the conclusion of the Treaty of Utrecht—as regulating the territorial status of the Contracting Powers in the East

1 Translation. The Treaty of Munster of January 30th, 1648, concluded between the late King Phillip IV and the States General, shall form the basis of the present Treaty and shall hold good in every respect so far as it is not modified by the following articles, and, as regards Articles 5 and 16 of the said Peace of Munster, these Articles shall only hold good in so far as concerns the aforesaid High Contracting Parties and their subjects.
and West Indies and if, on the contrary, a restitution of any territories acquired before the war in violation of the Treaty of Münster had been envisaged, specific provisions would no doubt have been inserted.

There is further no trace of evidence that Spain ever claimed at a later opportunity, for instance in connection with the territorial rearrangements at the end of the Napoleonic Wars, the restitution of territories taken or withheld from her in violation of the Treaty of Münster or Utrecht.

As it is not proved that Spain, at the beginning of 1648 or in June 1714, was in possession of the Island of Palmas (or Miangas), there is no proof that Spain acquired by the Treaty of Münster or the Treaty of Utrecht a title to sovereignty over the island which, in accordance with the said treaties, and as long as they hold good, could have been modified by the Netherlands only in agreement with Spain.

It is, therefore, unnecessary to consider whether subsequently Spain by any express or conclusive action, abandoned the right, which the said treaties may have conferred upon her in regard to Palmas (or Miangas). Moreover, even if she had acquired a title she never intended to abandon, it would remain to be seen whether continuous and peaceful display of sovereignty by any other Power at a later period might not have superseded even conventional rights.

It appears further to be evident that Treaties concluded by Spain with third Powers recognizing her sovereignty over the 'Philippines' could not be binding upon the Netherlands and, as the treaties do not mention the island in dispute, they are not available even as indirect evidence.

We thus come back to the question whether, failing any Treaty which, as between the States concerned, decides unequivocally what is the situation as regards the island, the existence of territorial sovereignty is established with sufficient soundness by other facts.

Although the United States Government does not take up the position that Spanish sovereignty must be recognized because it was actually exercised, the American Counter-Case none the less states that 'there is at least some evidence of Spanish activities in the island'. In these circumstances it is necessary to consider whether and in what extent the territorial sovereignty of Spain was manifested in or in regard to the Island of Palmas (or Miangas).

Here it may be well to refer to a passage taken from information supplied by the Spanish to the American Government and communicated by the latter to the Netherlands Legation at Washington, in a note dated April 25th, 1914. The passage in question is reproduced in the text and in the annex of the United States' Memorandum, and runs as follows:

"It appears, therefore, that this Island of Palmas or Miangas, being within the limits marked by the Bull of Alexander the Sixth, and the agreement celebrated between Spain and Portugal regarding the possession of the Maluco, must have been seen by the Spaniards on the different voyages of discovery which were made in these parts, and that it belonged to Spain at least by right of the Philippine Archipelago was ceded by the Treaty of Paris: but precise data of acts of dominion which Spain may have exercised in this island have not been found.

This is the data and information which we have been able to find referring to said island, with which without doubt, because of the small importance it had, the discoverers did not occupy themselves, neither afterwards the governors of the Philippines, nor the historians and chroniclers, such as Herrera and Navarrete and the fathers Colín and Pastelle of the Society of Jesus, who refer in their works to the above-mentioned data without detailing any information about the said island.

It further results from the Explanations furnished by the Government of the United States at the request of the Arbitrator that an exhaustive examination of the records which were handed over to the American authorities under Article VIII of the Treaty of Paris, namely such as pertain to judicial, notarial and administrative matters, has revealed nothing bearing on the allegations made by natives of Palmas in 1919 to Captain Malone and Mr. Alvarez on the subject of regular visits of Spanish ships, even gunboats, and on the collection of the 'Cedula' tax. This being so, no weight can be given to such allegations as to the exercise of Spanish sovereignty in recent times—quite apart from the fact that the evidence in question belongs to an epoch subsequent to the rise of the dispute.

Apart from the facts already referred to concerning the period of discovery, and the mention of a letter which was sent on July 31st, 1604, by the Spanish pilot Bartolome Pérez from the Island of Palmas and the contents of which are not known, and apart from certain allegations as to commercial relations between Palmas and Mindanao, the documents laid before the Arbitrator contain no trace of Spanish activities of any kind specifically on the Island of Palmas.

Neither is there any official document mentioning the Island of Palmas as belonging to an administrative or judicial district of the former Spanish Government in the Philippines. In a letter emanating from the Provincial Prelacy of the Franciscan Order of Minoras mentioned above, it is said that the Islands of 'Mata and Palmas should belong (deben pertenecer) to the group of Islands of Sarangani and consequently to the District of Davao in the Island of Mindanao'.

It is further said in this letter that 'the island of Palmas, as it was near to Mindanao, must have been administered (debía ser administrada) spiritually in the last years of Spanish dominion by the fathers who resided in the District of Davao'. It results from the very terms of this letter, which places the 'Islands Miangis' to the north-east of the Island-Karakekang ('Karekekan'), that these statements, which suppose the existence of Mata, are not based immediately on information taken on the spot, but are rather conjectures of the author as to what seems probable. In the Rejoinder filed by the United States Government there is an extract from a letter of the Dutch missionary Steller, dated December 9th, 1895. It appears from this letter that the Resident of Menado, at the same time as he set up the Netherlands coat of arms at Palmas (or Miangas), had the intention to present a medal to the native Chief of the island, 'because the said chief, recently detained in Mindanao on business, would not let the commanding officer of a Spanish warship force the Spanish flag upon him'.

These facts, supposing they are correct, are no proof of a display of sovereignty over Palmas (or Miangas); rather the contrary. If the Spanish naval authorities to whom the administrative inspection of the southern Philippine Islands belonged, were convinced that the Island of Palmas was Spanish territory, the refusal of the native chief to accept the Spanish flag would naturally have led either to direct action on the Island in order to affirm Spanish sovereignty, or, if the Netherlands rights had been invoked, to negotiations such as were the sequels to General Wood's visit in 1906.
As regards the information concerning the native language or knowledge of Spanish, even if sufficiently established, it is too vague to indicate the existence of a political and administrative connection between Palmas (or Miangas) and Mindanao.

In a telegram from General Leonard Wood to the Bureau of Insular Affairs, reproduced in the American Expedition, it is stated that "the administrative inspection of the islands in the south (i.e. of the Philippines, especially round their coasts, belonged absolutely to the naval Spanish authorities. As papas pertaining to military and naval matters were not handed over to the American authorities under the Treaty of Paris, the files relating to the said administrative inspection are not in the possession of the United States. The fact that not the ordinary provincial agencies but the navy were in charge of the inspection of the islands in the south, together with another incidentally mentioned by Major General E. S. Otis, in a report of August 31st, 1899, namely the existence of a state of war or at least of renewed hostility amongst the Moros against Spanish rule, leads to the very probable—though not necessary—conclusion that the complete absence of evidence as to the display of Spanish sovereignty over the Island of Palmas is not due to mere chance, but is to be explained by the absence of interest of Spain in the establishment or the maintenance of her rule over a small island lying far off the coast of a distant and only incompletely subdued province.

It has been remarked, not without reason, that the United States, having acquired sovereignty by session only in 1898, were at some disadvantage for the collection of evidence concerning the original acquisition and the display of sovereignty over Palmas. The Arbitrator has no possibility of taking into account this situation; he can find his award only on the facts alleged and proved by the Parties, and he is bound to consider all proved facts which are pertinent in his opinion. Moreover it does not appear that the Spanish Government refused to furnish the documents requested.

Among the methods of indirect proof, not of the exercise of sovereignty, but of its existence in law, submitted by the United States, there is the evidence from maps. This subject has been very completely developed in the Memorandum of the United States and has also been fully dealt with in the Netherlands Counter-Memorandum, as well as in the United States Rejoinder. A comparison of the information supplied by the two Parties shows that only with the greatest caution can account be taken of maps in deciding a question of sovereignty, at any rate in the case of an island such as Palmas (or Miangas). Any maps which do not precisely indicate the political distribution of territories, and in particular the Island of Palmas (or Miangas) clearly marked as such, must be rejected forthwith, unless they contribute—supposing that they are accurate—to the location of geographical names. Moreover, indications of such a nature are only of value when there is reason to think that the cartographer has not merely referred to already existing maps—as seems very often to be the case—but that he has based his decision on information carefully collected for the purpose. Above all, then, official or semi-official maps seem capable of fulfilling these conditions, and they would be of special interest in cases where they do not assert the sovereignty of the country of which the Government has caused them to be issued.

If the Arbitrator is satisfied as to the existence of legally relevant facts which contradict the statements of cartographers whose sources of information are not known, he can attach no weight to the maps, however numerous and generally appreciated they may be.

The first condition required of maps that are to serve as evidence on points of law is their geographical accuracy. It must here be pointed out that not only maps of ancient date, but also modern, even official or semi-official maps, seldom wanting in accuracy. Thus, a comparison of the maps submitted to the Arbitrator shows that there is doubt as to the existence of the names of several islands which should be close to Palmas (or Miangas), and in about the same latitude. The St. Joannes Islands, Hunter’s Island and the Isle of Mata are shown, all or some of them, on several maps even of quite recent date, although their existence seems very doubtful. The non-existence of the Island of Mata and the identity of the St. Joannes and Hunter’s Islands with Palmas, though they appear on several maps as distinct and rather distant islands, only, on the evidence laid before the Arbitrator, be considered as fairly certain.

The “Century Atlas” (Exhibit No. 8 of the American Memorandum) and the map published in 1902 by the Bureau of Insular Affairs of the United States (Exhibit No. 11), show "Mata I., “Palmas I.” and "Haycock or Hunter I.” The Spanish map (Captain Montero), reproduced by the War Department of the United States (Exhibit No. 9) also mentions these three islands, although "Haycock I.” and “Hunter I.” are here different islands. There is nothing in the map of the Challenger of 1885. The only large scale map submitted to the Arbitrator which, as appears from inscriptions on it, is directly based on researches on the spot, is that attached to the Netherlands Memorandum (British Admiralty Chart No. 2575). Now this map shows neither an island of Mata, nor of Hunter, nor of any other name in the regions where they should be, according to the other maps, and Haycock Island is indicated at two points other than that adopted in “Exhibits Nos. 8 & 11.” Whatever be the accuracy of the British Admiralty Chart for the details in question, these points show that only with the greatest caution can be made of maps as indications of the existence of sovereignty over Palmas (or Miangas). The maps which, in the view of the United States, are of an official or semi-official character and are of Spanish or American origin are that of Captain Montero and that of the Insular Department, referred to above (Exhibits Nos. 8 & 11). The first mentioned gives for that matter no indication as to political frontiers, and the second only reproduces the lines traced by the treaty of December 10th, 1898. They have therefore no bearing on the point in question, even apart from the evident inaccuracies, at least as regards Hunter Island, which they appear to contain precisely in the region under consideration.

As regards maps of Dutch origin, there are in particular two which, in the view of the United States, possess an official character and which might exclude Palmas (or Miangas) from the Dutch possessions. The first of these, published in 1857 by M. Bogaerts, lithographer to the Royal Military Academy, and dedicated to the Governor of that institution, if it possesses the official character attributed to it by the American Memorandum and disputed by the Netherlands Counter-Memorandum, might serve to indicate that the island was not considered at the period in question as Dutch but as Spanish territory. Anyhow, a map affords only an indication—and that a very indirect one—and, except when annexed to a legal instrument, has not the value of such an instrument, involving recognition or abandonment of
The importance of this map can only be judged in the light of facts prior or subsequent to 1857, which the Netherlands Government alleges in order to prove the exercise of sovereignty over the Island of Palms (or Miangas); these facts, together with the cartographical evidence relied upon in their support or submitted in connection with the question of the right location of the Island or Islands called "Meangis", will be considered at the same time as the Netherlands' arguments covered by the Dutch Memorandum. While Bogaert's map does not, as it stands, furnish proof of the recognition of Spanish sovereignty, it must further be pointed out that it is inaccurate as regards the group of islands marked "Meangis" and indicated on this map somewhat to the north of "Nanoea", as well as in other points, for example the shape of Mindanao and the colouring of certain small islands.

The conclusions drawn in the United States Memorandum from the second map, i.e. the atlas published by the Ministry for the Colonies (1897-1904) appear to be refuted by the information contained in the Netherlands' Counter-Memorandum. A copy of a detailed map from the same atlas is there shown which represents "P. Miangis (E. Palma)" amongst Dutch possessions, not only by the coloured contours, but also because it indicates the Saragani Islands as "Amrikanansch". The general map, on the other hand, reproduced as "Exhibit No. 10" in the American Memorandum, excludes the former island from Dutch territory, by a line of demarcation between the different colonial possessions. There seems to be no doubt that the special map must prevail over the general, even though the latter was published three months later.

As to the special map contained in the first edition of the same atlas (Atlas der Nederlandsche Bezittingen in Oost-Indie 1883-1885), where the "Melangis" are reproduced as a group of islands north of the Nanoea and distinct from "Palmas", the same observations apply as to Bogaert's map, which is fairly similar on this point. The "Explanations" filed by the Netherlands Government make it clear that the authors of the map did not rely on new and authentic information about the region here in question, but reproduced older maps.

In the last place there remains to be considered title arising out of contiguity. Although States have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the terra firma (nearest continent or island of considerable size). Not only would it seem that there are no precedents sufficiently frequent and sufficiently precise in their bearing to establish such a rule of international law, but the alleged principle itself is by its very nature so uncertain and contested that even Governments of the same State have on different occasions maintained contradictory opinions as to its soundness. The principle of contiguity, in regard to islands, may not be out of place when it is a question of allotting them to one State rather than another; either by agreement between the Parties, or by a decision not necessarily based on law; but as a rule establishing ipso jure the presumption of sovereignty in favour of a particular State, this principle would be in conflict with what has been said as to territorial sovereignty and as to the necessary relation between the right to exclude other States from a region and the duty to display therein the activities of a State. Nor is this principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty; for it is wholly lacking in precision and would in its application lead to arbitrary results. This would be especially true in a case such as that of the island in question, which is not relatively close to one single continent, but forms part of a large archipelago in which strict delimitations between the different parts are not naturally obvious.

There lies, however, at the root of the idea of contiguity one point which must be considered also in regard to the Island of Palms (or Miangas). It has been explained above that in the exercise of territorial sovereignty there are necessarily gaps, intermitence in time and discontinuity in space. This phenomenon will be particularly noticeable in the case of colonial territories, partly uninhabited or as yet partly unsubdued. The fact that a State cannot prove display of sovereignty as regards such a portion of territo rity cannot for the time being be interpreted as showing that sovereignty is in-existent. Each case must be appreciated in accordance with the particular circumstances.

It is, however, to be observed that international arbitral jurisprudence in disputes on territorial sovereignty (e.g. the award in the arbitration between Italy and Switzerland concerning the Alpe Cravara; Lafozantine, Pasteurise Internationale, pp. 201-209) would seem to attribute greater weight to— or even isolated—acts of display of sovereignty than to continuity of territory, even if such continuity is combined with the existence of natural boundaries. As regards groups of islands, it is possible that a group may under certain circumstances be regarded as in law a unit, and that the fate of the principal part may involve the rest. Here, however, we must distinguish between, on the one hand, the act of first taking possession, which can hardly extend to every portion of territory, and, on the other hand, the display of sovereignty as a continuous and prolonged manifestation which must itself flow through the whole territory.

As to the territory forming the subject of the present dispute, it must be remembered that it is a somewhat isolated island, and therefore a territory clearly delimited and individualised. It is moreover an island permanently inhabited, occupied by a population sufficiently numerous for it to be impossible that acts of administration could be lacking for very long periods. The memoranda of both Parties assert that there is communication by boat and even with native craft between the Island of Palms (or Miangas) and neighbouring regions. The inability in such a case to indicate any acts of public administration makes it difficult to imagine the actual display of sovereignty, even if the sovereignty be regarded as confined within such narrow limits as would be supposed for a small island inhabited exclusively by natives.

IV.

The Netherlands' arguments contend that the East India Company established Dutch sovereignty over the Island of Palms (or Miangas) as early as the 17th century, by means of conventions with the princes of Tabukan (Taboekan) and Taruna (Taroena), two native chieftains of the Island of Sangi (Groot Sangihe), the principal island of the Talautae Isles (Sangi Islands), and that sovereignty has been displayed during the past two centuries.
In the annexes to the Netherlands Memorandum the texts of conventions concluded by the Dutch East India Company (and, after 1795, by the Netherlands State), in 1677, 1697, 1720, 1758, 1828, 1885 and 1889 with the Princes, Radjas or Kings, as they are indiscriminately called, of Tabukan, Taruna and Kandahar (Kandhar)-Taruna. All these principalities are situated in the Northern part of the Island of Sangi (Groot Sangihe or Sangi-\h锦) and, at any rate since 1885, include, besides parts of that island, also certain small islands further north, the Nanusa Islands—all incontestably Dutch—and, according to the Netherlands, also the Island of Palmas (or Miasangas).

These successive contracts are one much like another; the more recent are more developed and better suited to modern ideas in economic, religious and other matters, but they are all based on the conception that the prince receives his principality as a fief of the Company or the Dutch State, which is suzerain. Their eminently political nature is confirmed by the supplementary agreements of 1771, 1779 and 1782, concerning the obligations of vassals in the event of war. The dependence of the vassal State is ensured by the important powers given to the nearest representative of the colonial Government and, in the last resort, to that Government itself. The most recent of these contracts prior to the cession of the Philippines to the United States, that of 1885, contains, besides the allocation of powers for internal administration, the following provisions also, in regard to international interests: exclusion of the Prince from any direct relations with foreign Powers, and even with their nationals in important economic matters; the currency of the Dutch Indies to be legal tender; the jurisdiction over foreigners to belong to the Government of the Dutch Indies; the vassal is bound to suppress slavery, the White Slave Traffic and piracy; he is also bound to render assistance to the shipwrecked.

Even the oldest contract, dated 1677, contains clauses binding the vassal of the East India Company to refuse to admit the nationals of other States, in particular Spain, into his territories, and to tolerate no religion other than that of the doctrine of the mance. According to the agreements of 1771, 1779 and 1782, the vassal State is bound to suppress slavery, etc.

The authenticity of these contracts cannot be questioned. The fact that true copies, certified by the competent officials of the Netherlands Government, have been supplied and have been forwarded to the Arbitrator through the channels laid down in the Special Agreement, renders the reproduction of facsimiles of texts and of signatures or seals superfluous. This observation equally applies to other documents or extracts from documents taken from the archives of the East India Company, or of the Netherlands Government. There is no reason to suppose that typographical errors in the reproduction of texts may have any practical importance for the evidence in question.

The fact that these contracts were renewed from time to time and appear to indicate an extension of the influence of the suzerain, seems to show that the regime of suzerainty has been effective. The sovereignty of the Netherlands over the Sangi and Talauer Islands is moreover not disputed. There is here a manifestation of territorial sovereignty normal for such a region. The questions to be solved in the present case are the following:

Was the island of Palmas (or Miasangas) in 1889 a part of territory under Netherlands' sovereignty?

Did this sovereignty actually exist in 1889 in regard to Palmas (or Miasangas) and are the facts proved which were alleged on this subject?

If the claim to sovereignty is based on the continuous and peaceful display of State authority, the fact of such display must be shown precisely in relation to the disputed territory. It is not necessary that there should be a special administration established in this territory; but it cannot suffice for the territory to be attached to another by a legal relation which is not recognized in international law as valid against a State contesting this claim to sovereignty; what is essential in such a case is the continuous and peaceful display of actual power in the contested region.

According to the description of the frontiers of the territory of Taruna annexed to the contract of 1885, the list of dependencies of Taruna on the Talauer Islands mentions first the different islands of Nanusa, and ends by the words "ten slote nog hot eiland Melangis (Palmas)" and "lastly the island of Melangis (Palmas)".

The similar description of frontiers attached to the contract of 1889 states that the Islands of Nanusa (including the Island of "Miasangas") belong to the territory of Kandahar-Taruna. If these two mentions refer to the Island of Palmas (or Miasangas) it must be recognized that that island at any rate nominally, belongs to the vassal State in question; it is by no means necessary to prove the existence of a special contract with a chieflain of Palmas (or Miasangas).

However much the opinions of the Parties may differ as to the existence of proof of the display of Dutch sovereignty over the Island of Palmas (or Miasangas), the reports, furnished by both sides, of the visit of General Wood, in January 1906, show that at that time there were at least traces of continuous administration and even of administration of the island in dispute, and of foreign relations of the island, and even traces of Dutch sovereignty. General Wood noted with surprise that the Dutch flag was flying on the beach and on the boat which came to meet the American ship. According to information gathered by him, the flag had been there for 15 years and perhaps even longer. Since the contract of 1885 with Taruna and that of 1889 with Kandahar-Taruna comprise Palmas (or Miasangas) within the territories of a native State under the suzerainty of the Netherlands and since it has been established that in 1903 on the said island a state of things existed showing at least certain traces of continuous display of Dutch sovereignty, it is now necessary to examine what is the nature of the facts invoked as proving such sovereignty, and to what periods such facts relate. This examination will show whether or not the Netherlands have displayed sovereignty over the Island of Palmas (or Miasangas) in an effective continuous and peaceful manner at a period at which such exercise may have excluded the acquisition of sovereignty, or a title to such acquisition, by the United States of America.

Before beginning to consider the facts alleged by the Netherlands in support of their arguments, there are two preliminary points, in regard to which the Parties also put forward different views, which require elucidation. These relate to questions raised by the United States: firstly the power of the
East India Company to act validly under international law, on behalf of the Netherlands, in particular by concluding so-called political contracts with native rulers; secondly the identity or non-identity of the island in dispute with the island to which the allegations of the Netherlands as to display of sovereignty would seem to relate.

The acts of the East India Company (Generale Gecomputeerde Nederlandsche Oost-Indische Compagnie), in view of occupying or colonizing the regions at issue in the present affair, must, in international law, be entirely assimilated to acts of the Netherlands State itself. From the end of the 16th till the 19th century, companies formed by individuals and engaged in economic pursuits (Chartered Companies), were invested by the State to whom they were subject with public powers for the acquisition and administration of colonies. The Dutch East India Company is one of the best known. Article V of the Treaty of Munster and consequently also the Treaty of Utrecht clearly show that the East and West India Companies were entitled to create situations recognized by international law; for the peace between Spain and the Netherlands extends to “tous Potentats, Nations & Peuples” with whom the said Companies, in the name of the States of the Netherlands, “entre les limites de leurs Temtiments sont en Amitié et Alliance”. The conclusion of conventions, even of a political nature, was, by Article XXXV of the Charter of 1602, within the powers of the Company. It is a question of decision in each individual case whether a contract concluded by the Company falls within the range of simple economic transactions or is of a political and public administrative nature.

As regards contracts between a State or a Company such as the Dutch East India Company and native princes or chiefs of peoples not recognized as members of the community of nations, they are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as are subject to the law of nations. But, on the other hand, contracts of this nature are not wholly void of indirect effects on situations governed by international law; if they do not constitute titles in international law, they are none the less facts of which that law must in certain circumstances take account. From the time of the discoveries until recent times, colonial territory has very often been acquired, especially in the East Indies, by means of contracts with the native authorities, which contracts leave the existing organization more or less intact as regards the native population, whilst granting to the colonizing Power, besides economic advantages such as monopolies or navigation and commercial privileges, also the exclusive direction of relations with other Powers, and the right to exercise public authority in regard to their own nationals and to foreigners. The form of the legal relations created by such contracts is most generally that of suzerain and vassal, or of the so-called colonial protectorate.

In substance, it is not an agreement between equals; it is rather a form of internal organisation of a colonial territory, on the basis of autonomy for the natives. In order to regularise the situation as regards other States, this organisation requires to be completed by the establishment of powers to ensure the fulfilment of the obligations imposed by international law on every State in regard to its own territory. And thus suzerainty over the native State becomes the basis of territorial sovereignty as towards other members of the community of nations. It is the sum-total of functions thus allotted either to the native authorities or to those of the colonial Power which decides the question whether at any certain period the conditions required for the existence of sovereignty are fulfilled. It is a question to be decided in each case whether such a regime is to be considered as effective or whether it is essentially fictitious, either for the whole or a part of the territory. There always remains reserved the question whether the establishment of such a system is not forbidden by the pre-existing rights of other States.

The point of view here adopted by the Arbitrator is—at least in principle—in conformity with the attitude taken up by the United States in the note already quoted above, from the Secretary of State to the Spanish Minister, dated January 7th, 1900, and relating to two small islands lying just outside the line drawn by the Treaty of Paris, but claimed by the United States under the said Treaty. The note states that the two islands “have not hitherto been directly administered by Spain, but have been successfully claimed by Spain as a part of the dominions of her subject, the Sultan of Sulu. As such they have been administered by Sulu agencies, under some vague form of resident supervision by Spanish agencies, which latter have been withdrawn as a result of the recent war.”

This system of contracts between colonial Powers and native princes and chiefs is even expressly approved by Article V of the Treaty of Munster quoted above; for, among the “Potentats, Nations and Peoples”, with whom the Dutch State or Companies may have concluded treaties of alliance and friendship in the East and West Indies, are necessarily the native princes and chiefs.

The Arbitrator can therefore not exclude the contracts invoked by the Netherlands from being taken into consideration in the present case.

As to the identity of the island in dispute with the islands “Melangis (Palmas)” and “Miangas” in the contracts of 1883 and 1899 respectively, this must be considered as established. A large scale map which was sent to the Governor-General of the Netherlands East Indies by the Resident of Menado in January 1896 and which indicates in different colours the administrative districts on the Sango and Talauer Islands in almost complete conformity with the description of the territory of Taruma given in the annex to the contract of 1885, shows that the name of Nanusa, applied to the group of seven islands by the contract, is there given to a single island of this group, usually called Menampi (Mequampi). This large scale map, prepared evidently for administrative purposes, of which a reproduction has been filed with the Explanations of the Netherlands Government, shows an isolated island “Palmas of Melangis” which, though not quite correct in size and shape and though about 40’ too much to the south and 20’ too much to the east, cannot but correspond to Palmas (or Miangas), since the most reliable detailed modern maps, in particular the British Admiralty Chart, show no other island but Palmas (or Miangas) between the Talauer and Nanusa Islands and Mindanao.

This comparatively correct location of the island is supported by earlier maps. The map edited at Amsterdam by Covens and Mortier at a date not exactly known, but certainly during the 18th century, shows at the place of Palmas (or Miangas) a single island with the inscription “1 regne Pº Menangus” (the right island Menangus) as distinguished from the “engebache Eiland Menangus” and from the group of the Nanusa. This map proves that before that time uncertainty had existed as to the real
existence of one or several islands Menangus, an uncertainty evidently due in its origin to the mention of the existence of “Islands Meangis” made by the Englishman Dampier, in his book published in 1698.

In conformity with this statement by Covens and Mortier, the map contained in the book published in 1855 by the navigator Cuateron shows a single island “Mianguis”, not in exactly the place of the island in dispute, but distinct from the “Namase” and lying about midway between Cape San Augustin and the “Namase”. Cuateron’s map shows “Mianguis” distinctly as a Dutch possession—by colour expressly indicated as relating to political boundaries; it is accompanied by geographical and statistical information and due to an author who travelled extensively in these parts (1841-1849), and against whose reliability not sufficient reasons have been given. Among other points the explanation gives for “Mianguis” the comparatively exact geographical location (latitude north 5° 33’ 30’’ [Special Agreement 5° 33’’]; longitude east of Rome 118° 42’ 10” — 127° 12’ 35” east of Greenwich [Special Agreement 126° 36’’]) and also detailed though evidently only approximative statistical information about the composition of the population. It further appears from Cuateron’s book that “Mianguis” is something apart from the Nanusa, though Cuateron observes the “Namusa” Islands are little known by the geographers under the name of “Mianguis”.

A proof of the fact that the Dutch authorities were quite aware of the identity of “Miangus” with the island charted on many maps as “Palmas” is to be found in the reports of the Commanders of the Dutch Government Steamer Raaf (November 1896) and of H.M.S. Elna (June 1898). These officers mention expressly the double name and give the almost exact nautical location of the island then visited.

One observation is however to be made. The island, shown on the maps and mentioned in the contracts, bears different names: Melangis, Miangus, Mianis, Miangus. In different documents referred to in the Netherlands Government’s Counter-Memorandum more than one of these variations of the name appear, although in the opinion of the Netherlands Government they all concern the same island. These differences, sometimes considerable at first sight, are sufficiently explained by the statements of linguistic experts, produced by the Netherlands Government. The peculiarity of the native language from which the name of the island is borrowed and the difficulty of transposing the sounds of this language into a western alphabet seem not only to make comprehensible the existence of different spellings, but to explain why precisely these variations have appeared. Differences of spelling are even recorded as such in documents as early as a letter, dated May 11th, 1701, of the Governor of the Moluccas and a report, dated September 12th, 1726. Moreover, the difference of spelling would not justify the conclusion that the more or less different names referred to different islands; for in the whole region in question no other island has been mentioned to which these names—or at least most of them—would better apply; for the Island of Tanugand, with the place Minangan already referred to, is clearly distinguished from the island of Miangus in the documents of both the 18th and the 19th centuries relating to the dependencies of Tabukan.

No evidence has been submitted to support the supposition that the island, appearing on some old maps as “t regie Menangus” would be identical with Ariaga (Marare), which, according to a statement of Melville van Carseby, mentioned in the United States Memorandum, is uninhabited.

Great stress is laid in the Rejoinder of the United States on the fact that the Nanusa or some islands of this group are designated by several distinguished cartographers and navigators of the 19th century as “Islands Meangis” or by some similar name, and that amongst these cartographers and sailors some are Dutchmen, in particular Baron Melville van Carseby. This statement which is, no doubt, exact, cannot however prove that the island Miangus mentioned as a dependency of Tabukan or Taruna or Kandahar-Taruna is to be identified with the “Is. Meangii” and therefore with the Nanusa. It is clear that the cartographers referred to apply the name of “Iles Meangis” or some similar name to a group of islands. On the other hand, the island the identity of which is disputed can be but a single, distant, isolated island. The attribution of the name Meangis to the Nanusa seems to be an error, because the official documents laid before the Arbitrator which belong about to the same period as the maps mentioning the “Is. Meangii” make a clear distinction between the principal island composing the Nanusa and the island of Miangus or Menangus or Melangis, though the latter is considered as “onderhoorie” of the Nanusa Islands. The identification of the Nanusa with “Meangis” Islands may be explained by the desire to locate somewhere the Meangis Islands, famous since Dampier’s voyage. Seeing that up to very recent times an extraordinary inexactitude about the names and the location of the islands in precisely that part of the Celebes Sea is shown to exist by almost all the maps filed by the Parties, including the two maps of Melville van Carseby, an erroneous attribution of the name “Miangus”, even by Dutch cartographers, is possible.

It is not excluded that the three “English Menangis Islands” which are located on some maps to the east of the “right Menangis” and of which a detailed map with indication of the depth of the surrounding sea has been filed, did in fact exist, but have disappeared in consequence of earthquakes such as reported by Cuateron.

Finally it may be noted that the information concerning Palmas or the other islands such as St. Juan, Mata, Hunter Island, which are to be identified with it, contains, except for the most recent period, nothing which relates to the population of the island; moreover all these names, given to the island, except Mata, may have been given by navigators who did not land or get into contact with the natives. Miangas however is a native name, which the inhabitants must have communicated to the chiefs to whom they were subject and to the navigators with whom they came in touch. The name of Miangas as designating an inhabited place (negoji) is much older than the establishment of the more centralized village in 1892.

It results from these statements that, when the contracts of 1885 and 1899 mentioned, in connection with, but distinct from the Nanusa, a single island Melangis or Miangis as belonging to Taruna or Kandahar-Taruna, only the island in dispute can have meant, and that this island has been known under these same or similar names at least since the 18th century. No plausible suggestion has been made as to what the single island “Miangas”, the existence of which cannot be doubted, might be, if it is not the island in dispute.

The special map on sheet 14 (issued in 1901) of the “Atlas van Nederlandse Oost-Indie” (1897-1904), in showing “P. Miangus (Palmas E.)” as a Dutch possession in the place indicated in the Special Agreement, is in conformity with earlier maps and information, particularly with the Government’s special map of 1886. Under these circumstances no weight can be given to the fact that on Bogaert’s map of 1857 and in the atlas of Stenfort and
Siethoff (1883-85), as well as on other maps, a group of islands called Meangis, or a similar name, appears.

* * *

The preliminary questions being settled, the evidence laid before the Arbitrator by the Netherlands Government in support of its claim is now to be considered.

As regards the documents relating to the 17th and 18th centuries, which in the view of the Netherlands show that already at that date the Prince of Tabukan had not only claimed, but also actually displayed a certain authority over Palmas (or Miangas), the following must be noted:

The Netherlands Government gives weight to the fact that Dutch navigators, who, in search of the islands Meangis mentioned by Dampier, were sailing in the seas south of Mindanao and whose reports are at least in part preserved, not only came in sight of Palmas (or Miangas), but were able to state that the island belonged to the native State of Tabukan, which was under Dutch suzerainty as shown by the contracts of November 3rd, 1677, and September 26th, 1697.

The existence of Dutch rule would be proved by the fact that the Prince's flag—i.e., the Dutch East India Company's flag—was seen being waved by the people of the island when the Dutch ships De Ee, Lareque and De Peer went in sight of the island on November 21st, 1700, but were prevented from landing by the conditions of the sea. The commander of the Lareque, who had already sighted the island on November 12th of the same year, was instructed to make more precise investigations by landing, and he was able to do so on December 9th and 10th. Not only was the Prince's flag again hoisted by the natives, but the inhabitants informed the sailors that the name of the island was "Meangis". They gave to the commander a document—lost since that time—which, dating from 1681 and emanating from Manilla, stated that Tabukan, whose existence and death are confirmed by the contract of 1697, stated the allegiance of the people of "Miangas" towards Tabukan. There exists however only an indirect report on this visit of December 10th, 1700, namely a letter dated May 11th, 1701, and sent by the Governor in Council of the Moluccas at Ternate to the Governor General and India Council. In this letter, based, no doubt, on information furnished by the commander of the Lareque, who had reached Ternate on December 29th, 1700, the Governor says that the island in question was equal to the Talau islands and that its name, correctly spelt, is not "Meangis", but "Mayages".

These statements as well as the circumstance that all the reports without any mention of neighboring islands, speak of a single island, the shape of which corresponds fairly with that of Palmas (or Miangas), would make it almost certain that the island in question is in fact Palmas (or Miangas), unless the nautical observations given in the report mentioned above (4° 49'; 4° 37'; 5° 9') might point to the Nanusa group, to which the allegiance with Tabukan would equally apply. These observations, though not subject to error, would however seem to offer relatively more guarantee of accuracy than those based on the length of time taken to cover a distance at sea, mainly relied upon in the Netherlands Memorandum for the location of the island. Since, however, no other single island in those parts of the Sea of Celebes seems to exist, and since it is most unlikely that the navigators would on none of the three visits in November and December have sighted and mentioned neighboring islands, there is at least a great probability that the island visited by the Lareque on December 10th, 1700, was Palmas (or Miangas).

The mention of an island "Meangis", in connection with, but distinct from the Nanusa, appears again in a document, dated November 1st, 1701, concerning regulations as to criminal justice (suppression of vendetta and reservation of capital punishment as an exclusive prerogative of the East India Company) in the native State of Tabukan, to which the island visited December 10th, 1700, was reported to belong. The fact that the regulations for Tabukan are, by an express provision, declared applicable to the "islands of Nanusa and Meangis thereunder included" proves that an island of the later name was known and deliberately treated as belonging to the vassal State of Tabukan.

In a report of the Governor of Ternate, dated June 11th, 1706, the island "Miangas" is mentioned as the northernmost of the dependencies of the native States of Tabukan and Taruna, in connection with "Karakotang" (Onara or Kakarutan on the Brit. Adm. map), one of the Nanusa, and specifically identified with the island first seen by the Lareque on November 21st, 1700. Finally, another report of the Governor of Ternate, dated September 12th, 1726, mentions a decision on the question whether 80 Talauers (inhabitants of the Talau islands) who had arrived at Taruna from the island "Meangis" off (or "Meanges") were subjects of Taruna or of Tabukan. This island is expressly identified with that which was visited in 1700 by the commander of the Lareque.

This documentary evidence, taken together with the fact that no island called Mianeas or bearing a similar name other than Palmas (or Miangas) seems to exist north of the Talau islands (Sangi) and Talau islands, leads to the conclusion that the island Palmas (or Miangas) was in the early part of the 18th century considered by the Dutch East India Company as a part of their vassal State of Tabukan. This is the more probable for the reason that in later times, notably in an official report of 1825, the "far distant island Melangis" is mentioned again as belonging to Tabukan.

In the documents subsequent to 1825, Miangas (Melangis) appears as a dependency of Tabukan, another of the vassal States in the north of Sangi (Groot Sangihe), which already in 1726 had claimed the island as its own. The date and circumstances of this transfer are not known, but it must have taken place before 1838; for report of the Governor of Menado, dated December 31st, 1837, mentions the Nanusa and "Melangis" as parts of Taruna. This state of things has been maintained in the contracts of 1885 and 1899. From the point of view of international law, the transfer from one to another vassal State is to be considered as a purely domestic affair of the Netherlands; for their suzerainty over Tabukan and Taruna goes back far beyond the date of this transfer.

Considering that the contracts of 1676 and 1697 with Tabukan established in favor of the Dutch East India Company extensive rights of suzerainty over Tabukan and an exclusive right of intercourse with that State, and considering further that at least two characteristic acts of jurisdiction expressly relating to Miangas, in 1701 and 1726, are reported, whilst no display of sovereignty by any other Power during the same period is known, it may be admitted that at least in the first quarter of the 18th century, and probably also before that time, the Dutch East India Company exercised rights of suzerainty over Palmas (or Miangas) and that therefore the island was at
that time, in conformity with the international law of the period, under Netherlands sovereignty.

No evidence has been laid before the Arbitrator from which it would result that this state of things had already existed in 1648 and had thus been confirmed by the Treaty of Münster. It suffices to refer to what has already been said as to this Treaty in connection with the title claimed by Spain. On the one hand, it cannot be invoked as having transformed a state of possession into a conventional title inter partes, for the reason that Dutch possession of the island Palmas (or Miangas) is not proved to have existed at the critical date. On the other hand, it was stated that neither the Treaty of Münster nor the Treaty of Utrecht, if they are at all applicable to the case, could at present be invoked for invalidating the acquisition of sovereignty over Palmas (or Miangas) obtained by the Dutch at a date subsequent to 1648. It follows rather from what has been said about the rights of Netherlands sovereignty over Tabukan in the early 19th century, and as to relations between Tabukan and Palmas (or Miangas), that the Treaty of Utrecht recognized these rights of suzerainty as comprising the rajah of Tabukan amongst the ‘potentates, nations, and peoples with whom the Lords States or members of the East and West India Companies are in friendship and alliance’.

The admission of the existence of territorial sovereignty early in the 19th century and the display of such sovereignty in the 19th century and particularly in 1906, would not lead, as the Netherlands Government appears to suppose, by analogy with French, Dutch and German civil law, to the conclusion that, unless the contrary is proved, there is a presumption for the existence of sovereignty in the meantime. For the reasons given above, no presumptions of this kind are to be applied in international arbitrations, except upon express stipulation. It remains for the Tribunal to decide whether it is sufficient to establish the continuous existence of sovereignty, on the ground of evidence as to its display at more or less long intervals.

There is a considerable gap in the documentary evidence laid before the Tribunal by the Netherlands Government, as far as concerns not the vassal State of Tabukan in general, but Palmas (or Miangas) in particular. There is however no reason to suppose, when the Resident van Delden, in a report of 1825, mentioned the island “Melinga” as belonging to Tabukan, that these relations has not existed between 1726 and 1825.

Van Delden’s report, as well as later documents relating to the 19th century, shows that Miangas was always considered by the Dutch authorities as belonging to the Sangi and Talauer Isles and as being in a particular connection with the Nanusa. An extensive report of the Resident of Menado, dated August 12th, 1857, gives detailed statements about the administrative organisation, including the names of the villages (negerijen) and districts or presidencies (djoegoeschappen) and the number and titles and names of the native officials. The island “Melinga” goes with the Nanusa, but is distinct from the island “Namaea” (usually called Melangi, after the chief village) and Karaton; it is administered by one “radja,” who at that time was named Sasoe. This report leaves no room for doubt as to the legal situation of Melangi at that period, and is in conformity with the territorial description given for Palmas (or Miangas) in the contracts of 1885 and 1899 already mentioned, and also with a table, dated September 15th, 1889, showing the whole system of administrative districts in the Talauer Islands which are dependencies of the native principalities of the Sangi Isles.

It would however seem that before 1895 the direct relations between the island and the colonial administration were very loose. In a report on a visit paid to the island in November 1895 by the Resident of Menado, it is stated that, according to the natives, no ship had ever before that time visited the island, and that no European had ever been there; the Resident himself was of opinion that he was the first colonial official who went to Palmas (or Miangas); also the commander of H.M.S. Edi, who patrolled the Celebes Sea in 1896, mentions that “in man’s memory a steamer had never been at Miangas”. The documents relating to the time before 1895 are indeed scanty, but they are not entirely lacking. A series of statements made by certain natives, chiefs and others, mostly of good age, whose memories went back far beyond 1895—at least to 1870—have been laid by the Netherlands Government before the Tribunal, two of them also in the native language used by the witnesses. It would seem to result from these depositions that the people of Miangas used to send yearly presents (pahawoewa) to the rajah of Taruna as token of their submission; even details about the distribution of the tribute to be collected are given. On the other hand the rajah of Taruna was under the obligation to give assistance to the island in case of distress. A deposition made by a Dutch civil officer gives the list of 8 headmen who had been instituted either by the rajah of Tabukan (probably Tarana) or by the Resident of Menado at Miangas until 1917.

Whatever may be the value of such depositions made all since 1924, they are at least in part supported by documentary evidence. Thus the list of headmen is confirmed as concerns the nomination of Timpala by a decree signed on September 15th, 1889, by the Resident of Menado. The most important fact is however the existence of documentary evidence as to the taxation of the people of Miangas by the Dutch authorities. Whilst in earlier times the tribute was paid in mats, rice and other objects, it was, in conformity with the contract with Taruna of 1885, replaced by a capitation tax, to be paid in money (one florin for each native man above 18 years). A table has been produced by the Netherlands Government which contains for all the dependencies of the Sangi States situated in the Talauer Islands the number of taxpayers and the amount to be paid. There “Menasga” ranks as a part of the “Djoegoeschap” (Presidency) of the Nanusa under the dependencies of Taruna, with 88 “Hasselflichtigen” (taxpayers), paying each Fl. 1.

It further results from a report of the Controleur of Taruna dated November 17th, 1896, that the people of “Melinga” paid their tax by selling products on the larger islands and thus getting the money with which the new tax was to be paid. The effective payment of the tax is likewise confirmed by the commander of H.M.S. Edi in a report dated June 18th, 1898.

The report of the Controleur of Taruna referred to mentions the fact that on November 4th, 1896, a coat of arms was handed to the “Kapitein-laat” (administrative head) of “Melinga” just as two days before, the same act had taken place at Karaton (Karatong), an island of the Nanusa. The report mentions that in both cases the native authorities were informed as to the meaning of this act. The distribution of coats of arms and flags as signs of sovereignty is regulated by instructions sanctioned by the Crown in 1843. The coats of arms placed at Miangas in 1896 were found in good state by H.M.S. Edi in 1898. The existence of a “vlaggestok” on the island is
proved by sketches made in 1895 and 1898 by officers of the Dutch ships Raaf and Edi.

The orders given, May 13th, 1898, to H.M.S. Edi which was to be stationed in the seas of North-East Celebes and Ternate leave no doubt that the task of the said vessel was to patrol these coasts and the Sangi and Talauer Islands, and, "if necessary, to make respected the rules for the maintenance of strict neutrality". The log-book of the ship proves that H.M.S. Edi twice visited Palmas (or Mianga) during the war, in June and in September 1898.

As regards the 20th century, it is to be observed that events subsequent to 1906 must in any case be ruled out, in accordance both with the general principles of arbitral procedure between States and with the understanding arrived at between the Parties in the note of the Department of State, dated January 25th, 1913, and the note of the Netherlands Minister at Washington, dated May 29th, 1915. The events falling between the Treaty of Paris, December 10th, 1898, and the rise of the present dispute in 1906, cannot in themselves serve to indicate the legal situation of the island at the critical moment when the cession of the Philippines by Spain took place. They are however indirectly of a certain interest, owing to the light they might throw on the period immediately preceding. It is to be noted in the first place that there is no essential difference between the relations between the Dutch authorities and the island of Palmas (or Mianga) before and after the Treaty of Paris. There cannot therefore be any question of ruling out the events of the period 1899-1906 as possibly being influenced by the existence of the said Treaty. The contract with Kandahar-Taruna of 1899 runs on the same lines as the preceding contract of 1883 with Taruna, and was in preparation already before 1898. The system of taxation, as shown by the table of the years 1904 and 1905, is the same as that instituted in 1895. The headman Padilang, instituted in 1899, was replaced by a new man only in 1917.

The assistance given in the island after the typhoon of October 1904, though in itself not necessarily a display of State functions, was considered as such—as is shown by the report of the Resident of Menado, dated December 31st, 1904—that the island "Mianga", which was particularly damaged, could only get the indispensable help through Government assistance ("van Gouvernementswege"). Reference may also be made to a relation which seems to have existed already in former times between the tribute paid by the islanders to the Sangi rulers and the assistance to be given to them in time of distress by the larger islands with their greater resources.

V.

The conclusions to be derived from the above examination of the arguments of the Parties are the following:

The claim of the United States to sovereignty over the Island of Palmas (or Mianga) is derived from Spain by way of cession under the Treaty of Paris. The latter Treaty, though it comprises the island in dispute within the limits of cession, and in spite of the absence of any reserve or protest by the Netherlands as to these limits, has not created in favour of the United States any title of sovereignty such as was not already vested in Spain.
Since the moment when the Spaniards, in withdrawing from the Moluccas in 1666, made express reservations as to the maintenance of their sovereign rights, up to the contestation made by the United States in 1906, no contestation or other action whatever or protest against the exercise of territorial rights by the Netherlands over the Talaute (Sangi) Isles and their dependencies (Miangas included) has been recorded. The peaceful character of the display of Netherlands sovereignty for the entire period to which the evidence concerning acts of display relates (1700-1906) must be admitted. There is moreover no evidence which would establish any act of display of sovereignty over the island by Spain or another Power, such as might counter-balance or annihilate the manifestations of Netherlands sovereignty. As to third Powers, the evidence submitted to the Tribunal does not disclose any trace of such action, at least from the middle of the 17th century onwards. These circumstances, together with the absence of any evidence of a conflict between Spanish and Netherlands authorities during more than two centuries as regards Palmas (or Miangas), are an indirect proof of the exclusive display of Netherlands sovereignty.

This being so, it remains to be considered first whether the display of State authority might not be legally defective and therefore unable to create a valid title of sovereignty, and secondly whether the United States may not put forward a better title to that of the Netherlands.

As to the conditions of acquisition of sovereignty by way of continuous and peaceful display of State authority (so-called prescription), some of which have been discussed in the United States Counter-Memorandum, the following must be said:

The display has been open and public, that is to say that it was in conformity with usages as to exercise of sovereignty over colonial States. A clandestine exercise of State authority over an inhabited territory during a considerable length of time would seem to be impossible. An obligation for the Netherlands to notify to other Powers the establishment of suzerainty over the Sangi States or of the display of sovereignty in these territories did not exist.

Such notification, like any other formal act, can only be the condition of legality as a consequence of an explicit rule of law. A rule of this kind adopted by the Powers in 1885 for the African continent does not apply de plano to other regions, and thus the contract with Taruna of 1885, or with Kandahar-Taruna of 1889, even if they were to be considered as the first assertions of sovereignty over Palmas (or Miangas) would not be subject to the rule of notification.

There can further be no doubt that the Netherlands exercised the State authority over the Sangi States as sovereign in their own right, not under a derived or precarious title.

Finally it is to be observed that the question whether the establishment of the Dutch on the Talaute Isles (Sangi) in 1677 was a violation of the Treaty of Münster and whether this circumstance might have prevented the acquisition of sovereignty even by means of prolonged exercise of State authority, need not be examined, since the Treaty of Utrecht recognized the state of things existing in 1714 and therefore the suzerain right of the Netherlands over Tabukan and Miangas.

The conditions of acquisition of sovereignty by the Netherlands are therefore to be considered as fulfilled. It remains now to be seen whether the United States as successors of Spain are in a position to bring forward an equivalent or stronger title. This is to be answered in the negative.

The title of discovery, if it had not been already disposed of by the Treaties of Münster and Utrecht would, under the most favourable and most extensive interpretation, exist only as an inchoate title, as a claim to establish sovereignty by effective occupation. An inchoate title however cannot prevail over a definite title founded on continuous and peaceful display of sovereignty.

The title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law.

The title of recognition by treaty does not apply, because even if the Sangi States, with the dependency of Miangas, are to be considered as "held and possessed" by Spain in 1648, the rights of Spain to be derived from the Treaty of Münster would have been superseded by those which were acquired by the Treaty of Utrecht. Now if there is evidence of a state of possession in 1714 concerning the island of Palmas (or Miangas), such evidence is exclusively in favour of the Netherlands. But even if the Treaty of Utrecht could not be taken into consideration, the acquiescence of Spain in the situation created after 1677 would deprive her and her successors of the possibility of still invoking conventional rights at the present time.

The Netherlands title of sovereignty, acquired by continuous and peaceful display of State authority during a long period of time going probably back beyond the year 1700, therefore holds good.

The same conclusion would be reached, if, for argument's sake, it were admitted that the evidence laid before the Tribunal in conformity with the rules governing the present procedure did not—as it is submitted by the United States—suffice to establish continuous and peaceful display of sovereignty over the Island of Palmas (or Miangas). In this case no Party would have established its claim to sovereignty over the Island and the decision of the Arbitrator would have to be founded on the relative strength of the titles invoked by each Party.

A solution on this ground would be necessary under the Special Agreement. The terms adopted by the Parties in order to determine the point to be decided by the Arbitrator (Article I) presuppose for the present case that the Island of Palmas (or Miangas) can belong only either to the United States or to the Netherlands, and must form in its entirety a part of the territory either of the one or of the other of these two Powers, Parties to the dispute. For since, according to the terms of its Preamble, the Agreement of January 23rd, 1925, has for object to "terminate" the dispute, it is the evident will of the Parties that the arbitral award shall not conclude by a "non liquet", but shall in any event decide that the island forms a part of the territory of one or the other of two litigant Powers.

The possibility for the Arbitrator to found his decision on the relative strength of the titles invoked on either side must have been envisaged by the Parties to the Special Agreement, because it was to be foreseen that the evidence produced as regards sovereignty over a territory in the circumstances the island in dispute might prove not to be sufficient to lead to a clear conclusion as to the existence of sovereignty.

For the reasons given above, no presumption in favour of Spanish sovereignty can be based in international law on the titles invoked by the United States as successors of Spain. Therefore, there would not be sufficient grounds for deciding the case in favour of the United States, even if it
were admitted, in accordance with their submission, that the evidence produced by the Netherlands in support of their claim either does not relate to the Island in dispute or does not suffice to establish a continuous display of State authority over the island. For, in any case, the exercise of some acts of State authority and the existence of external signs of sovereignty, e.g., flags and coat of arms, has been proved by the Netherlands, even if the Arbitrator were to retain only such evidence as can, in view of the trustworthy and sufficiently accurate nautical observations given to support it, concern solely the island of Palmas (or Miangas), namely that relating to the visits of the steamer Raaf in 1895, of H.M.S. Edi in 1898 and of General Wood in 1906.

These facts at least constitute a beginning of establishment of sovereignty by continuous and peaceful display of State authority, or a commencement of occupation of an island not yet forming a part of the territory of a State; and such a state of things would create in favour of the Netherlands an inchoate title for completing the conditions of sovereignty. Such inchoate title, based on display of State authority, would, in the opinion of the Arbitrator, prevail over an inchoate title derived from discovery, especially if this latter title has been left for a very long time without completion by occupation; and it would equally prevail over any claim which, in equity, might be deduced from the notion of contiguity. International law, like law in general, has the object of assuring the coexistence of different interests which are worthy of legal protection. If, as in the present instance, only one of two conflicting interests is to prevail, because sovereignty can be attributed to but one of the Parties, the interest which involves the maintenance of a state of things having offered at the critical time to the inhabitants of the disputed territory and to other States a certain guarantee for the respect of their rights ought, in doubt, to prevail over an interest which—supposing it to be recognized in international law—has not yet received any concrete form of development.

Supposing that, at the time of the coming into force of the Treaty of Paris, the Island of Palmas (or Miangas) did not form part of the territory of any State, Spain would have been able to cede only the rights which she might possibly derive from discovery or contiguity. On the other hand, the inchoate title of the Netherlands could not have been modified by a treaty concluded between third Powers; and such a treaty could not have impressed the character of illegality on any act undertaken by the Netherlands with a view to completing their inchoate title—at least as long as no dispute on the matter had arisen, i.e., until 1906.

Now it appears from the report on the visit of General Wood to Palmas (or Miangas), on January 21st, 1906, that the establishment of Netherlands authority, attested also by external signs of sovereignty, had already reached such a degree of development, that the importance of maintaining this state of things ought to be considered as prevailing over a claim possibly based either on discovery in very distant times and unsupported by occupation, or on mere geographical position.

This is the conclusion reached on the ground of the relative strength of the titles invoked by each Party, and founded exclusively on a limited part of the evidence concerning the epoch immediately preceding the rise of the dispute.

This same conclusion must impose itself with still greater force if there be taken into consideration—as the Arbitrator considers should be done—all the evidence which tends to show that there were unchallenged acts of peaceful display of Netherlands sovereignty in the period from 1700 to 1906, and which—as has been stated above—may be regarded as sufficiently proving the existence of Netherlands sovereignty.

For these reasons the Arbitrator, in conformity with Article I of the Special Agreement of January 23rd, 1925, decides that: The Island of Palmas (or Miangas) forms in its entirety a part of Netherlands territory.

Done at The Hague, this fourth day of April 1928.

Max Huber, Arbitrator,
Michiels van Verduynen, Secretary General.
International Court of Justice

Corfu Channel
(United Kingdom of Great Britain and Northern Ireland v. Albania)
Preliminary Objection, Judgment

I.C.J. Reports 1948
Le présent arrêt doit être cité comme suit :

« Affaire du détroit de Corfou, Arrêt sur l'exception préliminaire : C. I. J. Recueil 1948, p. 15. »

This Judgment should be cited as follows:

In the Corfu Channel case,

between

the Government of the United Kingdom of Great Britain and Northern Ireland, represented by:

Mr. W. E. Beckett, C.M.G., K.C., Legal Adviser to the Foreign Office, as Agent, assisted by
The Right Honourable Sir Hartley Shawcross, K.C., M.P.,
Attorney-General;
Dr. H. Lauterpacht, Professor of international law in the
University of Cambridge;
Mr. C. H. M. Waldock, Professor of international law in the
University of Oxford;
Mr. R. O. Wilberforce,
Mr. J. Mervyn Jones,
Mr. M. E. Reed (of the Attorney-General’s Office), members
of the English Bar, as Counsel,

and

the Government of the People’s Republic of Albania, represented
by:
M. Kahreman Ylli, Minister Plenipotentiary of Albania in Paris,
as Agent, assisted by
Professor Vladimir Voco, Professor of international law in
Charles University at Prague, and
Professor Ivo Lapenna, Professor of international law in the
University at Zagreb, as Counsel,

THE COURT,

composed as above,

delivers the following judgment:

By an Application, transmitted to and filed in the Registry of
the Court on May 22nd, 1947, under Article 40, paragraph 1, of the
Statute, and Article 32, paragraph 2, of the Rules of Court, the
Government of the United Kingdom of Great Britain and Northern
Ireland instituted proceedings before the Court against the Govern-
ment of the People’s Republic of Albania. These proceedings
concerned the incident which occurred in the Corfu Channel on
October 22nd, 1946, when two British destroyers struck mines, the
explosion of which caused damage to these vessels and heavy loss
of life.
It is stated in the Application that the subject of the dispute and the succinct statement of the facts and grounds on which the claim of the United Kingdom is based are to be found in a note dated December 9th, 1946, transmitted by the Government of the United Kingdom to the Albanian Government, a copy of which is attached to the Application. It is alleged in the Application that the Court has jurisdiction "under Article 36 (1) of its Statute as being a matter, which is one specially provided for in the Charter of the United Nations, on the grounds: (a) that the Security Council of the United Nations, at the conclusion of proceedings in which it dealt with the dispute under Article 36 of the Charter, by a Resolution, decided to recommend both the Government of the United Kingdom and the Albanian Government to refer the present dispute to the International Court of Justice; (b) that the Albanian Government accepted the invitation of the Security Council under Article 32 of the Charter to participate in the discussion of the dispute and accepted the condition laid down by the Security Council, when conveying the invitation, that Albania accepts in the present case all the obligations which a Member of the United Nations would have to assume in a similar case; (c) that Article 25 of the Charter provides that the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

Finally, it is stated in the Application that the purpose of the claim of the Government of the United Kingdom is to secure a decision of the Court that the Albanian Government is internationally responsible for the loss and injury resulting from the fact that two destroyers of the Royal Navy struck mines in Albanian territorial waters in the Corfu Channel, and to have the repair or compensation due therefor from the Albanian Government determined by the Court.

By a telegram of January 24th, 1947, the Albanian Government accepted the decision of the Security Council inviting it, in accordance with Article 32 of the Charter, to participate, without a vote, in the proceedings with regard to the dispute, on condition that Albania should accept, in the present case, all the obligations which a Member of the United Nations would have to assume in a similar case.

The Resolution of the Security Council of April 9th, 1947, to which the Application refers, is as follows:

"The Security Council having considered statements of representatives of the United Kingdom and Albania concerning a dispute between the United Kingdom and Albania arising out of an incident on 22nd October, 1946, in the Strait of Corfu in which two British ships were damaged by mines with resulting loss of life and injury to their crews recommends that the United Kingdom and Albanian Governments should immediately refer the dispute to the International Court of Justice in accordance with the provisions of the Statute of the Court."

Notice of the Application of the Government of the United Kingdom was given on May 22nd, 1947, by the Registrar of the Court, to the Albanian Government by telegram and by letter. On the same day, the Application was transmitted by the Registrar to the Secretary-General of the United Nations for communication in accordance with Article 40, paragraph 3, of the Statute.

On June 23rd, 1947, the Registrar received from the Albanian Government, following upon a reminder addressed to the latter, a telegram acknowledging receipt of the letter and telegram of May 22nd, and announcing the despatch of a reply to these communications.

On July 23rd, 1947, the Deputy-Registrar received from the hands of M. Kahreman Ylli, Albanian Minister in Paris, a letter from the Deputy-Minister of Foreign Affairs of Albania, dated at Tirana, July 2nd, 1947, which confirmed the receipt of the Application, and, after referring to the contents of that document, requested the Registrar "to be good enough to bring the following statement to the knowledge of the Court:

The Government of the People's Republic of Albania finds itself obliged to observe:

1. That the Government of the United Kingdom, in instituting proceedings before the Court, has not complied with the recommendation adopted by the Security Council on 9th April, 1947, whereby that body recommended 'that the United Kingdom and Albanian Governments should immediately refer the dispute to the International Court of Justice in accordance with the provisions of the Statute of the Court'.

The Albanian Government considers that, according both to the Court's Statute and to general international law, in the absence of an acceptance by Albania of Article 36 of the Court's Statute or of any other instrument of international law whereby the Albanian Government might have accepted the compulsory jurisdiction of the Court, the Government of the United Kingdom was not entitled to refer the dispute to the Court by unilateral application.

2. It would appear that the Government of the United Kingdom endeavours to justify this proceeding by invoking Article 25 of the Charter of the United Nations.

There can, however, be no doubt that Article 25 of the Charter relates solely to decisions of the Security Council taken on the basis of the provisions of Chapter VII of the Charter and does not apply to recommendations made by the Council with reference to the pacific settlement of disputes, since such recommendations are not binding and consequently cannot afford an indirect basis for the compulsory jurisdiction of the Court, a jurisdiction which can only ensue from explicit declarations made by States Parties to the Statute of the Court, in accordance with Article 36, 3, of the Statute.

3. The Albanian Government considers that, according to the terms of the Security Council's recommendation of 9th April, 1947, the Government of the United Kingdom, before bringing the case
before the International Court of Justice, should have reached an understanding with the Albanian Government regarding the conditions under which the two Parties, proceeding in conformity with the Council's recommendation, should submit their dispute to the Court.

The Albanian Government is therefore justified in its conclusion that the Government of the United Kingdom has not proceeded in conformity with the Council's recommendation, with the Statute of the Court or with the recognized principles of international law.

In these circumstances, the Albanian Government would be within its rights in holding that the Government of the United Kingdom was not entitled to bring the case before the Court without first concluding a special agreement with the Albanian Government, fully accepting for its part the recommendation of the Security Council, is prepared, notwithstanding this irregularity and in evidence of its devotion to the principles of friendly collaboration between nations and of the pacific settlement of disputes, to appear before the Court;

Whereas the note above mentioned gives notice of the appointment as Agent for the Albanian Government of M. Kahreman Yll, Minister Plenipotentiary of Albania in Paris, and of his address for service at The Hague;

Whereas, having regard to the Resolution of the Security Council of April 9th, 1947, the said note of the Albanian Government may be regarded as constituting the document mentioned in Article 36 of the Rules of Court;

In the Order, the time-limits were fixed as follows: the 1st October, 1947, for the presentation of the Memorial of the United Kingdom, and the 10th December, 1947, for the presentation of the Counter-Memorial of Albania.

The Memorial of the United Kingdom, presented within the time-limit fixed by the Order, contains statements and submissions with regard to the incidents which occurred on October 22nd, 1946, in the Corfu Channel. These statements and submissions develop the points indicated in the Application as constituting the claim of the United Kingdom.

Within the time-limit fixed for the presentation of the Counter-Memorial, the Agent for the Albanian Government, by a document dated December 1st and filed in the Registry on December 9th, submitted a Preliminary Objection to the Application on the ground of inadmissibility, based upon the following statements:

"I. The facts:

(1) The Security Council, in a Resolution adopted on April 9th last, recommended that the United Kingdom and Albanian Governments should immediately refer the dispute between them arising out of an incident on October 22nd, 1946, in the Strait of Corfu, to the International Court of Justice, in accordance with the provisions of the Statute of the Court;

(2) contrary to this recommendation, the United Kingdom Government, alone and without any agreement with the Albanian Government, approached the Court on May 13th last. By proceeding thus unilaterally, the Government of the United Kingdom brought an Application before the Court;

(3) on July 2nd last, the Albanian Government made to the Court most explicit reservations respecting the manner in which
the Government of the United Kingdom had brought the case before the Court, but, subject to these reservations, stated that it was prepared to appear before the Court;

(4) on the other hand, the Albanian Government, in its letter of July 2nd last addressed to the Court, fully accepted the Security Council’s recommendation of April 9th last, as far as it was concerned, and observed that, to bring their case before the Court, the two Governments should have reached an understanding in conformity with the Security Council’s recommendation and in accordance with the provisions of the Court’s Statute.

II. The Law:

(1) According to Article 36, paragraph 1, of the Court’s Statute, its jurisdiction ‘comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force’. According to Article 40, paragraph 1, of the Statute, ‘cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application....’.

(2) The Albanian Government not being bound by any treaty or convention in force to submit its dispute with the United Kingdom Government to the Court, it follows that, in accordance with the provisions of the Statute of the Court, only both parties to this dispute can validly do so.

If this is so, the case must be brought before the Court by the notification of the special agreement, and not by an application.

(3) In its Application of May 13th last, the United Kingdom Government invoked no treaty or convention in force to show that the parties are submitting their dispute to the Court in accordance with the provisions of the Statute.

The United Kingdom Government maintains that this is a matter which is one specially provided for in the Charter of the United Nations, on the grounds: (a) that the Security Council of the United Nations, at the conclusion of proceedings in which it dealt with the dispute under Article 36 of the Charter, by a Resolution, of which a copy forms Annex 2 to this Application, decided to recommend both the Government of the United Kingdom and the Albanian Government to refer the present dispute to the International Court of Justice; (b) that the Albanian Government accepted the invitation of the Security Council under Article 32 of the Charter to participate in the discussion of the dispute and accepted the condition laid down by the Security Council, when conveying the invitation, that Albania accepts in the present case all the obligations which a Member of the United Nations would have to assume in a similar case.

(A copy of the invitation of the Security Council and of the Albanian Government’s reply thereto form Annex 3 to the present Application; (c) that Article 25 of the Charter provides that the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.’ (See letter from the Agent of the Government of the United Kingdom of Great Britain and Northern Ireland, dated May 13th, 1947.)

As regards these reasons given by the United Kingdom Government, the Albanian Government has the honour to make the following observations:

Ad (a) The Security Council, in its Resolution of April 9th last, only recommended the United Kingdom and Albanian Governments to refer their dispute to the International Court of Justice in accordance with the provisions of the Statute of the Court.

Such a recommendation certainly cannot ipso facto constitute a matter specially provided for in the Charter of the United Nations to which the Court’s jurisdiction extends. Nothing in the Charter of the United Nations provides for such a case;

ad (b) In complying with the invitation given by the Secretary-General ad interim of the United Nations on January 20th last, the Albanian Government only accepted ‘in the present case all the obligations which a Member of the United Nations would have to assume in a similar case’, within the meaning of Article 32 of the Charter.

As it was a recommendation, the obligations cannot ipso facto constitute a matter specially provided for in the Charter of the United Nations with a view to the Court’s compulsory jurisdiction.

As a result of rights and obligations assumed by them in the Charter, Members of the United Nations are never bound to appear before the Court without any other procedure, namely, without having duly and expressly accepted the Court’s jurisdiction in conformity with the provisions of its Statute;

ad (c) The Security Council’s Resolution of April 9th last does not provide a recommendation which, in conformity with the Charter of the United Nations, has no binding force for the Governments of Albania and the United Kingdom without their consent and acceptance. Moreover, according to the very terms of the Resolution, the two Governments must proceed in conformity with the provisions of the Statute of the Court in order that they may submit their dispute to it.

The said Resolution of the Security Council cannot, in conformity with the Charter of the United Nations and with the provisions of the Statute of the Court, be considered to be a decision of the Security Council, such as would on the one hand oblige both parties, ipso facto and without any other step, to appear before the International Court of Justice, and such as would, on the other hand, authorize them to approach the International Court of Justice without regard to the provisions of the Statute of the Court.

To sum up the foregoing observations, the Albanian Government asserts that neither the said Resolution of April 9th last, nor the said declaration of the Albanian Government of 20th January last, nor yet Article 25 of the Charter, can, whether taken separately or conjointly, be relied on as imposing the Court’s compulsory jurisdiction on the Albanian Government in the present case.

III. Conclusions:


May it please the Court to proceed in conformity with Article 62 of the Rules of Court,
to place on record that, in accepting the Security Council’s recommendation, the Albanian Government is only obliged to submit the above-mentioned dispute to the Court in accordance with the provisions of the Statute of the Court,
and to give judgment that the Application of May 13th last addressed to the Court by the Government of the United Kingdom against the Government of the People’s Republic of Albania, is inadmissible, the United Kingdom Government having submitted the said Application contrary to the provisions of Article 40, paragraph 1, and of Article 36, paragraph 1, of the Statute of the Court.”

The Albanian Preliminary Objection was transmitted, on December 9th, to the Agent for the United Kingdom and was communicated on December 11th to the Members of the United Nations, pursuant to the provisions of Article 63 of the Statute.

By an Order, made on December 10th, 1947, the President of the Court, as the Court was not sitting, fixed January 20th, 1948, as the time-limit for the presentation by the Government of the United Kingdom of a written statement of its observations and submissions in regard to the Preliminary Objection.

This statement, dated January 19th, 1948, and received in the Registry on the same date, contains, in addition to a number of arguments, the following statements and submissions:

(a) It [the Government of the United Kingdom] has fully complied with the recommendation of the Security Council immediately to refer the dispute to the Court. It did so in its Application of 13th May, 1947, which fully and clearly indicated the subject of the dispute, and the parties, in accordance with Article 40 (1) of the Statute of the Court and Article 32 (2) of the Rules of Court.

The Government of Albania, after delivery of the United Kingdom Application, stated in its letter of 2nd July, 1947, that it fully accepted the recommendation of the Security Council, and that it was prepared to appear before the Court and to accept its jurisdiction in this case.

(b) This Albanian letter, coupled with the Resolution of the Security Council of 9th April, 1947, was accepted by the President of the Court as a document which satisfied the conditions laid down by the Security Council for the appearance before the Court of a State not party to the Statute. (See Resolution of the Security Council of 15th October, 1946, under which a State not party to the Statute may make a ‘particular declaration’ accepting the jurisdiction of the Court in respect of a particular dispute only.)

(c) In these circumstances the jurisdiction of the Court to make the Order of 31st July, 1947, and to proceed with the trial of this dispute is fully established. Under Article 36 (1) of the Statute, the jurisdiction of the Court comprises all cases which the parties refer to it, and there is no dispute which States entitled to appear before the Court cannot refer to it.... The parties have clearly referred the present dispute by the above-mentioned documents (namely, the United Kingdom Application of 13th May, 1947, and the Albanian letter of 2nd July, 1947), which, whether or not they constitute a ‘special agreement’, at least constitute a ‘reference’. A special agreement is not necessary....

(e) Article 40 of the Statute merely defines the formal basis for action by the Court in a case where jurisdiction is established by Article 36 (1). There is nothing in the Statute or the Rules of Court which prevents the proceedings being formally instituted by application, even though the jurisdiction of the Court is established by a ‘reference’ by the parties or by a ‘special agreement’. Accordingly the Government of the United Kingdom, in bringing this matter before the Court by application, has, it is submitted, proceeded correctly....

(f) Further, there has been, in fact, an agreement between the parties constituted by the acceptance of the jurisdiction on the part of the Government of the United Kingdom in compliance with the Resolution of the Security Council of 9th April, 1947 (as evidenced by its Application of 13th May, 1947), followed by an acceptance of the jurisdiction on the part of the Government of Albania in its letter of 2nd July, 1947, to refer (without prejudice to the Albanian Government’s view (as to the interpretation of Article 25 of the Charter) to the Court the issues defined in the Application. This agreement possesses all the essentials of a ‘special agreement’ and conforms fully with Article 40 of the Statute....

(g) Even if (which is not admitted) there was any formal irregularity in the mode of the commencement of the present proceedings, this irregularity has been cured, because the Albanian Government by its letter of 2nd July, 1947, has waived any possible objection and has consented to the jurisdiction of the Court. An irregularity in the manner in which a case is introduced may be cured by subsequent events....

(h) Having once consented to the jurisdiction, the Albanian Government cannot afterwards withdraw its consent....

(i) The President’s Order of 31st July, 1947, clearly proceeded upon the basis that the Albanian Government had definitely accepted the jurisdiction, as was, in fact, the case. It is not competent for the Albanian Government to reopen the question of jurisdiction....

12. In view of the circumstances above referred to, which constitute an acceptance by the Government of the United Kingdom and a clear acceptance by Albania of the jurisdiction of the Court, the Government of the United Kingdom has not, in these Observations, set forth arguments on the applicability of Article 25 of the Charter. However, the Government of the United Kingdom must reserve the right, if necessary, to invoke the jurisdiction of the Court on the grounds set forth in its original Application.”
In conclusion, the Government of the United Kingdom submits to the Court:

(a) that the preliminary objection submitted by the Government of Albania should be dismissed,

(b) that the Government of Albania should be directed to comply with the terms of the President’s Order of 31st July, 1947, and to deliver a Counter-Memorial on the merits of the dispute without further delay.”

As the Court did not have upon the Bench a judge of Albanian nationality, the Albanian Government availed itself of the right provided by Article 31, paragraph 2, of the Statute, and designated Dr. Igor Daxner, President of a Chamber of the Supreme Court of Czechoslovakia, as judge ad hoc.

In the course of public sittings, held on February 26th, 27th and 28th, and on March 1st, 2nd and 5th, 1948, the Court heard oral arguments on behalf of the respective parties: M. Kahraman Ylli, Agent, and Professor Vochov, Counsel, for Albania; and Mr. W. E. Beckett, Agent, and Sir Hartley Shawcross, Counsel, for the United Kingdom. On being questioned by the President before the close of the hearing, the Agent for the Albanian Government declared that the submissions presented in the Albanian Preliminary Objection of December 9th, 1947, were final submissions; a similar declaration was made on behalf of the Agent for the Government of the United Kingdom with regard to the submissions in the Observations of the United Kingdom of January 19th, 1948.

Documents in support were filed as annexes to the Application and Memorial of the United Kingdom Government, to the Preliminary Objection of the Albanian Government and to the Observations of the United Kingdom Government in regard to this Preliminary Objection, as well as in view of the oral proceedings.1

The above being the state of the proceedings, the Court must now adjudicate upon the Preliminary Objection raised on behalf of the Government of the People’s Republic of Albania.

* * *

In the written submissions, which it confirmed orally at the hearing on March 5th, 1948, the Albanian Government requests the Court

“to place on record that the Albanian Government, in accepting the Security Council’s recommendation, is only obliged to submit the above-mentioned dispute to the Court in accordance with the provisions of the Statute of the Court”,

and

“to give judgment that the Application of May 13th last, addressed to the Court by the Government of the United Kingdom against the Government of the People’s Republic of Albania, is inadmissible, the Government of the United Kingdom having submitted the said Application contrary to the provisions of Article 40, paragraph 1, and Article 36, paragraph 1, of the Statute of the Court”.

The first submission relates to the Resolution of April 9th, 1947, in which the Security Council recommended “that the United Kingdom and Albanian Governments should immediately refer this dispute to the International Court of Justice in accordance with the provisions of the Statute of the Court”. The Albanian Government accepted this recommendation and on the basis of its acceptance recognizes its obligation to refer the dispute to the Court in accordance with the provisions of the Statute. It is true that this obligation could only be fulfilled in accordance with the provisions of the Statute. In recognizing this fact in accordance with the request of the Albanian Government, the Court points out that that Government subsequently contracted other engagements, the date and exact scope of which will be established later.

The second submission of the Albanian Government, which is disputed by the Government of the United Kingdom, appears to constitute an objection on the ground of the inadmissibility of the Application. The intention of the Albanian Government, however, seems to be somewhat lacking in precision in this respect. When it refers, in its submissions, to Article 40, paragraph 1, of the Statute of the Court, the Albanian Government appears merely to have in mind a procedural irregularity resulting from the fact that the main proceedings were instituted by means of an application instead of by a special agreement concluded beforehand. The Albanian Government, however, also refers to Article 36, paragraph 1, of the Statute, a provision which relates exclusively to the jurisdiction of the Court; and the criticisms which are directed against the Application of the United Kingdom in the text of the Preliminary Objection, relate to an alleged lack of compulsory jurisdiction as well as to the formal admissibility of the Application.

This argument may be explained by the connexion which the United Kingdom Government, for its part, had made between the institution of proceedings by application and the existence, alleged by it in this case, of compulsory jurisdiction.

In support of its Application, the Government of the United Kingdom invoked certain provisions of the Charter of the United Nations and of the Statute of the Court to establish the existence of a case of compulsory jurisdiction. The Court does not consider that it needs to express an opinion on this point, since, as will be pointed out, the letter of July 2nd, 1947, addressed by the Albanian Government to the Court, constitutes a voluntary acceptance of its jurisdiction.

The letter of July 2nd, 1947, in spite of the reservation stated therein, the exact scope of which will be considered later, removes

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1 See list in Annex.
all difficulties concerning the question of the admissibility of the Application and the question of the jurisdiction of the Court.

With respect to the first point, the Albanian Government, while declaring on the one hand that it “would be within its rights in holding that the Government of the United Kingdom was not entitled to bring the case before the International Court by unilateral action, without first concluding a special agreement with the Albanian Government”, states, on the other hand, that “it is prepared, notwithstanding this irregularity in the action taken by the Government of the United Kingdom, to appear before the Court”. This language used by the Albanian Government cannot be understood otherwise than as a waiver of the right subsequently to raise an objection directed against the admissibility of the Application founded on the alleged procedural irregularity of that instrument.

The letter of July 2nd, 1947, is no less decisive as regards the question of the Court’s jurisdiction. Not only does the Albanian Government, which had already assumed certain obligations towards the Security Council by its telegram of January 24th, 1947, declare in that letter that it “fully accepts the recommendation of the Security Council” to the effect that the dispute should be referred to the Court in accordance with the provisions of the Court’s Statute, but, after stating that it is “profoundly convinced of the justice of its case”, it accepts in precise terms “the jurisdiction of the Court for this case”. The letter of July 2nd, therefore, in the opinion of the Court, constitutes a voluntary and indisputable acceptance of the Court’s jurisdiction.

While the consent of the parties confers jurisdiction on the Court, neither the Statute nor the Rules require that this consent should be expressed in any particular form.

The Albanian contention that the Application cannot be entertained because it has been filed contrary to the provisions of Article 40, paragraph 1, and of Article 36, paragraph 1, of the Court’s Statute, is essentially founded on the assumption that the institution of proceedings by application is only possible where compulsory jurisdiction exists and that, where it does not, proceedings can only be instituted by special agreement.

This is a mere assertion which is not justified by either of the texts cited. Article 32, paragraph 2, of the Rules does not require the Applicant, as an absolute necessity, but only “as far as possible”, to specify in the application the provision on which he founds the jurisdiction of the Court. It clearly implies, both by its actual terms and by the reasons underlying it, that the institution of proceedings by application is not exclusively reserved for the domain of compulsory jurisdiction.

In submitting the case by means of an Application, the Government of the United Kingdom gave the Albanian Government the opportunity of accepting the jurisdiction of the Court. This acceptance was given in the Albanian Government’s letter of July 2nd, 1947.

Besides, separate action of this kind was in keeping with the respective positions of the parties in proceedings where there is in fact a claimant, the United Kingdom, and a defendant, Albania.

Furthermore, there is nothing to prevent the acceptance of jurisdiction, as in the present case, from being effected by two separate and successive acts, instead of jointly and beforehand by a special agreement. As the Permanent Court of International Justice has said in its Judgment No. 12, of April 26th, 1928, page 23: “The acceptance by a State of the Court’s jurisdiction in a particular case is not, under the Statute, subordinated to the observance of certain forms, such as, for instance, the previous conclusion of a special agreement.”

The Security Council’s recommendation has been relied upon to support opposite conclusions. But, in the first place, though this recommendation clearly indicates that the bringing of the case before the Court requires action on the part of the parties, it does not specify that this action must be taken jointly, and, in the second place, the method of submitting the case to the Court is regulated by the texts governing the working of the Court as was pointed out by the Security Council in its recommendation.

The Court cannot therefore hold to be irregular a proceeding which is not precluded by any provision in these texts.

The scope of the reservation formulated in the letter of July 2nd, 1947, has still to be considered. The reservation is as follows: “Nevertheless, the Albanian Government makes the most explicit reservations respecting the manner in which the Government of the United Kingdom has brought the case before the Court in application of the Security Council’s recommendation and more especially respecting the interpretation which that Government has sought to place on Article 25 of the Charter with reference to the binding character of the Security Council’s recommendations. The Albanian Government wishes to emphasize that its acceptance of the Court’s jurisdiction for this case cannot constitute a precedent for the future.”

This reservation is the only limit set by the Albanian Government either to its acceptance of the Court’s jurisdiction, or to its abandonment of any objection to the admissibility of the proceedings. It is for the Court to decide, with binding force as between the parties, what is the interpretation of the letter of July 2nd, 1947. It is clear that the reservation contained in the letter is intended only to maintain a principle and to prevent the establishment of a precedent as regards the future. The Albanian Government makes its reservations—both as to the manner in which the United Kingdom Government has instituted
the proceedings, and as to the interpretation which that Government claimed to give to Article 23 of the Charter with a view to establishing the Court's compulsory jurisdiction—not for the purposes of the present proceedings, but in order to retain complete freedom of decision in the future. It is clear that no question of a precedent could arise unless the letter signified in the present case the acceptance of the Court's jurisdiction on the merits.

The reservation in the letter of July 2nd, 1947, therefore does not enable Albania to raise a preliminary objection based on an irregularity of procedure, or to dispute thereafter the Court's jurisdiction on the merits.

For these reasons,

while placing on record the declaration contained in the first submission of the Albanian Government, but subject to the explicit reservation of the obligations assumed by that Government in its letter of July 2nd, 1947,

The Court,

by fifteen votes against one,

(1) rejects the Preliminary Objection submitted by the Albanian Government on December 9th, 1947;

(2) decides that proceedings on the merits shall continue and fixes the time-limits for the filing of subsequent pleadings as follows:

(a) for the Counter-Memorial of the Albanian Government, Tuesday, June 15th, 1948;

(b) for the Reply of the United Kingdom Government, Monday, August 2nd, 1948;

(c) for the Rejoinder of the Albanian Government, Monday, September 20th, 1948.

The present judgment has been drafted in French and English, the French text being authoritative.

Done at the Peace Palace, The Hague, this twenty-fifth day of March, one thousand nine hundred and forty-eight, in three copies, one of which shall be placed in the archives of the Court and the others delivered to the Governments of the People's Republic of Albania and of the United Kingdom of Great Britain and Northern Ireland respectively.

(Signed) J. G. GUERRERO,

President.

(Signed) EDVARD HAMBRO,

Registrar.

Judges Basdevant, Alvarez, Winiarski, Zorić, De Visscher, Badawi Pasha, Krylov, whilst concurring in the judgment of the Court, have availed themselves of the right conferred on them by Article 57 of the Statute and appended to the judgment a statement of their separate opinion.

M. Daxner, Judge ad hoc, declaring that he is unable to concur in the judgment of the Court, has availed himself of the right conferred on him by Article 57 of the Statute and appended to the judgment a statement of his separate opinion.

(Initialized) J. G. G.

(Initialized) E. H.
International Court of Justice

Reparation for Injuries Suffered in the Service of the United Nations
Advisory Opinion

I.C.J. Reports 1949
COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

RÉPARATION DES DOMMAGES
SUBIS AU SERVICE
DES NATIONS UNIES

AVIS CONSULTATIF DU 11 AVRIL 1949

1949

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

REPARATION FOR INJURIES
SUFFERED IN THE SERVICE
OF THE UNITED NATIONS

ADVISORY OPINION OF APRIL 11th, 1949

Le présent avis doit être cité comme suit:

"Réparation des dommages subis au service des Nations Unies,
Avis consultatif: C. I. J. Recueil 1949, p. 174."

This Opinion should be cited as follows:

"Reparation for injuries suffered in the service of the United Nations,

N° de vente : Sales number 17
INTERNATIONAL COURT OF JUSTICE

YEAR 1949.

April 11th, 1949.

REPARATION FOR INJURIES SUFFERED IN THE SERVICE OF THE UNITED NATIONS

Injuries suffered by agents of United Nations in course of performance of duties.—Damage to United Nations.—Damage to agents.
—Capacity of United Nations to bring claims for reparation due in respect of both.—International personality of United Nations.—Capacity as necessary implication arising from Charter and activities of United Nations.—Functional protection of agents.—Claim against a Member of the United Nations.—Claim against a non-member.—Reconciliation of claim by national State and claim by United Nations.—Claim by United Nations against agent’s national State.

ADVISORY OPINION.

Present: President Basdevant; Vice-President Guerrero; Judges Alvarez, Fabela, Hackworth, Winnarski, Zoricic, De Visscher, Sir Arnold McNair, Klaestad, Badawi Pasha, Krylov, Read, Hsu Mo, Azevedo.

THE COURT, composed as above,
gives the following advisory opinion:

On December 3rd, 1948, the General Assembly of the United Nations adopted the following Resolution:

"Whereas the series of tragic events which have lately befallen agents of the United Nations engaged in the performance of their duties raises, with greater urgency than ever, the question of the arrangements to be made by the United Nations with a view to ensuring to its agents the fullest measure of protection in the future and ensuring that reparation be made for the injuries suffered; and

Whereas it is highly desirable that the Secretary-General should be able to act without question as efficaciously as possible with a view to obtaining any reparation due; therefore

The General Assembly

Decides to submit the following legal questions to the International Court of Justice for an advisory opinion:

I. In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused (?a) to the United Nations, (b) to the victim or to persons entitled through him?

II. In the event of an affirmative reply on point I (b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?

Instructs the Secretary-General, after the Court has given its opinion, to prepare proposals in the light of that opinion, and to submit them to the General Assembly at its next regular session."

In a letter of December 4th, 1948, filed in the Registry on December 7th, the Secretary-General of the United Nations forwarded to the Court a certified true copy of the Resolution of the General Assembly. On December 10th, in accordance with paragraph 1 of Article 66 of the Statute, the Registrar gave notice of the Request to all States entitled to appear before the Court. On December 11th, by means of a special and direct communication as provided in paragraph 2 of Article 66, he informed these States that, in an Order made on the same date, the Court had
stated that it was prepared to receive written statements on the questions before February 14th, 1949, and to hear oral statements on March 7th, 1949.

Written statements were received from the following States: India, China, United States of America, United Kingdom of Great Britain and Northern Ireland, and France. These statements were communicated to all States entitled to appear before the Court and to the Secretary-General of the United Nations. In the meantime, the Secretary-General of the United Nations, having regard to Article 65 of the Statute (paragraph 2 of which provides that every question submitted for an opinion shall be accompanied by all documents likely to throw light upon it), had sent to the Registrar the documents which are enumerated in the list annexed to this Opinion.

Furthermore, the Secretary-General of the United Nations and the Governments of the French Republic, of the United Kingdom and of the Kingdom of Belgium informed the Court that they had designated representatives to present oral statements.

In the course of public sittings held on March 7th, 8th and 9th, 1949, the Court heard the oral statements presented on behalf of the Secretary-General of the United Nations by Mr. Ivan Kertov, Assistant Secretary-General in charge of the Legal Department as his Representative, and by Mr. A. H. Feller, Principal Director of that Department, as Counsel;

on behalf of the Government of the Kingdom of Belgium, by M. Georges Kaeckenbeeck, D.C.L., Minister Plenipotentiary of His Majesty the King of the Belgians, Head of the Division for Peace Conferences and International Organization at the Ministry for Foreign Affairs, Member of the Permanent Court of Arbitration;

on behalf of the Government of the French Republic, by M. Charles Chaumont, Professor of Public International Law at the Faculty of Law, Nancy; Legal Adviser to the Ministry for Foreign Affairs;

on behalf of the Government of the United Kingdom of Great Britain and Northern Ireland by Mr. G. G. Fitzmaurice, Second Legal Adviser to the Foreign Office.

* * *

The first question asked of the Court is as follows:

"In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the repair or due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him?"

It will be useful to make the following preliminary observations:

(a) The Organization of the United Nations will be referred to usually, but not invariably, as "the Organization".

(b) Questions I (a) and I (b) refer to "an international claim against the responsible de jure or de facto government". The Court understands that these questions are directed to claims against a State, and will, therefore, in this opinion, use the expression "State" or "defendant State".

(c) The Court understands the word "agent" in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the Organization with carrying out, or helping to carry out, one of its functions— in short, any person through whom it acts.

(d) As this question assumes an injury suffered in such circumstances as to involve a State’s responsibility, it must be supposed, for the purpose of this Opinion, that the damage results from a failure by the State to perform obligations of which the purpose is to protect the agents of the Organization in the performance of their duties.

(e) The position of a defendant State which is not a member of the Organization is dealt with later, and for the present the Court will assume that the defendant State is a Member of the Organization.

* * *

The questions asked of the Court relate to the "capacity to bring an international claim"; accordingly, we must begin by defining what is meant by that capacity, and consider the characteristics of the Organization, so as to determine whether, in general, these characteristics do, or do not, include for the Organization a right to present an international claim.

Competence to bring an international claim is, for those possessing it, the capacity to resort to the customary methods recognized by international law for the establishment, the presentation and the settlement of claims. Among these methods may be mentioned protest, request for an enquiry, negotiation, and request for submission to an arbitral tribunal or to the Court in so far as this may be authorized by the Statute.

This capacity certainly belongs to the State; a State can bring an international claim against another State. Such a claim takes the form of a claim between two political entities, equal in law, similar
in form, and both the direct subjects of international law. It is
dealt with by means of negotiation, and cannot, in the present state
of the law as to international jurisdiction, be submitted to a tribunal,
except with the consent of the States concerned.

When the Organization brings a claim against one of its Members,
this claim will be presented in the same manner, and regulated
by the same procedure. It may, when necessary, be supported
by the political means at the disposal of the Organization. In
these ways the Organization would find a method for securing
the observance of its rights by the Member against which it has
a claim.

But, in the international sphere, has the Organization such
a nature as involves the capacity to bring an international claim?
In order to answer this question, the Court must first enquire
whether the Charter has given the Organization such a position
that it possesses, in regard to its Members, rights which it is entitled
to ask them to respect. In other words, does the Organization
possess international personality? This is no doubt a doctrinal
expression, which has sometimes given rise to controversy. But
it will be used here to mean that if the Organization is recognized
as having that personality, it is an entity capable of availing itself
of obligations incumbent upon its Members.

To answer this question, which is not settled by the actual
terms of the Charter, we must consider what characteristics it
was intended thereby to give to the Organization.

The subjects of law in any legal system are not necessarily
identical in their nature or in the extent of their rights, and their
nature depends upon the needs of the community. Throughout
its history, the development of international law has been influenced
by the requirements of international life, and the progressive
increase in the collective activities of States has already given rise
to instances of action upon the international plane by certain
entities which are not States. This development culminated
in the establishment in June 1945 of an international organization
whose purposes and principles are specified in the Charter of the
United Nations. But to achieve these ends the attribution
of international personality is indispensable.

The Charter has not been content to make the Organization
created by it merely a centre "for harmonizing the actions of nations
in the attainment of these common ends" (Article 1, para. 4).
It has equipped that centre with organs, and has given it special
tasks. It has defined the position of the Members in relation to
the Organization by requiring them to give it every assistance in
any action undertaken by it (Article 2, para. 5), and to accept and
carry out the decisions of the Security Council; by authorizing
the General Assembly to make recommendations to the Members;
by giving the Organization legal capacity and privileges and
immunities in the territory of each of its Members; and by providing
for the conclusion of agreements between the Organization and its
Members. Practice—in particular the conclusion of conventions
to which the Organization is a party—has confirmed this character
of the Organization, which occupies a position in certain respects
detached from its Members, and which is under a duty to
remind them, if need be, of certain obligations. It must be added
that the Organization is a political body, charged with political
tasks of an important character, and covering a wide field namely,
the maintenance of international peace and security, the development
of friendly relations among nations, and the achievement of
international co-operation in the solution of problems of an economic,
social, cultural or humanitarian character (Article 1); and in dealing
with its Members it employs political means. The "Convention
on the Privileges and Immunities of the United Nations" of 1946
creates rights and duties between each of the signatories and the
Organization (see, in particular, Section 35). It is difficult to see
how such a convention could operate except upon the international
plane and as between parties possessing international personality.

In the opinion of the Court, the Organization was intended to
eexercise and enjoy, and in fact exercising and enjoying,
functions and rights which can only be explained on the basis
of the possession of a large measure of international personality
and the capacity to operate upon an international plane. It
is at present the supreme type of international organization, and
it could not carry out the intentions of its founders if it was devoid
of international personality. It must be acknowledged that its
Members, by entrusting certain functions to it, with the attendant
duties and responsibilities, have clothed it with the competence
required to enable those functions to be effectively discharged.

Accordingly, the Court has come to the conclusion that the
Organization is an international person. That is not the same
thing as saying that it is a State, which it certainly is not, or that
its legal personality and rights and duties are the same as those
of a State. Still less is it the same thing as saying that it is "a
super-State", whatever that expression may mean. It does not
evén imply that all its rights and duties must be upon the
international plane, any more than all the rights and duties of a State
must be upon that plane. What it does mean is that it is a subject
of international law and capable of possessing international rights
and duties, and that it has capacity to maintain its rights by
bringing international claims.

The next question is whether the sum of the international rights
of the Organization comprises the right to bring the kind of inter-
national claim described in the Request for this Opinion. That
is a claim against a State to obtain reparation in respect of the
damage caused by the injury of an agent of the Organization in the course of the performance of his duties. Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice. The functions of the Organization are of such a character that they could not be effectively discharged if they involved the concurrent action, on the international plane, of fifty-eight or more Foreign Offices, and the Court concludes that the Members have endowed the Organization with capacity to bring international claims when necessitated by the discharge of its functions.

What is the position as regards the claims mentioned in the request for an opinion? Question I is divided into two points, which must be considered in turn.

* * *

Question I (a) is as follows:

"In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations...?"

The question is concerned solely with the reparation of damage caused to the Organization when one of its agents suffers injury at the same time. It cannot be doubted that the Organization has the capacity to bring an international claim against one of its Members which has caused injury to it by a breach of its international obligations towards it. The damage specified in Question I (a) means exclusively damage caused to the interests of the Organization itself, to its administrative machine, to its property and assets, and to the interests of which it is the guardian. It is clear that the Organization has the capacity to bring a claim for this damage. As the claim is based on the breach of an international obligation on the part of the Member held responsible by the Organization, the Member cannot contend that this obligation is governed by municipal law, and the Organization is justified in giving its claim the character of an international claim.

When the Organization has sustained damage resulting from a breach by a Member of its international obligations, it is impossible to see how it can obtain reparation unless it possesses capacity to bring an international claim. It cannot be supposed that in such an event all the Members of the Organization, save the defendant State, must combine to bring a claim against the defendant for the damage suffered by the Organization.

The Court is not called upon to determine the precise extent of the reparation which the Organization would be entitled to recover. It may, however, be said that the measure of the reparation should depend upon the amount of the damage which the Organization has suffered as the result of the wrongful act or omission of the defendant State and should be calculated in accordance with the rules of international law. Amongst other things, this damage would include the reimbursement of any reasonable compensation which the Organization had to pay to its agent or to persons entitled through him. Again, the death or disablement of one of its agents engaged upon a distant mission might involve very considerable expenditure in replacing him. These are mere illustrations, and the Court cannot pretend to forecast all the kinds of damage which the Organization itself might sustain.

* * *

Question I (b) is as follows:

....."has the United Nations, as an Organization, the capacity to bring an international claim .... in respect of the damage caused .... (b) to the victim or to persons entitled through him?""

In dealing with the question of law which arises out of Question I (b), it is unnecessary to repeat the considerations which led to an affirmative answer being given to Question I (a). It can now be assumed that the Organization has the capacity to bring a claim on the international plane, to negotiate, to conclude a special agreement and to prosecute a claim before an international tribunal. The only legal question which remains to be considered is whether, in the course of bringing an international claim of this kind, the Organization can recover "the reparation due in respect of the damage caused .... to the victim.....".

The traditional rule that diplomatic protection is exercised by the national State does not involve the giving of a negative answer to Question I (b).

In the first place, this rule applies to claims brought by a State. But here we have the different and new case of a claim that would be brought by the Organization.

In the second place, even in inter-State relations, there are important exceptions to the rule, for there are cases in which protection may be exercised by a State on behalf of persons not having its nationality.

In the third place, the rule rests on two bases. The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party
to whom an international obligation is due can bring a claim in
respect of its breach. This is precisely what happens when the
Organization, in bringing a claim for damage suffered by its agent,
does so by invoking the breach of an obligation towards itself.
Thus, the rule of the nationality of claims affords no reason against
recognizing that the Organization has the right to bring a claim for
the damage referred to in Question I (b). On the contrary, the
principle underlying this rule leads to the recognition of this capacity
as belonging to the Organization, when the Organization invokes,
as the ground of its claim, a breach of an obligation towards itself.

Nor does the analogy of the traditional rule of diplomatic protec-
tion of nationals abroad justify in itself an affirmative reply. It
is not possible, by a strained use of the concept of allegiance,
to assimilate the legal bond which exists, under Article 100 of
the Charter, between the Organization on the one hand, and the
Secretary-General and the staff on the other, to the bond of
nationality existing between a State and its nationals.

The Court is here faced with a new situation. The questions
to which it gives rise can only be solved by realizing that the situa-
tion is dominated by the provisions of the Charter considered in
the light of the principles of international law.

The question lies within the limits already established; that is
to say it presupposes that the injury for which the reparation is
demanded arises from a breach of an obligation designed to help an
agent of the Organization in the performance of his duties. It is
not a case in which the wrongful act or omission would merely
constitute a breach of the general obligations of a State concerning
the position of aliens; claims made under this head would be within
the competence of the national State and not, as a general rule,
within that of the Organization.

The Charter does not expressly confer upon the Organization
the capacity to include, in its claim for reparation, damage caused
to the victim or to persons entitled through him. The Court must
therefore begin by enquiring whether the provisions of the Charter
concerning the functions of the Organization, and the part played
by its agents in the performance of those functions, imply for
the Organization power to afford its agents the limited protection
that would consist in the bringing of a claim on their behalf for
reparation for damage suffered in such circumstances. Under
international law, the Organization must be deemed to have those
powers which, though not expressly provided in the Charter, are
conferred upon it by necessary implication as being essential to
the performance of its duties. This principle of law was applied
by the Permanent Court of International Justice to the International
Labour Organization in its Advisory Opinion No. 13 of July 23rd,
1926 (Series B., No. 13, p. 18), and must be applied to the United
Nations.

Having regard to its purposes and functions already referred
to, the Organization may find it necessary, and in fact found
it necessary, to entrust its agents with important missions to
be performed in disturbed parts of the world. Many missions,
from their very nature, involve the agents in unusual dangers
to which ordinary persons are not exposed. For the same reason,
the injuries suffered by its agents in these circumstances will
sometimes have occurred in such a manner that their national
State would not be justified in bringing a claim for reparation
on the ground of diplomatic protection, or, at any rate, would
not feel disposed to do so. Both to ensure the efficient and
independent performance of these missions and to afford effective
support to its agents, the Organization must provide them with
adequate protection.

This need of protection for the agents of the Organization,
as a condition of the performance of its functions, has already
been realized, and the Preamble to the Resolution of December 3rd,
1948 (supra, p. 175), shows that this was the unanimous view of
the General Assembly.

For this purpose, the Members of the Organization have entered
into certain undertakings, some of which are in the Charter and
others in complementary agreements. The content of these
undertakings need not be described here; but the Court must
stress the importance of the duty to render to the Organization
"every assistance" which is accepted by the Members in Article 2,
paragraph 5, of the Charter. It must be noted that the effective
working of the Organization—the accomplishment of its task,
and the independence and effectiveness of the work of its agents—
require that these undertakings should be strictly observed.
For that purpose, it is necessary that, when an infringement
occurs, the Organization should be able to call upon the responsible
State to remedy its default, and, in particular, to obtain from
the State reparation for the damage that the default may have
caused to its agent.

In order that the agent may perform his duties satisfactorily,
he must feel that this protection is assured to him by the Organiza-
tion, and that he may count on it. To ensure the independence
of the agent, and, consequently, the independent action of the
Organization itself, it is essential that in performing his duties
he need not have to rely on any other protection than that of
the Organization (save of course for the more direct and immediate
protection due from the State in whose territory he may be).
In particular, he should not have to rely on the protection of his
own State. If he had to rely on that State, his independence
might well be compromised, contrary to the principle applied
by Article 100 of the Charter. And lastly, it is essential that—
whether the agent belongs to a powerful or to a weak State; to one more affected or less affected by the complications of international life; to one in sympathy or not in sympathy with the mission of the agent—he should know that in the performance of his duties he is under the protection of the Organization. This assurance is even more necessary when the agent is stateless.

Upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intention out of the Charter.

The obligations entered into by States to enable the agents of the Organization to perform their duties are undertaken not in the interest of the agents, but in that of the Organization. When it claims redress for a breach of these obligations, the Organization is invoking its own right, the right that the obligations due to it should be respected. On this ground, it asks for reparation of the injury suffered, for “it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form”; as was stated by the Permanent Court in its Judgment No. 8 of July 26th, 1927 (Series A., No. 9, p. 21). In claiming reparation based on the injury suffered by its agent, the Organization does not represent the agent, but is asserting its own right, the right to secure respect for undertakings entered into towards the Organization.

Having regard to the foregoing considerations, and to the undeniable right of the Organization to demand that its Members shall fulfill the obligations entered into by them in the interest of the good workings of the Organization, the Court is of the opinion that, in the case of a breach of these obligations, the Organization has the capacity to claim adequate reparation, and that in assessing this reparation it is authorized to include the damage suffered by the victim or by persons entitled through him.

* * *

The question remains whether the Organization has “the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him” when the defendant State is not a member of the Organization.

In considering this aspect of Question I (a) and (b), it is necessary to keep in mind the reasons which have led the Court to give an affirmative answer to it when the defendant State is a Member of the Organization. It has now been established that the Organization has capacity to bring claims on the international plane, and that it possesses a right of functional protection in respect of its agents. Here again the Court is authorized to assume that the damage suffered involves the responsibility of a State, and it is not called upon to express an opinion upon the various ways in which that responsibility might be engaged. Accordingly the question is whether the Organization has capacity to bring a claim against the defendant State to recover reparation in respect of that damage or whether, on the contrary, the defendant State, not being a member, is justified in raising the objection that the Organization lacks the capacity to bring an international claim. On this point, the Court’s opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims.

Accordingly, the Court arrives at the conclusion that an affirmative answer should be given to Question I (a) and (b) whether or not the defendant State is a Member of the United Nations.

* * *

Question II is as follows:

“In the event of an affirmative reply on point I (b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?”

The affirmative reply given by the Court on point I (b) obliges it now to examine Question II. When the victim has a nationality, cases can clearly occur in which the injury suffered by him may engage the interest both of his national State and of the Organization. In such an event, competition between the State’s right of diplomatic protection and the Organization’s right of functional protection might arise, and this is the only case with which the Court is invited to deal.

In such a case, there is no rule of law which assigns priority to the one or to the other, or which compels either the State or the Organization to refrain from bringing an international claim.
The Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense, and as between the Organization and its Members it draws attention to their duty to render “every assistance” provided by Article 2, paragraph 5, of the Charter.

Although the bases of the two claims are different, that does not mean that the defendant State can be compelled to pay the reparation due in respect of the damage twice over. International tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State in such a case.

The risk of competition between the Organization and the national State can be reduced or eliminated either by a general convention or by agreements entered into in each particular case. There is no doubt that in due course a practice will be developed, and it is worthy of note that already certain States whose nationals have been injured in the performance of missions undertaken for the Organization have shown a reasonable and co-operative disposition to find a practical solution.

* * *

The question of reconciling action by the Organization with the rights of a national State may arise in another way; that is to say, when the agent bears the nationality of the defendant State.

The ordinary practice whereby a State does not exercise protection on behalf of one of its nationals against a State which regards him as its own national, does not constitute a precedent which is relevant here. The action of the Organization is in fact based not upon the nationality of the victim but upon his status as agent of the Organization. Therefore it does not matter whether or not the State to which the claim is addressed regards him as its own national, because the question of nationality is not pertinent to the admissibility of the claim.

In law, therefore, it does not seem that the fact of the possession of the nationality of the defendant State by the agent constitutes any obstacle to a claim brought by the Organization for a breach of obligations towards it occurring in relation to the performance of his mission by that agent.

For these reasons,
The Court is of opinion

On Question 1 (a):

(i) unanimously,

That, in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a Member State, the United Nations as an Organization has the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused to the United Nations.

(ii) unanimously,

That, in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State which is not a member, the United Nations as an Organization has the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused to the United Nations.

On Question 1 (b):

(i) by eleven votes against four,

That, in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a Member State, the United Nations as an Organization has the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused to the victim or to persons entitled through him.

(ii) by eleven votes against four,

That, in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State which is not a member, the United Nations as an Organization has the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused to the victim or to persons entitled through him.
On Question II:

By ten votes against five,

When the United Nations as an Organization is bringing a claim for reparation of damage caused to its agent, it can only do so by basing its claim upon a breach of obligations due to itself; respect for this rule will usually prevent a conflict between the action of the United Nations and such rights as the agent's national State may possess, and thus bring about a reconciliation between their claims; moreover, this reconciliation must depend upon considerations applicable to each particular case, and upon agreements to be made between the Organization and individual States, either generally or in each case.

Done in English and French, the English text being authoritative, at the Peace Palace, The Hague, this eleventh day of April, one thousand nine hundred and forty-nine, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) Basdevant,
President.

(Signed) E. Hambro,
Registrar.

Judge Winiarski states with regret that he is unable to concur in the reply given by the Court to Question I (b). In general, he shares the views expressed in Judge Hackworth's dissenting opinion.

Judges Alvarez and Azevedo, whilst concurring in the Opinion of the Court, have availed themselves of the right conferred on them by Article 57 of the Statute and appended to the Opinion statements of their individual opinion.

Judges Hackworth, Badawi Pasha and Krylov, declaring that they are unable to concur in the Opinion of the Court, have availed themselves of the right conferred on them by Article 57 of the Statute and appended to the Opinion statements of their dissenting opinion.

(Initialled) J. B.
(Initialled) E. H.
International Court of Justice

Interpretation of Peace Treaties
Advisory Opinion

I.C.J. Reports 1950
Le présent avis doit être cité comme suit :

«Interprétation des traités de paix,
Avis consultatif : C. I. J. Recueil 1950, p. 65.»

This Opinion should be cited as follows:

“Interpretation of Peace Treaties,
INTERNATIONAL COURT OF JUSTICE

YEAR 1950

March 30th, 1950

INTERPRETATION OF PEACE TREATIES WITH BULGARIA, HUNGARY AND ROMANIA

Advisory function.—Competence of the Court: objection on the ground of alleged lack of competence of the General Assembly, based on the character of the Court as an organ of the United Nations; Article 2, paragraph 7, of the Charter.—Power of the Court to reply to a Request for Opinion in spite of the opposition of certain States; duty to answer; limits of this duty; Article 65 of the Statute.—Questions relating solely to the conditions of application of a procedure, provided for by treaty, for the settlement of disputes.—Article 68 of the Statute; discretion allowed to the Court.—Existence of disputes; applicability of the procedure provided for by treaty for the settlement of disputes to disputes concerning the interpretation or execution of the treaty.—Definition of a question put to the Court.—Compulsory settlement of disputes by Treaty Commissions; obligation for the parties to the dispute to co-operate in the constitution of the Commissions by appointing their representatives.

ADVISORY OPINION

Present: President BASDEVANT; Vice-President GUERRERO; Judges ALVAREZ, HACKWORTH, WINIAKSKI, ZORIČIĆ, DE VISSCHER, Sir ARNOLD MCNAIR, KLAESTAD, BADAWI PASHA, KRYLOV, READ, HSU MO, AZEVEDO; Registrar HAMBO.
OPIN. OF 30 III 50 (INTERPRETATION OF PEACE TREATIES) 67

Romania to join in appointing Commissions pursuant to the provisions of the respective Treaties of Peace for the settlement of disputes concerning the interpretation or execution of these Treaties,

Whereas the Governments of Bulgaria, Hungary and Romania have refused to appoint their representatives to the Treaty Commissions, maintaining that they were under no legal obligation to do so,

Whereas the Secretary-General of the United Nations is authorized by the Treaties of Peace, upon request by either party to a dispute, to appoint the third member of a Treaty Commission if the parties fail to agree upon the appointment of the third member,

Whereas it is important for the Secretary-General to be advised authoritatively concerning the scope of his authority under the Treaties of Peace,

The General Assembly

1. Expresses its continuing interest in and its increased concern at the grave accusations made against Bulgaria, Hungary and Romania;

2. Records its opinion that the refusal of the Governments of Bulgaria, Hungary and Romania to co-operate in its efforts to examine the grave charges with regard to the observance of human rights and fundamental freedoms justifies this concern of the General Assembly about the state of affairs prevailing in Bulgaria, Hungary and Romania in this respect;

3. Decides to submit the following questions to the International Court of Justice for an advisory opinion:

'I. Do the diplomatic exchanges between Bulgaria, Hungary and Romania, on the one hand, and certain Allied and Associated Powers signatories to the Treaties of Peace, on the other, concerning the implementation of Article 2 of the Treaties with Bulgaria and Hungary and Article 3 of the Treaty with Romania, disclose disputes subject to the provisions for the settlement of disputes contained in Article 36 of the Treaty of Peace with Bulgaria, Article 40 of the Treaty of Peace with Hungary, and Article 38 of the Treaty of Peace with Romania?'

In the event of an affirmative reply to question I:

'II. Are the Governments of Bulgaria, Hungary and Romania obligated to carry out the provisions of the articles referred to in question I, including the provisions for the appointment of their representatives to the Treaty Commissions?'

In the event of an affirmative reply to question II and if within thirty days from the date when the Court delivers its opinion,

the Governments concerned have not notified the Secretary-General that they have appointed their representatives to the Treaty Commissions, and the Secretary-General has so advised the International Court of Justice:

'III. If one party fails to appoint a representative to a Treaty Commission under the Treaties of Peace with Bulgaria, Hungary and Romania where that party is obligated to appoint a representative to the Treaty Commission, is the Secretary-General of the United Nations authorized to appoint the third member of the Commission upon the request of the other party to a dispute according to the provisions of the respective Treaties?'

In the event of an affirmative reply to question III:

'IV. Would a Treaty Commission composed of a representative of one party and a third member appointed by the Secretary-General of the United Nations constitute a Commission, within the meaning of the relevant Treaty articles, competent to make a definitive and binding decision in settlement of a dispute?'

4. Requests the Secretary-General to make available to the International Court of Justice the relevant exchanges of diplomatic correspondence communicated to the Secretary-General for circulation to the Members of the United Nations and the records of the General Assembly proceedings on this question;

5. Decides to retain on the agenda of the Fifth Regular Session of the General Assembly the question of the observance of human rights and fundamental freedoms in Bulgaria, Hungary and Romania, with a view to ensuring that the charges are appropriately examined and dealt with.'

By a letter of October 31st, 1949, filed in the Registry on November 3rd, the Secretary-General of the United Nations transmitted to the Court a certified true copy of the General Assembly's Resolution.

On November 7th, 1949, in accordance with paragraph 1 of Article 66 of the Court’s Statute, the Registrar gave notice of the Request to all States entitled to appear before the Court. On the same date, the Registrar, by means of a special and direct communication as provided in paragraph 2 of the above-mentioned article, informed all States entitled to appear before the Court and parties to one or more of the above-mentioned Peace Treaties (Australia, Canada, United States of America, Greece, India, New Zealand, Pakistan, United Kingdom of Great Britain and Northern Ireland, Byelorussian Soviet Socialist Republic, Ukrainian Soviet Socialist Republic, Czechoslovakia, Union of Soviet Socialist Republics, Union of South Africa, Yugoslavia) that the Court was prepared to receive from them written statements on the questions submitted
to it for an advisory opinion and to hear oral statements at a date which would be fixed in due course.

An identical communication was sent, also on November 7th, in pursuance of paragraph 1 of Article 63 of the Statute, to the other States parties to one of the above-mentioned Treaties, namely, Bulgaria, Hungary and Romania.

These communications were accompanied by copies of an Order, made on the same date, by which the Acting President of the Court appointed January 16th, 1950, as the date of expiry of the time-limit for the submission of written statements and reserved the rest of the procedure for further decision.

Written statements and communications were received within the prescribed time-limit from the following States: United States of America, United Kingdom, Bulgaria, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Byelorussian Soviet Socialist Republic, Romania, Czechoslovakia, Australia and Hungary.

In accordance with Article 65 of the Statute, the Secretary-General of the United Nations transmitted to the Registrar a set of documents which reached the Registry on November 26th, 1949. Some additional documents, which had subsequently been filed with the Secretariat, were forwarded to the Registry, where they arrived on February 24th, 1950. All these documents are enumerated in the list attached to the present Opinion.

In a letter dated January 23rd, 1950, the Assistant Secretary-General in charge of the Legal Department of the Secretariat of the United Nations announced that he intended to take part in the oral proceedings and to submit a statement on behalf of the Secretary-General.

The Government of the United Kingdom and the Government of the United States of America stated, in letters dated respectively January 6th and February 10th, 1950, that they intended to submit oral statements.

At public sittings held on February 28th and on March 1st and 2nd, 1950, the Court heard oral statements submitted:

on behalf of the Secretary-General of the United Nations by Mr. Ivan Kerno, Assistant Secretary-General in charge of the Legal Department;

on behalf of the Government of the United States of America by the Honorable Benjamin V. Cohen;

on behalf of the Government of the United Kingdom by Mr. G. G. Fitzmaurice, C.M.G., Second Legal Adviser of the Foreign Office.

* * *

In conformity with the Resolution of the General Assembly of October 22nd, 1949, the Court is at present called upon to give an Opinion only on Questions I and II set forth in that Resolution.

The power of the Court to exercise its advisory function in the present case has been contested by the Governments of Bulgaria, Hungary and Romania, and also by several other Governments, in the communications which they have addressed to the Court.

This objection is founded mainly on two arguments.

It is contended that the Request for an Opinion was an action ultra vires on the part of the General Assembly because, in dealing with the question of the observance of human rights and fundamental freedoms in the three States mentioned above, it was “interfering” or “intervening” in matters essentially within the domestic jurisdiction of States. This contention against the exercise by the Court of its advisory function seems thus to be based on the alleged incompetence of the General Assembly itself, an incompetence deduced from Article 2, paragraph 7, of the Charter.

The terms of the General Assembly’s Resolution of October 22nd, 1949, considered as a whole and in its separate parts, show that this argument is based on a misunderstanding. When the vote was taken on this Resolution, the General Assembly was faced with a situation arising out of the charges made by certain Allied and Associated Powers, against the Governments of Bulgaria, Hungary and Romania of having violated the provisions of the Peace Treaties concerning the observance of human rights and fundamental freedoms. For the purposes of the present Opinion, it suffices to note that the General Assembly justified the adoption of its Resolution by stating that “the United Nations, pursuant to Article 55 of the Charter, shall promote universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion”.

The Court is not called upon to deal with the charges brought before the General Assembly since the Questions put to the Court relate neither to the alleged violations of the provisions of the Treaties concerning human rights and fundamental freedoms nor to the interpretation of the articles relating to these matters. The object of the Request is much more limited. It is directed solely to obtaining from the Court certain clarifications of a legal nature regarding the applicability of the procedure for the settlement of disputes by the Commissions provided for in the express terms of Article 36 of the Treaty with Bulgaria, Article 40 of the Treaty with Hungary and Article 38 of the Treaty with Romania. The interpretation of the terms of a treaty for this purpose could not be considered as a question essentially within the domestic jurisdiction of a State. It is a question of inter-
national law which, by its very nature, lies within the competence of the Court.

These considerations also suffice to dispose of the objection based on the principle of domestic jurisdiction and directed specifically against the competence of the Court, namely, that the Court, as an organ of the United Nations, is bound to observe the provisions of the Charter, including Article 2, paragraph 7.

The same considerations furnish an answer to the objection that the advisory procedure before the Court would take the place of the procedure instituted by the Peace Treaties for the settlement of disputes. So far from placing an obstacle in the way of the latter procedure, the object of this Request is to facilitate it by seeking information for the General Assembly as to its applicability to the circumstances of the present case.

It thus appears that these objections to the Court's competence to give the Advisory Opinion which has been requested are ill-founded and cannot be upheld.

Another argument that has been invoked against the power of the Court to answer the Questions put to it in this case is based on the opposition of the Governments of Bulgaria, Hungary and Romania to the advisory procedure. The Court cannot, it is said, give the Advisory Opinion requested without violating the well-established principle of international law according to which no judicial proceedings relating to a legal question pending between States can take place without their consent.

This objection reveals a confusion between the principles governing contentious procedure and those which are applicable to Advisory Opinions.

The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different: in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States, the Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an "organ of the United Nations", represents its participation in the activities of the Organization, and, in principle, should not be refused.

There are certain limits, however, to the Court's duty to reply to a Request for an Opinion. It is not merely an "organ of the United Nations", it is essentially the "principal judicial organ" of the Organization (Art. 92 of the Charter and Art. 1 of the Statute). It is on account of this character of the Court that its power to answer the present Request for an Opinion has been challenged.

Article 65 of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request. In the opinion of the Court, the circumstances of the present case are profoundly different from those which were before the Permanent Court of International Justice in the Eastern Carelia case (Advisory Opinion No. 5), when the Court declined to give an Opinion because it found that the question put to it was directly related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties, and that at the same time it raised a question of fact which could not be elucidated without hearing both parties.

As has been observed, the present Request for an Opinion is solely concerned with the applicability to certain disputes of the procedure for settlement instituted by the Peace Treaties, and it is justifiable to conclude that it in no way touches the merits of those disputes. Furthermore, the settlement of these disputes is entrusted solely to the Commissions provided for by the Peace Treaties. Consequently, it is for these Commissions to decide upon any objections which may be raised to their jurisdiction in respect of any of these disputes, and the present Opinion in no way prejudges the decisions that may be taken on those objections. It follows that the legal position of the parties to these disputes cannot be in any way compromised by the answers that the Court may give to the Questions put to it.

It is true that Article 68 of the Statute provides that the Court in the exercise of its advisory functions shall further be guided by the provisions of the Statute which apply in contentious cases. But according to the same article these provisions would be applicable only "to the extent to which it [the Court] recognizes them to be applicable". It is therefore clear that their application depends on the particular circumstances of each case and that the Court possesses a large amount of discretion in the matter. In the present case the Court is dealing with a Request for an Opinion, the sole object of which is to enlighten the General Assembly as to the opportunities which the procedure contained in the Peace Treaties may afford for putting an end to a situation which has been presented to it. That being the object of the Request, the Court finds in the opposition to it made by Bulgaria, Hungary and Romania no reason why it should abstain from replying to the Request.

For the reasons stated above, the Court considers that it has the power to answer Questions I and II and that it is under a duty to do so.
Question I is framed in the following terms:

"Do the diplomatic exchanges between Bulgaria, Hungary and Romania on the one hand and certain Allied and Associated Powers signatories to the Treaties of Peace on the other, concerning the implementation of Article 2 of the Treaties with Bulgaria and Hungary and Article 3 of the Treaty with Romania, disclose disputes subject to the provisions for the settlement of disputes contained in Article 36 of the Treaty of Peace with Bulgaria, Article 40 of the Treaty of Peace with Hungary and Article 38 of the Treaty of Peace with Romania?"

The text of the articles mentioned in Question I is as follows:

Article 2 of the Treaty with Bulgaria (to which correspond mutatis mutandis Article 2, paragraph 1, of the Treaty with Hungary and Article 3, paragraph 1, of the Treaty with Romania):

"Bulgaria shall take all measures necessary to secure to all persons under Bulgarian jurisdiction, without distinction as to race, sex, language or religion, the enjoyment of human rights and of the fundamental freedoms, including freedom of expression, of press and publication, of religious worship, of political opinion and of public meeting."

Article 36 of the Treaty with Bulgaria (to which correspond mutatis mutandis Article 40 of the Treaty with Hungary and Article 38 of the Treaty with Romania):

"1. Except where another procedure is specifically provided under any article of the present Treaty, any dispute concerning the interpretation or execution of the Treaty, which is not settle by direct diplomatic negotiations, shall be referred to the Third Heads of Mission acting under Article 35, except that in this case the Heads of Mission will not be restricted by the time-limit provided in that Article. Any such dispute not resolved by them within a period of two months shall, unless the parties to the dispute mutually agree upon another means of settlement, be referred at the request of either party to the dispute to a Commission composed of one representative of each party and a third member selected by mutual agreement of the two parties from nationals of the third country. Should the two parties fail to agree within a period of one month upon the appointment of the third member, the Secretary-General of the United Nations may be requested by either party to make the appointment.

2. The decision of the majority of the members of the Commission shall be the decision of the Commission, and shall be accepted by the parties as definitive and binding."

The text of Article 35, which is referred to in Article 36 of the Treaty with Bulgaria (and to which correspond mutatis mutandis Article 39 of the Treaty with Hungary and Article 37 of the Treaty with Romania), is as follows:

"1. For a period not to exceed eighteen months from the coming into force of the present Treaty, the Heads of the Diplomatic Missions in Sofia of the Soviet Union, the United Kingdom and the United States of America, acting in concert, will represent the Allied and Associated Powers in dealing with the Bulgarian Government in all matters concerning the execution and interpretation of the present Treaty.

2. The Three Heads of Mission will give the Bulgarian Government such guidance, technical advice and clarification as may be necessary to ensure the rapid and efficient execution of the present Treaty both in letter and in spirit.

3. The Bulgarian Government shall afford the said Three Heads of Mission all necessary information and any assistance which they may require in the fulfilment of the tasks devolving on them under the present Treaty."

Question I involves two main points. First, do the diplomatic exchanges between Bulgaria, Hungary and Romania on the one hand and certain Allied and Associated Powers signatories to the Peace Treaties on the other, disclose any disputes? Second, if they do, are such disputes among those which are subject to the provisions for the settlement of disputes contained in Article 36 of the Treaty with Bulgaria, Article 40 of the Treaty with Hungary, and Article 38 of the Treaty with Romania?

Whether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence. In the diplomatic correspondence submitted to the Court, the United Kingdom, acting in association with Australia, Canada and New Zealand, and the United States of America charged Bulgaria, Hungary and Romania with having violated, in various ways, the provisions of the articles dealing with human rights and fundamental freedoms in the Peace Treaties and called upon the three Governments to take remedial measures to carry out their obligations under the Treaties. The three Governments, on the other hand, denied the charges. There has thus arisen a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations. Confronted with such a situation, the Court must conclude that international disputes have arisen.

This conclusion is not invalidated by the text of Article 36 of the Treaty with Bulgaria (Article 40 of the Treaty with Hungary and Article 38 of the Treaty with Romania). This article, in referring to "any dispute", is couched in general terms. It does not justify limiting the idea of "the dispute" to a dispute between the United States of America, the United Kingdom and the Union of Soviet Socialist Republics acting on the one hand, and Bulgaria
(Hungary or Romania) on the other. In the present case, a dispute exists between each of the three States—Bulgaria, Hungary and Romania—and each of the Allied and Associated States which sent protests to them.

The next point to be dealt with is whether the disputes are subject to the provisions of the articles for the settlement of disputes contained in the Peace Treaties. The disputes must be considered to fall within those provisions if they relate to the interpretation or execution of the Treaties, and if no other procedure of settlement is specifically provided elsewhere in the Treaties.

Inasmuch as the disputes relate to the question of the performance or non-performance of the obligations provided in the articles dealing with human rights and fundamental freedoms, they are clearly disputes concerning the interpretation or execution of the Peace Treaties. In particular, certain answers from the Governments accused of violations of the Peace Treaties make use of arguments which clearly involve an interpretation of those Treaties.

Since no other procedure is specifically provided in any other article of the Treaties, the disputes must be subject to the methods of settlement contained in the articles providing for the settlement of all disputes.

The Court thus concludes that Question I must be answered in the affirmative.

In these circumstances, it becomes necessary to take up Question II, which is as follows:

"Are the Governments of Bulgaria, Hungary and Romania obligated to carry out the provisions of the articles referred to in Question I, including the provisions for the appointment of their representatives to the Treaty Commissions?"

Before answering the Question, the Court must determine the scope of the expression "the provisions of the articles referred to in Question I". Question I mentions two sets of articles: one set being those articles concerning human rights, namely, Article 2 of the Treaties with Bulgaria and Hungary, and Article 3 of the Treaty with Romania; the other set being those articles concerning the settlement of disputes, namely, Article 36 of the Treaty with Bulgaria, Article 40 of the Treaty with Hungary and Article 38 of the Treaty with Romania. The Court considers that the expression "the provisions of the articles referred to in Question I" refers only to the articles providing for the settlement of disputes, and does not refer to the articles dealing with human rights.

This view is clearly borne out by the various considerations stated in the Resolution of the General Assembly of October 22nd, 1949. It is confirmed by the fact that the Questions put to the Court have for their sole object to determine whether the disputes, if they exist, are among those falling under the procedure provided for in the Treaties with a view to their settlement by arbitration. The Court does not think that the General Assembly would have asked it whether Bulgaria, Hungary and Romania are obligated to carry out the articles concerning human rights. For, in the first place, the three Governments have not denied that they are obligated to carry out these articles. In the second place, the words which precede Question II, "In the event of an affirmative answer to Question I", exclude the idea that Question II refers to the articles relating to human rights. There is no reason why the General Assembly should have made the consideration of the question concerning human rights depend on an affirmative answer to a question relating to the existence of disputes. The articles concerning human rights are mentioned in Question I only by way of describing the subject-matter of the diplomatic exchanges between the States concerned.

The real meaning of Question II, in the opinion of the Court, is this: In view of the disputes which have arisen and which have so far not been settled, are Bulgaria, Hungary and Romania obligated to carry out, respectively, the provisions of Article 36 of the Treaty with Bulgaria, Article 40 of the Treaty with Hungary, and Article 38 of the Treaty with Romania?

The articles for the settlement of disputes provide that any dispute which is not settled by direct diplomatic negotiations shall be referred to the Three Heads of Mission. If not resolved by them within a period of two months, the dispute shall, unless the parties to the dispute agree upon another means of settlement, be referred at the request of either party to the dispute to a Commission composed of one representative of each party and a third member, to be selected in accordance with the relevant articles of the Treaties.

The diplomatic documents presented to the Court show that the United Kingdom and the United States of America on the one hand, and Bulgaria, Hungary and Romania on the other, have not succeeded in settling their disputes by direct negotiations. They further show that these disputes were not resolved by the Heads of Mission within the prescribed period of two months. It is a fact that the parties to the disputes have not agreed upon any other means of settlement. It is also a fact that the United Kingdom and the United States of America, after the expiry of the prescribed period, requested that the disputes be settled by the Commissions mentioned in the Treaties.
This situation led the General Assembly to put Question II so as to obtain guidance for its future action.

The Court finds that all the conditions required for the commencement of the stage of the settlement of disputes by the Commissions have been fulfilled.

In view of the fact that the Treaties provide that any dispute shall be referred to a Commission "at the request of either party", it follows that either party is obliged, at the request of the other party, to co-operate in constituting the Commission, in particular by appointing its representative. Otherwise the method of settlement by Commissions provided for in the Treaties would completely fail in its purpose.

The reply to Question II, as interpreted above, must therefore be in the affirmative.

For these reasons,

THE COURT IS OF OPINION,

On Question I:

by eleven votes to three,

that the diplomatic exchanges between Bulgaria, Hungary and Romania on the one hand and certain Allied and Associated Powers signatories to the Treaties of Peace on the other, concerning the implementation of Article 2 of the Treaties with Bulgaria and Hungary and Article 3 of the Treaty with Romania, disclose disputes subject to the provisions for the settlement of disputes contained in Article 36 of the Treaty of Peace with Bulgaria, Article 40 of the Treaty of Peace with Hungary, and Article 38 of the Treaty of Peace with Romania;

On Question II:

by eleven votes to three,

that the Governments of Bulgaria, Hungary and Romania are obligated to carry out the provisions of those articles referred to in Question I, which relate to the settlement of disputes, including the provisions for the appointment of their representatives to the Treaty Commissions.

Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this thirtieth day of March, one thousand nine hundred and fifty, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) Basdevant, President.

(Signed) E. Hambro, Registrar.

Judge Azevedo, while concurring in the Opinion of the Court, has availed himself of the right conferred on him by Article 57 of the Statute and appended to the Opinion a statement of his separate opinion.

Judges Winiarski, Zorić and Krylov, considering that the Court should have declined to give an Opinion in this case, have availed themselves of the right conferred on them by Article 57 of the Statute and appended to the Opinion statements of their dissenting opinions.

(Initialled) J. B.
(Initialled) E. H.
International Court of Justice

Interpretation of Peace Treaties (second phase)
Advisory Opinion

_I.C.J. Reports 1950_
INTERPRÉTATION DES TRAITÉS DE PAIX CONCLUS AVEC LA BULGARIE, LA HONGRIE ET LA ROUMANIE
(DEUXIÈME PHASE)
AVIS CONSULTATIF DU 18 JUILLET 1950

1950

INTERNATIONAL COURT OF JUSTICE
REPORTS OF JUDGMENTS, ADVISORY OPINIONS AND ORDERS
INTERPRETATION OF PEACE TREATIES WITH BULGARIA, HUNGARY AND ROMANIA
(SECOND PHASE)
ADVISORY OPINION OF JULY 18th, 1950

Le présent avis doit être cité comme suit :
«Interpretation des traités de paix (deuxième phase), Avis consultatif: C. I. J. Recueil 1950, p. 221.»

This Opinion should be cited as follows:
INTERNATIONAL COURT OF JUSTICE

YEAR 1950
July 18th, 1930

INTERPRETATION OF PEACE TREATIES WITH BULGARIA, HUNGARY AND ROMANIA
(SECOND PHASE)

Interpretation of article of a treaty referring the settlement of disputes to a commission composed of one representative from each party and a third member chosen by common agreement between the two parties; power conferred upon the Secretary-General of the United Nations to proceed to the appointment of a third member, failing agreement between the parties.—Inapplicability of this provision to the case in which one of the parties refuses to appoint its own commissioner.—Natural and ordinary meaning of the terms; meaning which accords with the normal order of the appointment of commissioner—provision to be strictly construed.—Breach of a treaty obligation; impossibility of providing a remedy by modifying the conditions for the exercise of the power to appoint the third member as laid down in the Treaties.—Impossibility to apply the principle of interpretation ut res magis valeat quam pereat contrary to the letter and spirit of the Treaties.

ADVISORY OPINION

Present: President Basdevant; Vice-President Guerrero; Judges Alvarez, Hackworth, Winiarski, De Visscher, Sir Arnold McNair, Klaestad, Badawi Pasha, Krylov, Read, Hsu Mo, Azevedo; Registrar Hambro.

On October 22nd, 1949, the General Assembly of the United Nations adopted the following Resolution:

"Whereas the United Nations, pursuant to Article 55 of the Charter, shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Whereas the General Assembly, at the second part of its Third Regular Session, considered the question of the observance in Bulgaria and Hungary of human rights and fundamental freedoms,

Whereas the General Assembly, on 30 April 1949, adopted Resolution 272 (III) concerning this question in which it expressed its deep concern at the grave accusations made against the Governments of Bulgaria and Hungary regarding the suppression of human rights and fundamental freedoms in those countries; noted with satisfaction that steps had been taken by several States signatories to the Treaties of Peace with Bulgaria and Hungary regarding these accusations; expressed the hope that measures would be diligently applied, in accordance with the Treaties, in order to ensure respect for human rights and fundamental freedoms; and most urgently drew the attention of the Governments of Bulgaria and Hungary to their obligations under the Peace Treaties, including the obligation to co-operate in the settlement of the question,

Whereas the General Assembly has resolved to consider also at the Fourth Regular Session the question of the observance in Romania of human rights and fundamental freedoms,

Whereas certain of the Allied and Associated Powers signatories to the Treaties of Peace with Bulgaria, Hungary and Romania have charged the Governments of those countries with violations of the Treaties of Peace and have called upon those Governments to take remedial measures,

Whereas the Governments of Bulgaria, Hungary and Romania have rejected the charges of Treaty violations,

Whereas the Governments of the Allied and Associated Powers concerned have sought unsuccessfully to refer the question of Treaty violations to the Heads of Mission in Sofia, Budapest and Bucharest, in pursuance of certain provisions in the Treaties of Peace,

Whereas the Governments of these Allied and Associated Powers have called upon the Governments of Bulgaria, Hungary and
the Governments concerned have not notified the Secretary-General that they have appointed their representatives to the Treaty Commissions, and the Secretary-General has so advised the International Court of Justice:

'III. If one party fails to appoint a representative to a Treaty Commission under the Treaties of Peace with Bulgaria, Hungary and Romania where that party is obligated to appoint a representative to the Treaty Commission, is the Secretary-General of the United Nations authorized to appoint the third member of the Commission upon the request of the other party to a dispute according to the provisions of the respective Treaties?'

In the event of an affirmative reply to question III:

'IV. Would a Treaty Commission composed of a representative of one party and a third member appointed by the Secretary-General of the United Nations constitute a Commission, within the meaning of the relevant Treaty articles, competent to make a definitive and binding decision in settlement of a dispute?'

4. Requests the Secretary-General to make available to the International Court of Justice the relevant exchanges of diplomatic correspondence communicated to the Secretary-General for circulation to the Members of the United Nations and the records of the General Assembly proceedings on this question;

5. Decides to retain on the agenda of the Fifth Regular Session of the General Assembly the question of the observance of human rights and fundamental freedoms in Bulgaria, Hungary and Romania, with a view to ensuring that the charges are appropriately examined and dealt with.'

In an Opinion given on March 30th, 1950 (I.C.J. Reports of Judgments, Advisory Opinions and Orders, 1950, pp. 65 et sqq.), the Court answered:

To question I:

"that the diplomatic exchanges between Bulgaria, Hungary and Romania on the one hand and certain Allied and Associated Powers signatories to the Treaties of Peace on the other, concerning the implementation of Article 2 of the Treaties with Bulgaria and Hungary and Article 3 of the Treaty with Romania, disclose disputes subject to the provisions for the settlement of disputes contained in Article 36 of the Treaty of Peace with Bulgaria, Article 40 of the Treaty of Peace with Hungary, and Article 38 of the Treaty of Peace with Romania;"

To question II:

"that the Governments of Bulgaria, Hungary and Romania are obligated to carry out the provisions of those articles referred
OPIN. OF 18 VII 50 (INTERPRETATION OF PEACE TREATIES) 226

on behalf of the Secretary-General of the United Nations by Dr. Ivan Kerno, Assistant Secretary-General in charge of the Legal Department;

on behalf of the Government of the United States of America, by the Hon. Benjamin V. Cohen;

on behalf of the Government of the United Kingdom of Great Britain and Northern Ireland, by Mr. G. G. Fitzmaurice, C.M.G., Second Legal Adviser of the Foreign Office.

* * *

Having stated, in its Opinion of March 30th, 1950, that the Governments of Bulgaria, Hungary and Romania are obligated to carry out the provisions of those articles of the Peace Treaties which relate to the settlement of disputes, including the provisions for the appointment of their representatives to the Treaty Commissions, and having received information from the Secretary-General of the United Nations that none of those Governments had notified him, within thirty days from the date of the delivery of the Court’s Advisory Opinion quoted above, that any one of the three Governments had appointed its representative to the Treaty Commissions, the Court is now called upon to answer Question III in the Resolution of the General Assembly of October 22nd, 1949, which reads as follows:

"III. If one party fails to appoint a representative to a Treaty Commission under the Treaties of Peace with Bulgaria, Hungary and Romania where that party is obligated to appoint a representative to the Treaty Commission, is the Secretary-General of the United Nations authorized to appoint the third member of the Commission upon the request of the other party to a dispute according to the provisions of the respective Treaties?"

Articles 36, 40 and 38, respectively, of the Peace Treaties with Bulgaria, Hungary and Romania, after providing that disputes concerning the interpretation or execution of the Treaties which had not been settled by direct negotiation should be referred to the Three Heads of Mission, continue:

"Any such dispute not resolved by them within a period of two months shall, unless the parties to the dispute mutually agree upon another means of settlement, be referred at the request of either party to the dispute to a Commission composed of one representative of each party and a third member selected by mutual agreement of the two parties from nationals of a third country. Should the two parties fail to agree within a period of one month upon the appointment of the third member, the Secretary-General of the United Nations may be requested by either party to make the appointment.

8
2. The decision of the majority of the members of the Commission shall be the decision of the Commission, and shall be accepted by the parties as definitive and binding."

The question at issue is whether the provision empowering the Secretary-General to appoint the third member of the Commission applies to the present case, in which one of the parties refuses to appoint its own representative to the Commission.

It has been contended that the term "third member" is used here simply to distinguish the neutral member from the two Commissioners appointed by the parties without implying that the third member can be appointed only when the two national Commissioners have already been appointed, and that therefore the mere fact of the failure of the parties, within the stipulated period, to select the third member by mutual agreement satisfies the condition required for the appointment of the latter by the Secretary-General.

The Court considers that the text of the Treaties does not admit of this interpretation. While the text in its literal sense does not completely exclude the possibility of the appointment of the third member before the appointment of both national Commissioners it is nevertheless true that according to the natural and ordinary meaning of the terms it was intended that the appointment of both the national Commissioners should precede that of the third member. This clearly results from the sequence of the events contemplated by the article: appointment of a national Commissioner by each party; selection of a third member by mutual agreement of the parties; failing such agreement within a month, his appointment by the Secretary-General. Moreover, this is the normal order followed in the practice of arbitration, and in the absence of any express provision to the contrary there is no reason to suppose that the parties wished to depart from it.

The Secretary-General's power to appoint a third member is derived solely from the agreement of the parties as expressed in the disputes clause of the Treaties; by its very nature such a clause must be strictly construed and can be applied only in the case expressly provided for therein. The case envisaged in the Treaties is exclusively that of the failure of the parties to agree upon the selection of a third member and by no means the much more serious case of a complete refusal of cooperation by one of them, taking the form of refusing to appoint its own Commissioner. The power conferred upon the Secretary-General to help the parties out of the difficulty of agreeing upon a third member cannot be extended to the situation which now exists.

Reference has been made for the purpose of justifying the reversal of the normal order of appointment, to the possible advantage that might result, in certain circumstances, from the appointment of a third member before the appointment by the parties of their respective commissioners. Such a change in the normal sequence could only be justified if it was shown by the attitude of the parties that they desired such a reversal in order to facilitate the constitution of the Commissions in accordance with the terms of the Treaties. But such is not the present case. The Governments of Bulgaria, Hungary and Romania have from the beginning denied the very existence of a dispute, and have absolutely refused to take part, in any manner whatever, in the procedure provided for in the disputes clauses of the Treaties. Even after the Court had given its Advisory Opinion of March 30th, 1950, which declared that these three Governments were bound to carry out the provisions of the Peace Treaties for the settlement of disputes, particularly the obligation to appoint their own Commissioners, these Governments have continued to adopt a purely negative attitude.

In these circumstances, the appointment of a third member by the Secretary-General, instead of bringing about the constitution of a three-member Commission such as the Treaties provide for, would result only in the constitution of a two-member Commission. A Commission consisting of two members is not the kind of commission for which the Treaties have provided. The opposition of the Commissioner of the only party represented could prevent a Commission so constituted from reaching any decision whatever. Such a Commission could only decide by unanimity, whereas the dispute clause provides that "the decision of the majority of the members of the Commission shall be the decision of the Commission and shall be accepted by the parties as definitive and binding." Nor would the decisions of a Commission of two members, one of whom is appointed by one party only, have the same degree of moral authority as those of a three-member Commission. In every respect, the result would be contrary to the letter as well as the spirit of the Treaties.

In short, the Secretary-General would be authorized to proceed to the appointment of a third member only if it were possible to constitute a Commission in conformity with the provisions of the Treaties. In the present case, the refusal by the Governments of Bulgaria, Hungary and Romania to appoint their own Commissioners has made the constitution of such a Commission impossible and has deprived the appointment of the third member by the Secretary-General of every purpose.

As the Court has declared in its Opinion of March 30th, 1950, the Governments of Bulgaria, Hungary and Romania are under an obligation to appoint their representatives to the Treaty Commissions, and it is clear that refusal to fulfil a treaty obligation involves international responsibility. Nevertheless, such a refusal cannot alter the conditions contemplated in the Treaties for the exercise by the Secretary-General of his power of appointment. These conditions are not present in this case, and their absence
OPIN. OF 18 VII 50 (INTERPRETATION OF PEACE TREATIES) 229

is not made good by the fact that it is due to the breach of a treaty obligation. The failure of machinery for settling disputes by reason of the practical impossibility of creating the Commission provided for in the Treaties is one thing; international responsibility is another. The breach of a treaty obligation cannot be remedied by creating a Commission which is not the kind of Commission contemplated by the Treaties. It is the duty of the Court to interpret the Treaties, not to revise them.

The principle of interpretation expressed in the maxim: Ut res magis valeat quam pereat, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit.

It has been pointed out that an arbitration commission may make a valid decision although the original number of its members, as fixed by the arbitration agreement, is later reduced by such circumstances as the withdrawal of one of the commissioners. These cases presuppose the initial validity of a commission, constituted in conformity with the will of the parties as expressed in the arbitration agreement, whereas the appointment of the third member by the Secretary-General in circumstances other than those contemplated in the Treaties raises precisely the question of the initial validity of the constitution of the Commission. In law, the two situations are clearly distinct and it is impossible to argue from one to the other.

Finally, it has been alleged that a negative answer by the Court to Question III would seriously jeopardize the future of the large number of arbitration clauses which have been drafted on the same model as that which appears in the Peace Treaties with Bulgaria, Hungary and Romania. The ineffectiveness in the present case of the clauses dealing with the settlement of disputes does not permit such a generalization. An examination of the practice of arbitration shows that, whereas the draftsmen of arbitration conventions have very often taken care to provide for the consequences of the inability of the parties to agree on the appointment of a third member, they have, apart from exceptional cases, refrained from anticipating a refusal by a party to appoint its own commissioner. The few Treaties containing express provisions for such a refusal indicate that the States which adopted this course felt the impossibility of remedying this situation simply by way of interpretation. In fact, the risk of such a possibility of a refusal is a small one, because normally each party has a direct interest in the appointment of its commissioner and must in any case be presumed to observe its treaty obligations. That this was not so in the present case does not justify the Court in exceeding its judicial function on the pretext of remedying a default for the occurrence of which the Treaties have made no provision.

Consequently, Question III must be answered in the negative. It is therefore not necessary for the Court to consider Question IV, which requires an answer only in the event of an affirmative answer to the preceding Question.

For these reasons,

THE COURT IS OF OPINION,

by eleven votes to two,

that, if one party fails to appoint a representative to a Treaty Commission under the Peace Treaties with Bulgaria, Hungary and Romania where that party is obligated to appoint a representative to the Treaty Commission, the Secretary-General of the United Nations is not authorized to appoint the third member of the Commission upon the request of the other party to a dispute.

Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this eighteenth day of July, one thousand nine hundred and fifty, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) Basdevant,
President.

(Signed) E. Hambro,
Registrar.

* * *

Judge Krylov, while joining in the conclusions of the opinion and the general line of argument, declares that he is unable to concur in the reasons dealing with the problem of international responsibility which, in his opinion, goes beyond the scope of the request for opinion.

Judges Read and Azevedo, declaring that they are unable to concur in the Opinion of the Court, have availed themselves of the right conferred on them by Article 57 of the Statute and appended to the Opinion statements of their dissenting opinion.

(Initialled) J. B.

(Initialled) F. H.
International Court of Justice

Interhandel
(Switzerland v. United States of America)
Preliminary Objections, Judgment

I.C.J. Reports 1959
Le présent arrêt doit être cité comme suit:
« Affaire de l’Interhandel,

This Judgment should be cited as follows:
“Interhandel Case,
INTERNATIONAL COURT OF JUSTICE

YEAR 1959

March 21st, 1959

INTERHANDDEL CASE
(SWITZERLAND v. UNITED STATES OF AMERICA)
(PRELIMINARY OBJECTIONS)

Declarations of acceptance of compulsory jurisdiction of Court.—Reservation ratione temporis with regard to date on which dispute arose.—Operation of principle of reciprocity.—Domestic jurisdiction of United States and scope of reservation (b) of its declaration of acceptance of compulsory jurisdiction of Court.—Application of rule of exhaustion of local remedies.

JUDGMENT

Present: President KLAESTAD; Vice-President ZAFRULLA KHAN; Judges Basdevant, Hackworth, Winiarski, Badawi, Armand-Ugon, Kojevnikov, Sir Hersch Lauterpacht, Moreno Quintana, Córdova, Wellington Koo, Spiroproulos, Sir Percy Spender; Judge ad hoc CARRY; Deputy-Registrar GARNIER-COIGNET.

In the Interhandel case,

between

the Swiss Confederation,
represented by
M. Georges Sauser-Hall, Professor emeritus of the Universities of Geneva and Neuchâtel,
as Agent,
and by
M. Paul Guggenheim, Professor at the Law Faculty of the University of Geneva and at the Graduate Institute of International Studies,
as Co-Agent,
assisted by
M. Henri Thévenaz, Professor of International Law at the University of Neuchâtel,
as Counsel and Expert,
and
M. Michael Gelzer, Doctor of Laws,
M. Hans Miesch, Doctor of Laws, First Secretary of Embassy,
as Experts,

and

the United States of America,
represented by
the Honorable Loftus Becker, Legal Adviser of the Department of State,
as Agent,
assisted by
Mr. Stanley D. Metzger, Assistant Legal Adviser for Economic Affairs, Department of State,
Mr. Sidney B. Jacoby, Professor of Law, Georgetown University,
as Counsel,

THE COURT,
composed as above,

delivers the following Judgment:

On October 2nd, 1957, the Ambassador of the Swiss Confederation to the Netherlands filed with the Registrar an Application dated October 1st instituting proceedings in the Court relating to a dispute which had arisen between the Swiss Confederation and the United
States of America with regard to the claim by Switzerland to the restitution by the United States of the assets of the Société internationale pour participations industrielles et commerciales S.A. (Interhandel).

The Application, which invoked Article 36, paragraph 2, of the Statute and the acceptance of the compulsory jurisdiction of the Court by the United States of America on August 26th, 1946, and by Switzerland on July 28th, 1948, was, in accordance with Article 40, paragraph 2, of the Statute, communicated to the Government of the United States of America. In accordance with paragraph 3 of the same Article, the other Members of the United Nations and the non-Member States entitled to appear before the Court were notified.

Time-limits for the filing of the Memorial and the Counter-Memorial were fixed by an Order of the Court on October 24th, 1957, and subsequently extended at the request of the Parties by an Order of January 15th, 1958. The Memorial of the Swiss Government was filed within the time-limit fixed by that Order. Within the time-limit fixed for the filing of the Counter-Memorial, the Government of the United States of America filed preliminary objections to the jurisdiction of the Court. On June 26th, 1958, an Order recording that the proceedings on the merits were suspended under the provisions of Article 62 of the Rules of Court, granted the Swiss Government a time-limit expiring on September 22nd, 1958, for the submission of a written statement of its observations and submissions on the preliminary objections. The written statement was filed on that date and the case became ready for hearing in respect of the preliminary objections.

The Court not including upon the Bench a judge of Swiss nationality, the Swiss Government, pursuant to Article 31, paragraph 2, of the Statute, chose M. Paul Carry, Professor of Commercial Law at the University of Geneva, to sit as Judge ad hoc in the present case.

Hearings were held on November 5th, 6th, 8th, 10th, 11th, 12th, 14th and 17th, 1958, in the course of which the Court heard the oral arguments and replies of the Honorable Loftus Becker, on behalf of the Government of the United States of America, and of M. Sauer-Hall and M. Guggenheim, on behalf of the Swiss Government.

In the course of the written and oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the Swiss Confederation, in the Application:

"May it please the Court:

To communicate the present Application instituting proceedings to the Government of the United States of America, in accordance with Article 40, paragraph 2, of the Statute of the Court;"

INTERHANDEL CASE (JUDGMENT OF 21 III 59) 9

To adjudge and declare, whether the Government of the United States of America appears or not, after considering the contentions of the Parties,

1. that the Government of the United States of America is under an obligation to restore the assets of the Société internationale pour participations industrielles et commerciales S.A. (Interhandel) to that company;

2. in the alternative, that the dispute is one which is fit for submission for judicial settlement, arbitration or conciliation under the conditions which it will be for the Court to determine.

The Swiss Federal Council further reserves the right to supplement and to modify its submissions."

On behalf of the same Government, in the Memorial:

"May it please the Court to adjudge and declare:

A. Principal Submissions

1. that the Government of the United States of America is under an obligation to restore the assets of the Société internationale pour participations industrielles et commerciales S.A. (Interhandel);

2. in the alternative, that in case the Court should not consider that proof of the non-enemy character of the property of the Société internationale pour participations industrielles et commerciales S.A. (Interhandel) has been furnished, an expert selected by the Court should be designated, in accordance with Article 50 of the Statute of the Court, with the task of

(a) examining the documents put at the disposal of the American Courts by Interhandel,

(b) examining the files and accounting records of the Sturzenegger Bank the seizure of which was ordered by the public authorities (Ministère public) of the Swiss Confederation on June 15th, 1950, subject to the reservation, however, that the expert in his expert opinion shall refer only to such documents as relate to the Interhandel case and shall be instructed to observe absolute secrecy concerning the documents of the Sturzenegger Bank, its clients and all other individuals and legal persons if such documents are not relevant to the case pending before the Court,

for the purpose of enabling the Court to determine the enemy or non-enemy character of the Interhandel assets in the General Aniline and Film Corporation.

B. Alternative Submissions in case the Court should not sustain the Swiss request to examine the merits of the dispute

1. (a) that the Court has jurisdiction to decide whether the dispute is one which is fit for submission either to the arbitral tribunal provided for in Article VI of the
the date on which the acceptance of the Court's compulsory jurisdiction by this country became binding on this country as regards Switzerland;

(3) Third Preliminary Objection

that there is no jurisdiction in this Court to hear or determine the matters raised by the Swiss Application and Memorial, for the reason that Interhandel, whose case Switzerland is espousing, has not exhausted the local remedies available to it in the United States courts;

(4) Fourth Preliminary Objection

(a) that there is no jurisdiction in this Court to hear or determine any issues raised by the Swiss Application or Memorial concerning the sale or disposition of the vested shares of General Aniline and Film Corporation (including the passing of good and clear title to any person or entity), for the reason that such sale or disposition has been determined by the United States of America, pursuant to paragraph (d) of the Conditions attached to this country's acceptance of this Court's jurisdiction, to be a matter essentially within the domestic jurisdiction of this country; and

(b) that there is no jurisdiction in this Court to hear or determine any issues raised by the Swiss Application or Memorial concerning the seizure and retention of the vested shares of General Aniline and Film Corporation, for the reason that such seizure and retention are, according to international law, matters within the domestic jurisdiction of the United States.

The United States of America reserves the right to supplement or to amend the preceding submissions, and, generally, to submit any further legal argument."

On behalf of the Swiss Government, in its Observations and Submissions:

"May it please the Court to adjudge and declare:

1. to dismiss the first preliminary objection of the United States of America;
2. to dismiss the second preliminary objection of the United States of America;
3. either to dismiss, or to join to the merits, the third preliminary objection of the United States of America;
4. either to dismiss, or to join to the merits, preliminary objection 4 (a) of the United States of America;
The Swiss Federal Council maintains and confirms its main and alternative submissions as set out on pages 67 and 68 of the Memorial of the Swiss Confederation of March 3rd, 1958.

The Swiss Federal Council supplements its main submissions by the following alternative submission:

The Swiss Federal Council requests the Court to declare that the property, rights and interests which the Société internationale pour participations industrielles et commerciales S.A. (Interhandel) possesses in the General Aniline and Film Corporation have the character of non-enemy (Swiss) property, and consequently to declare that by refusing to return the said property the Government of the United States of America is in breach of Article IV, paragraph 1, of the Washington Accord of May 25th, 1946, and of the obligations binding upon it under the general rules of international law.

The Swiss Federal Council further reserves the right to supplement and to modify the preceding submissions.”

On behalf of the same Government, Submissions deposited in the Registry on November 3rd, 1958:

"A. Principal Submissions
1. that the Government of the United States of America is under an obligation to restore the assets of the Société internationale pour participations industrielles et commerciales S.A. (Interhandel);
2. in the alternative, that in case the Court should not consider that proof of the non-enemy character of the property of the Société internationale pour participations industrielles et commerciales S.A. (Interhandel) has been furnished, an expert selected by the Court should be designated, in accordance with Article 50 of its Statute, with the task of:
   (a) examining the documents put at the disposal of the American courts by Interhandel,
   (b) examining the files and accounting records of the Sturzenegger Bank, the seizure of which was ordered by the public authorities (Ministère public) of the Swiss Confederation on June 15th, 1946, subject to the reservation, however, that the expert in his expert opinion shall refer only to such documents as relate to the Interhandel case, and shall be instructed to observe absolute secrecy concerning the documents of the Sturzenegger Bank, its clients and all other individuals and legal persons, if such documents are not relevant to the case pending before the Court,

for the purpose of enabling the Court to determine the enemy or non-enemy character of the Interhandel assets in the General Aniline and Film Corporation.

B. Alternative Principal Submission
The Swiss Federal Council requests the Court to declare that the property, rights and interests which the Société internationale

C. Submissions regarding the Submissions of the Government of the United States following its Preliminary Objections
1. To dismiss the first preliminary objection of the United States of America;
2. To dismiss the second preliminary objection of the United States;
3. Either to dismiss, or to join to the merits, the third preliminary objection of the United States of America;
4. Either to dismiss, or to join to the merits, the preliminary objection 4 (a) of the United States of America;
   either to dismiss, or to join to the merits, the preliminary objection 4 (b) of the United States of America;

In the alternative

should the Court uphold one or the other of the preliminary objections of the United States of America, to declare its competence in any case to decide whether the United States of America is under an obligation to submit the dispute regarding the validity of the Swiss Government’s claim either to the arbitral procedure provided for in Article VI of the Washington Accord of 1946, or to the Arbitral Tribunal provided for in the 1931 Treaty of Arbitration and Conciliation, or to the Conciliation Commission provided for in the same Treaty, and to fix the subsequent procedure.

D. Submissions on the merits in the event of the Court accepting one or other of the preliminary objections of the United States of America and accepting jurisdiction in conformity with the alternative submission as under C
1. To declare that the United States of America is under an obligation to submit the dispute for examination either to the arbitral procedure of the Washington Accord or to the Tribunal provided for in the Arbitration and Conciliation Treaty of 1931, and that the choice of one or the other Tribunal belongs to the Applicant State.
2. In the alternative:

that the United States of America is under an obligation to submit the dispute to the arbitral procedure provided for in Article VI of the Washington Accord of 1946.
3. In the further alternative:
that the United States of America is under an obligation to submit the dispute to the Arbitral Tribunal provided for in the Arbitration and Conciliation Treaty of 1931 between the Swiss Confederation and the United States of America.

4. In the final alternative:
that the United States of America is under an obligation to submit the dispute for examination by the Permanent Conciliation Commission provided for in Articles II-IV of the Arbitration and Conciliation Treaty of 1931.

At the hearing on November 6th, 1958, the Agent for the Government of the United States of America reaffirmed the submissions set forth in the Preliminary Objections.

For his part, the Agent for the Swiss Government repeated, at the hearing on November 12th, 1958, the submissions he had filed on November 3rd, whilst reserving his right to modify them after hearing any explanations that might be put forward on behalf of the Government of the United States of America.

At the hearing on November 14th, 1958, the Agent for the Government of the United States of America reaffirmed and maintained his earlier submissions whilst emphasizing that the preliminary objections were directed against all of the alternative as well as the principal submissions made on behalf of the Swiss Government.

Finally, at the hearing on November 17th, 1958, the Agent for the Swiss Government maintained the submissions he had filed in the Registry on November 3rd, 1958, which thus acquired the character of final submissions.

* * *

The declarations by which the Parties accepted the compulsory jurisdiction of the Court are as follows:

Declaration of the United States of America of August 14th, 1946 (in force since August 26th, 1946):

"I, Harry S. Truman, President of the United States of America, declare on behalf of the United States of America, under Article 36, paragraph 2, of the Statute of the International Court of Justice, and in accordance with the Resolution of August 2, 1946, of the Senate of the United States of America (two-thirds of the Senators present concurring therein), that the United States of America recognizes as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes hereafter arising concerning

(a) The interpretation of a treaty;
(b) Any question of international law;
(c) The existence of any fact which, if established, would constitute a breach of an international obligation;
(d) The nature or extent of the reparation to be made for the breach of an international obligation.

Provided, that this declaration shall not apply to
(a) Disputes the solution of which the Parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or
(b) Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America; or
(c) Disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction; and

Provided further, that this declaration shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration."

Declaration of Switzerland of July 6th, 1948 (in force since July 28th, 1948):

"The Swiss Federal Council, duly authorized for that purpose by a Federal decree which was adopted on 12 March 1948 by the Federal Assembly of the Swiss Confederation and became operative on 17 June 1948,

Hereby declares that the Swiss Confederation recognizes as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes concerning:

(a) The interpretation of a treaty;
(b) Any question of international law;
(c) The existence of any fact which, if established, would constitute a breach of an international obligation;
(d) The nature or extent of the reparation to be made for the breach of an international obligation.

This declaration, which is made under Article 36 of the Statute of the International Court of Justice, shall take effect from the date on which the Swiss Confederation becomes a party to that Statute and shall have effect as long as it has not been abrogated subject to one year's notice."

* * *

The present proceedings are concerned only with the preliminary objections raised by the Government of the United States of
America. It is nevertheless convenient to set out briefly the facts and circumstances as submitted by the Parties which constitute the origin of the present dispute.

By its decisions of February 16th and April 24th, 1942, based on the Trading with the Enemy Act of October 6th, 1917, as amended, the Government of the United States vested almost all of the shares of General Aniline and Film Corporation (briefly referred to as the GAF), a company incorporated in the United States, on the ground that these shares in reality belonged to the I.G. Farbenindustrie company of Frankfurt or that the GAF was in one way or another controlled by that enemy company.

It is not disputed that until 1940 I.G. Farben controlled the GAF through the Société internationale pour entreprises chimiques S.A. (I.G. Chemie), entered in the Commercial Register of the Canton of Bâle-Ville in 1928. However, according to the contention of the Swiss Government, the links between the German company I.G. Farben and the Swiss company I.G. Chemie were finally severed by the cancellation of the contract for an option and for the guarantee of dividends, a cancellation which was effected in June 1940, that is, well before the entry of the United States into the war. The Swiss company adopted the name of Société internationale pour productions et commerciales S.A. (briefly referred to as Interhandel); Article 2 of its Statute as modified in 1940 defines it as follows: “The enterprise is a holding company. Its object is participation in industrial and commercial undertakings of every kind, especially in the chemical field, in Switzerland and abroad, but excluding banking and the professional purchase and sale of securities.” The largest item in the assets of Interhandel is its participation in the GAF. Approximately 75% of the GAF “A” shares and all its issued “B” shares are said to belong to Interhandel. A considerable part, approximately 90%, of these shares and a sum of approximately $1,800,000 dollars, have been vested by the Government of the United States.

Towards the end of the war, under a provisional agreement between Switzerland, the United States of America, France and the United Kingdom, property in Switzerland belonging to Germans in Germany was blocked (Decree of the Federal Council of February 16th, 1945). The Swiss Compensation Office was entrusted with the task of uncovering property in Switzerland belonging to Germans or controlled by them. In the course of these investigations, the question of the character of Interhandel was raised, but as a result of investigations carried out in June and July, 1945, the Office, considering it to have been proved that Interhandel had severed its ties with the German company, did not regard it as necessary to undertake the blocking of its assets.

For its part, the Government of the United States, considering that Interhandel was still controlled by I.G. Farben, continued to seek evidence of such control. In these circumstances the Federal Department of Public Economy and the Federal Political Department ordered the Swiss Compensation Office provisionally to block the assets of Interhandel; this was done on October 30th, 1945. The Office then carried out a second investigation (November 1945-February 1946) which led to the same conclusion as had the first.

On May 25th, 1946, an agreement was concluded between the three Allied Powers and Switzerland (the Washington Accord). Under one of the provisions of the Accord, Switzerland undertook to pursue its investigations and to liquidate German property in Switzerland. It was the Compensation Office which was “empowered to uncover, take into possession, and liquidate German property” (Accord, Annex, II, A), in collaboration with a Joint Commission “composed of representatives of each of the four Governments” (Annex, II, B). The Accord lays down the details of that collaboration (Annex, II, C, D, E, F) and provides that, in the event of disagreement between the Joint Commission and the Compensation Office or if the party in interest so desires, the matter may within a period of one month be submitted to a Swiss Authority of Review composed of three members and presided over by a Judge. “The decisions of the Compensation Office, or of the Authority of Review, should the matter be referred to it, shall be final” (Annex, III). In the event, however, of disagreement with the Swiss Authority of Review on certain given matters, “the three Allied Governments may, within one month, require the difference to be submitted to arbitration” (Annex, III).

The Washington Accord further provides:

“Article IV, paragraph 1.

The Government of the United States will unblock Swiss assets in the United States. The necessary procedure will be determined without delay.

Article VI.

In case differences of opinion arise with regard to the application or interpretation of this Accord which cannot be settled in any other way, recourse shall be had to arbitration.”

After the conclusion of the Washington Accord, discussions with regard to Interhandel between the Swiss Compensation Office and the Joint Commission as well as between representatives of Switzerland and the United States were continued without reaching any conclusion accepted by the two parties. The Office, while declaring itself ready to examine any evidence as to the German character of Interhandel which might be submitted to it, continued to accept the results of its two investigations; the Joint Commission challenged
these results and continued its investigations. By its decision of January 5th, 1948, given on appeal by Interhandel, the Swiss Authority of Review annulling the blocking with retroactive effect. It had invited the Joint Commission to participate in the procedure, but the latter had declined the invitation. This question was not referred to the arbitration provided for in the Washington Accord.

In these circumstances, the Swiss Government considered itself entitled to regard the decision of the Swiss Authority of Review as a final one, having the force of res judicata vis-à-vis the Powers parties to the Washington Accord. Consequently, in a Note of May 4th, 1948, to the Department of State, the Swiss Legation at Washington invoked this decision and the Washington Accord to request the Government of the United States to restore to Interhandel the property which had been vested in the United States. On July 26th, 1948, the Department of State rejected this request, contending that the decision of the Swiss Authority of Review did not apply to the assets vested in the United States and claimed by I.G. Chemie. On September 7th, 1948, in a Note to the Department of State, the Swiss Legation in Washington, still relying on its interpretation of the Washington Accord, maintained that the decision of the Swiss Authority of Review recognizing Interhandel as a Swiss company was legally binding upon the signatories of that Accord. It expressed the hope that the United States Government would accordingly release the assets of Interhandel in the United States, failing which the Swiss Government would have to submit the question to the arbitral procedure laid down in Article VI of the Washington Accord. On October 12th, 1948, the Department of State replied to that communication, maintaining its previous view that the decision of the Swiss Authority of Review was inapplicable to property vested in the United States. It added that United States law in regard to the seizure and disposal of enemy property authorized non-enemy foreigners to demand the restitution of vested property and to apply for it to the courts. On October 21st, 1948, Interhandel, relying upon the provisions of the Trading with the Enemy Act, instituted proceedings in the United States District Court for the District of Columbia. Direct discussion between the two Governments was then interrupted until April 9th, 1953, on which day the French Government sent to the Government of the United States a Note questioning the procedure applied in the United States in the Interhandel case, stating that this procedure had led to a deadlock, and suggesting negotiations for a satisfactory settlement.

Up to 1957 the proceedings in the United States courts had made little progress on the merits. Interhandel, though it had produced a considerable number of the documents called for, did not produce all of them; it contended that the production of certain documents was prohibited by the Swiss authorities as constituting an offence under Article 273 of the Swiss Criminal Code and as violating banking secrecy (Article 47 of the Federal Law of November 8th, 1934). The action brought by Interhandel was the subject of a number of appeals in the United States courts and in a Memorandum appended to the Note addressed by the Department of State to the Swiss Minister on January 11th, 1957, it was said that Interhandel had finally failed in its suit. It was then that the Swiss Government, on October 2nd, 1957, addressed to the Court the Application instituting the present proceedings. The assertion in the Note of January 11th, 1957, that Interhandel’s claim was finally rejected proved, however, to be premature, as the Court will have occasion to point out in considering the Third Objection of the United States.

As stated, the exchange of notes with regard to Interhandel which had taken place in 1948, was resumed in 1953. In its Note of April 9th, 1953, the Swiss Legation at Washington suggested negotiations between the two Governments with a view to arriving amicably at a just and practical solution of the problem of Interhandel; these suggestions were repeated in the Notes of December 1st, 1954, and March 1st, 1955; they were not accepted by the Department of State. Finally, the Swiss Note of August 9th, 1956, formulated proposals for the settlement of the dispute either by means of arbitration or conciliation as provided for in the Treaty between Switzerland and the United States of February 16th, 1931, or by means of arbitration as provided for in the Washington Accord. This approach did not meet with the approval of the Government of the United States, which rejected it in its Note, already referred to, of January 11th, 1957.

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The subject of the claim as set forth in the final submissions presented on behalf of the Swiss Government, and disregarding certain items of a subsidiary character which can be left aside for the moment, is expressed essentially in two propositions:

1. as a principal submission, the Court is asked to adjudge and declare that the Government of the United States is under an obligation to restore the assets of the Société internationale pour participations industrielles et commerciales S.A. (Interhandel);

2. as an alternative submission, the Court is asked to adjudge and declare that the United States is under an obligation to submit the dispute to arbitration or to a conciliation procedure in accordance with certain conditions set forth first in the principal submissions and then in the alternative submissions.

The Government of the United States has put forward four preliminary objections to the Court’s dealing with the claims of the Swiss Government. Before proceeding to examine these objections, the Court must direct its attention to the claim, formulated for the
first time in the Observations and Submissions of the Swiss Government, which is in the following terms:

"The Swiss Federal Council requests the Court to declare that the property, rights and interests which the Société internationale pour participations industrielles et commerciales S.A. (Interhandel) possesses in General Aniline and Film Corporation have the character of non-enemy (Swiss) property, and consequently to declare that by refusing to return the said property the Government of the United States of America is in breach of Article IV, paragraph 1, of the Washington Accord of May 25th, 1945, and of the obligations binding upon it under the general rules of international law."

In its final Submissions, deposited in the Registry on November 3rd, 1958, the Swiss Government gives the following explanation with regard to this claim:

"The Swiss Government, after examining the Preliminary Objections of the United States of America, has come to the conclusion that these involve the modification of the Swiss Government’s principal and alternative Submissions, which are as follows:"

The claim in question, however, which is described as "alternative principal Submission", does not constitute a mere modification; it constitutes a new claim involving the merits of the dispute. Article 62, paragraph 3, of the Rules of Court, however, is categorical:

"Upon receipt by the Registrar of a preliminary objection filed by a party, the proceedings on the merits shall be suspended."

Consequently, the new Swiss submission relating to a request for a declaratory judgment, presented after the suspension of the proceedings on the merits, cannot be considered by the Court at the present stage of the proceedings.

* * *

First Preliminary Objection

The First Objection of the Government of the United States seeks a declaration that the Court is without jurisdiction on the ground that the present dispute arose before August 26th, 1946, the date on which the acceptance of the compulsory jurisdiction of the Court by the United States came into force. The declaration of the United States does indeed relate to legal disputes “hereafter arising”. The Government of the United States maintains that the dispute goes back at least to the middle of the year 1945, and that divergent opinions as to the character of Interhandel were exchanged between the American and Swiss authorities on a number of occasions before August 26th, 1946.

The Court would recall that the subject of the present dispute is indicated in the Application and in the Principal Final Submission of the Swiss Government which seeks the return to Interhandel of the assets vested in the United States. An examination of the documents reveals that a request to this effect was formulated by Switzerland for the first time in the Note of the Swiss Legation at Washington dated May 4th, 1948. The negative reply, which the Department of State describes as its final and considered view, is dated July 26th, 1948. Two other Notes exchanged shortly afterwards (on September 7th and October 12th of that same year) confirm that the divergent views of the two Governments were concerned with a clearly-defined legal question, namely, the restitution of Interhandel’s assets in the United States, and that the negotiations to this end rapidly reached a deadlock. Thus the dispute now submitted to the Court can clearly be placed at July 26th, 1948, the date of the first negative reply which the Government of the United States described as its final and considered view rejecting the demand for the restitution of the assets. Consequently the dispute arose subsequently to the date of the entry into force of the Declaration of the United States.

During the period indicated by the Government of the United States (the years 1945 and 1946), the exchanges of views between the Swiss authorities on the one hand and the Allied and, in the first place, the American authorities, on the other, related to the search for, and the blocking and liquidation of, German property and interests in Switzerland; the question of the Swiss or German character of Interhandel was the subject of investigations and exchanges of views for the purpose of reaching a decision as to the fate of the assets in Switzerland of that company. It was only after the decision of the Swiss Authority of Review of January 5th, 1948, definitely recognizing the non-enemy character of the assets of Interhandel and, in consequence, putting an end to the provisional blocking of these assets in Switzerland, had, in the opinion of the Federal Government, acquired the authority of res judicata, that that Government: for the first time addressed to the United States its claim for the restitution of Interhandel’s assets in the United States.

The discussions regarding Interhandel between the Swiss and American authorities in 1945, 1946 and 1947 took place within the framework of the collaboration established between them prior to the Washington Accord and defined in that Accord. The representatives of the Joint Commission and those of the Swiss Compensation Office communicated to each other the results of their enquiries and investigations, and discussed their opinions with regard to Interhandel, without arriving at any final conclusions. Thus, for instance, the minute of the meeting of the Joint Commission on September 8th, 1947, records:

"The representatives of the Swiss Compensation Office stated that their investigations had yielded only negative results and
that they were still waiting for the Allies to furnish their documents which the Swiss Compensation Office was ready to discuss with the Allied experts."

The Court cannot see in these discussions between the Allied and Swiss officials a dispute between Governments which had already arisen with regard to the restitution of the assets claimed by Interhandel in the United States; the facts and situations which have led to a dispute must not be confused with the dispute itself; the documents relating to this collaboration between the Allied and Swiss authorities for the purpose of liquidating German property in Switzerland are not relevant to the solution of the question raised by the first objection of the United States.

The First Preliminary Objection must therefore be rejected so far as the principal submission of Switzerland is concerned.

In the Alternative Submission, Switzerland asks the Court to adjudge and declare that the United States is under an obligation to submit the dispute to arbitration or conciliation.

In raising its objection *ratione temporis* to the Application of the Swiss Government, the Government of the United States has not distinguished between the principal claim and the alternative claim in the Application. It is, however, clear that the alternative claim, in spite of its close connection with the principal claim, is nevertheless a separate and distinct claim relating not to the substance of the dispute, but to the procedure for its settlement.

The point here in dispute is the obligation of the Government of the United States to submit to arbitration or to conciliation an obligation the existence of which is asserted by Switzerland and denied by the United States. This part of the dispute can only have arisen subsequently to that relating to the restitution of Interhandel's assets in the United States, since the procedure proposed by Switzerland and rejected by the United States was conceived as a means of settling the first dispute. In fact, the Swiss Government put forward this proposal for the first time in its Note of August 9th, 1956, and the Government of the United States rejected it by its Note of January 11th, 1957.

With regard to the Alternative Submission of Switzerland, the First Preliminary Objection cannot therefore be upheld.

* * *

**Second Preliminary Objection**

According to this Objection, the present dispute, even if it is subsequent to the date of the Declaration of the United States, arose before July 28th, 1948, the date of the entry into force of the Swiss Declaration. The argument set out in the Preliminary Objections is as follows:

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

In particular, it was contended with regard to disputes arising after August 26th, 1946, but before July 28th, 1948, that "Switzerland, as a Respondent, could have invoked the principle of reciprocity and claimed that, in the same way as the United States is not bound to accept the Court's jurisdiction with respect to disputes arising before its acceptance, Switzerland, too, could not be required to accept the Court's jurisdiction in relation to disputes arising before its acceptance."

Reciprocity in the case of Declarations accepting the compulsory jurisdiction of the Court enables a Party to invoke a reservation to that acceptance which it has not expressed in its own Declaration but which the other Party has expressed in its Declaration. For example, Switzerland, which has not expressed in its Declaration any reservation *ratione temporis*, while the United States has accepted the compulsory jurisdiction of the Court only in respect of disputes subsequent to August 26th, 1946, might, if in the position of Respondent, invoke by virtue of reciprocity against the United States the American reservation if the United States attempted to refer to the Court a dispute with Switzerland which had arisen before August 26th, 1946. This is the effect of reciprocity in this connection. Reciprocity enables the State which has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other Party. There the effect of reciprocity ends. It cannot justify a State, in this instance, the United States, in relying upon a restriction which the other Party, Switzerland, has not included in its own Declaration.

The Second Preliminary Objection must therefore be rejected so far as the Principal Submission of Switzerland is concerned.

Since it has already been found that the dispute concerning the obligation of the United States to agree to arbitration or conciliation did not arise until 1957, the Second Preliminary Objection must also be rejected so far as the Alternative Submission of Switzerland is concerned.

* * *

**Fourth Preliminary Objection**

Since the Fourth Preliminary Objection of the United States relates to the jurisdiction of the Court in the present case, the Court will proceed to consider it before the Third Objection which
is an objection to admissibility. This Fourth Objection really consists of two objections which are of different character and of unequal scope. The Court will deal in the first place with part (b) of this Objection.

The Government of the United States submits “that there is no jurisdiction in this Court to hear or determine any issues raised by the Swiss Application or Memorial concerning the seizure and retention of the vested shares of General Aniline and Film Corporation, for the reason that such seizure and retention are, according to international law, matters within the domestic jurisdiction of the United States”.

In challenging before the Court the seizure and retention of these shares by the authorities of the United States, the Swiss Government invokes the Washington Accord and general international law.

In order to determine whether the examination of the grounds thus invoked is excluded from the jurisdiction of the Court for the reason alleged by the United States, the Court will base itself on the course followed by the Permanent Court of International Justice in its Advisory Opinion concerning *Nationality Decrees issued in Tunis and Morocco* (Series B, No. 4), when dealing with a similar divergence of view. Accordingly, the Court does not, at the present stage of the proceedings, intend to assess the validity of the grounds invoked by the Swiss Government or to give an opinion on their interpretation, since that would be to enter upon the merits of the dispute. The Court will confine itself to considering whether the grounds invoked by the Swiss Government are such as to justify the provisional conclusion that they may be of relevance in this case and, if so, whether questions relating to the validity and interpretation of those grounds are questions of international law.

With regard to its principal Submission that the Government of the United States is under an obligation to restore the assets of Interhandel in the United States, the Swiss Government invokes Article IV of the Washington Accord. The Government of the United States contends that this Accord relates only to German property in Switzerland, and that Article IV “is of no relevance whatever in the present dispute”.

By Article IV of this international agreement, the United States has assumed the obligation to unblock Swiss assets in the United States. The Parties are in disagreement with regard to the meaning of the term “unblock” and the term “Swiss assets”. The interpretation of these terms is a question of international law which affects the merits of the dispute. At the present stage of the proceedings it is sufficient for the Court to note that Article IV of the Washington Accord may be of relevance for the solution of the present dispute and that its interpretation relates to international law.

The Government of the United States submits that according to international law the seizure and retention of enemy property in time of war are matters within the domestic jurisdiction of the United States and are not subject to any international supervision. All the authorities and judicial decisions cited by the United States refer to enemy property; but the whole question is whether the assets of Interhandel are enemy or neutral property. There having been a formal challenge based on principles of international law by a neutral State which has adopted the cause of its national, it is not open to the United States to say that their decision is final and not open to challenge; despite the American character of the Company, the shares of which are held by Interhandel, this is a matter which must be decided in the light of the principles and rules of international law governing the relations between belligerents and neutrals in time of war.

In its alternative Submission, the Swiss Government requests the Court to adjudge and declare that the United States is under an obligation to submit the dispute to arbitration or conciliation. The Swiss Government invokes Article VI of the Washington Accord, which provides: “In case differences of opinion arise with regard to the application or interpretation of this Accord which cannot be settled in any other way, recourse shall be had to arbitration.” It also invokes the Treaty of Arbitration and Conciliation between Switzerland and the United States, dated February 16th, 1931. Article I of this Treaty provides: “Every dispute arising between the Contracting Parties, of whatever nature it may be, shall, when ordinary diplomatic proceedings have failed, be submitted to arbitration or to conciliation, as the Contracting Parties may at the time decide.” The interpretation and application of these provisions relating to arbitration and conciliation involve questions of international law.

Part (b) of the Fourth Preliminary Objection must therefore be rejected.

Part (a) of the Fourth Objection seeks a finding from the Court that it is without jurisdiction to entertain the Application of the Swiss Government, for the reason that the sale or disposition by the Government of the United States of the shares of the GAF which have been vested as enemy property “has been determined by the United States of America, pursuant to paragraph (b) of the Conditions attached to this country’s acceptance of this Court’s jurisdiction, to be a matter essentially within the domestic jurisdiction of this country”. The Preliminary Objections state that: “Such declination encompasses all issues raised in the Swiss Application and Memorial (including issues raised by the Swiss-United States Treaty of 1931 and the Washington Accord of 1946), but they add: ‘in so far as the determination of the issues would affect the sale or disposition of the shares’. And they immediately go on to say: ‘However, the determination pursuant to paragraph (b) of the Conditions attached to this country’s acceptance of the Court’s
compulsory jurisdiction is made only as regards the sale or disposition of the assets.

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

Although the Agent for the United States maintained the Objection throughout the oral arguments, it appears to the Court that, thus presented, part (a) of the Fourth Objection only applies to the claim of the Swiss Government regarding the restitution of the assets of Interhandel which have been vested in the United States. Having regard to the decision of the Court set out below in respect of the Third Preliminary Objection of the United States, it appears to the Court that part (a) of the Fourth Preliminary Objection is without object at the present stage of the proceedings.

* * *

Third Preliminary Objection

The Third Preliminary Objection seeks a finding that there is no jurisdiction in this Court to hear or determine the matters raised by the Swiss Application and Memorial, for the reason that Interhandel, whose case Switzerland is espousing, has not exhausted the local remedies available to it in the United States courts.

Although framed as an objection to the jurisdiction of the Court, this Objection must be regarded as directed against the admissibility of the Application of the Swiss Government. Indeed, by its nature it is to be regarded as a plea which would become devoid of object if the requirement of the prior exhaustion of local remedies were fulfilled.

The Court has indicated in what conditions the Swiss Government, basing itself on the idea that Interhandel's suit had been finally rejected in the United States courts, considered itself entitled to institute proceedings by its Application of October 2nd, 1957. However, the decision given by the Supreme Court of the United States on October 14th, 1957, on the application of Interhandel made on August 6th, 1957, granted a writ of certiorari and re-admitted Interhandel into the suit. The judgment of that Court on June 16th, 1958, reversed the judgment of the Court of Appeals dismissing Interhandel's suit and remanded the case to the District Court. It was thenceforth open to Interhandel to avail itself again of the remedies available to it under the Trading with the Enemy Act, and to seek the restitution of its shares by proceedings in the United States courts. Its suit is still pending in the United States courts. The Court must have regard to the situation thus created.

The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system. A fortiori the rule must be observed when domestic proceedings are pending, as in the case of Interhandel, and when the two actions, that of the Swiss company in the United States courts and that of the Swiss Government in this Court, in its principal Submission, are designed to obtain the same result: the restitution of the assets of Interhandel vested in the United States.

The Swiss Government does not challenge the rule which requires that international judicial proceedings may only be instituted following the exhaustion of local remedies, but contends that the present case is one in which an exception to this rule is authorized by the rule itself.

The Court does not consider it necessary to dwell upon the assertion of the Swiss Government that “the United States itself has admitted that Interhandel had exhausted the remedies available in the United States courts”. It is true that the representatives of the Government of the United States expressed this opinion on several occasions, in particular in the memorandum annexed to the Note of the Secretary of State of January 11th, 1957. This opinion was based upon a view which has proved unfounded. In fact, the proceedings which Interhandel had instituted before the courts of the United States were then in progress.

However, the Swiss Government has raised against the Third Objection other considerations which require examination.

In the first place, it is contended that the rule is not applicable for the reason that the measure taken against Interhandel and regarded as contrary to international law is a measure which was taken not by a subordinate authority but by the Government of the United States. However, the Court must attach decisive importance to the fact that the laws of the United States make available to interested persons who consider that they have been deprived of their rights by measures taken in pursuance of the Trading with the Enemy Act, adequate remedies for the defence of their rights against the Executive.
It has also been contended on behalf of the Swiss Government that in the proceedings based upon the Trading with the Enemy Act, the United States courts are not in a position to adjudicate in accordance with the rules of international law and that the Supreme Court, in its decision of June 19th, 1959, made no reference to the many questions of international law which, in the opinion of the Swiss Government, constitute the subject of the present dispute. But the decisions of the United States courts bear witness to the fact that United States courts are competent to apply international law in their decisions when necessary. In the present case, when the dispute was brought to this Court, the proceedings in the United States courts had not reached the merits, in which considerations of international law could have been profitably relied upon.

The Parties have argued the question of the binding force before the courts of the United States of international instruments which, according to the practice of the United States, fall within the category of Executive Agreements; the Washington Accord is said to belong to that category. At the present stage of the proceedings it is not necessary for the Court to express an opinion on the matter. Neither is it practicable, before the final decision of the domestic courts, to anticipate what basis they may adopt for their judgment.

Finally, the Swiss Government laid special stress on the argument that the character of the principal Submission of Switzerland is that of a claim for the implementation of the decision given on January 5th, 1948, by the Swiss Authority of Review and based on the Washington Accord, a decision which the Swiss Government regards as an international judicial decision. "When an international decision has not been executed, there are no local remedies to exhaust, for the injury has been caused directly to the injured State." It has therefore contended that the failure by the United States to implement the decision constitutes a direct breach of international law, causing immediate injury to the rights of Switzerland as the Applicant State. The Court notes in the first place that to implement a decision is to apply its operative part. In the operative part of its decision, however, the Swiss Authority of Review "Decrees: (1) that the Appeal is sustained and the decision subjecting the appellant to the blocking of German property in Switzerland is annulled..." The decision of the Swiss Authority of Review relates to the unblocking of the assets of Interhandel in Switzerland; the Swiss claim is designed to secure the restitution of the assets of Interhandel in the United States. Without prejudging the validity of any arguments which the Swiss Government seeks or may seek to base upon that decision, the Court would confine itself to observing that such arguments do not deprive the dispute which has been referred to it of the character of a dispute in which the Swiss Government appears as having adopted the cause of its national, Interhandel, for the purpose of securing the

restitution to that company of assets vested by the Government of the United States. This is one of the very cases which give rise to the application of the rule of the exhaustion of local remedies.

For all these reasons, the Court upholds the Third Preliminary Objection so far as the principal Submission of Switzerland is concerned.

In its alternative claim, the Swiss Government asks the Court to declare its competence to decide whether the United States is under an obligation to submit the dispute to arbitration or conciliation. The Government of the United States contends that this claim, while not identical with the principal claim, is designed to secure the same object, namely, the restitution of the assets of Interhandel in the United States, and that for this reason the Third Objection applies equally to it. It maintains that the rule of the exhaustion of local remedies applies to each of the principal and alternative Submissions which seek "a ruling by this Court to the effect that some other international tribunal now has jurisdiction to determine that very same issue, even though that issue is at the same time being actively litigated in the United States courts".

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

It accordingly upholds the Third Preliminary Objection also as regards the alternative Submission of Switzerland.

For these reasons,

THE COURT,

by ten votes to five,
rejects the First Preliminary Objection of the Government of the United States of America;
unanimously,
rejects the Second Preliminary Objection;
by ten votes to five,
finds that it is not necessary to adjudicate on part (a) of the Fourth Preliminary Objection;
by fourteen votes to one,
rejects part (b) of the Fourth Preliminary Objection; and
by nine votes to six,
upholds the Third Preliminary Objection and holds that the
Application of the Government of the Swiss Confederation is
inadmissible.

Done in French and English, the French text being authoritative,
at the Peace Palace, The Hague, this twenty-first day of March,
one thousand nine hundred and fifty-nine, in three copies, one of
which will be placed in the archives of the Court and the others
transmitted to the Government of the Swiss Confederation and the
Government of the United States of America, respectively.

(Signed) Helge Klaestad,
President.

(Signed) Garnier-Coignet,
Deputy-Registrar.

Judge Basdevant states that he concurs in the decision that
the Application is inadmissible as that decision is set forth in the
operative part of the Judgment, but he adds that his opinion on
this point was reached in a way which, in certain respects, differs
from that followed by the Court. Basing himself on the provisions
of the Statute and of the Rules of Court, he considered that, in
order to assess the validity of the objections advanced, he should
direct his attention to the subject of the dispute and not to any
particular claim put forward in connection with the dispute. The
subject of the dispute and the subject of the claim are explicitly
differentiated in Article 32, paragraph 2, of the Rules of Court.
Accordingly, he has directed his attention to the statement in the
Application to the effect that the latter submits to the Court the
dispute relating to “the restitution by the United States of the
assets” of Interhandel. This indicates the subject of the dispute,
which is confirmed by an examination of the correspondence,
reveals the scope of the dispute, shows that it is not limited to
whatever may have been discussed at any particular moment
between the two Governments and consequently throws a light
upon the date at which the dispute between them arose. He was
thus led to the conclusion that the dispute to which the Appliance
relates did not arise until after July 28th, 1948, and this
factual finding is sufficient to justify the rejection of the first
two preliminary objections.

In his view, the subject of the dispute justifies, in this case,
the requirement of the preliminary exhaustion of local remedies
on the ground that if, through them, Interhandel obtains satis-
faction, the subject of the dispute will disappear. He refrained
from complicating the problem by considering any particular
claim that might be put forward in connection with the dispute
indicated in the Application. In considering the question whether
in fact the local remedies have been exhausted, he based himself
largely on the factual data mentioned in the Judgment. He took
account also of certain other facts—the fact that, at the date of
the memorandum of January 11th, 1957, an appeal by Interhandel
was pending in the American courts, the mention by the Swiss
Co-Agent (at the hearing on October 12th, 1957) of the application
made to the Supreme Court, with the comment that that applica-
tion also would end in a negative decision and, finally, the mention
in the preamble of the Order of the Court of October 24th, 1957,
of a judicial proceeding then pending in the United States.

As the anticipated effect of a judgment on a preliminary ob-
jection is to determine whether the proceedings on the merits
will or will not be resumed, he might have agreed that the Court
should confine itself to adjudicating on the Third Objection
which it has upheld. As the Application is declared to be
inadmissible, this puts an end to the proceedings and all the
other questions that were connected with them no longer arise.
He considered, nevertheless, that it was his duty to follow the
Court in the examination of the other points with which it dealt
and, on those points, he concurs in the operative part of the
Judgment.

Judge Kojevnikov states that he concurs in the Judgment of
the Court so far as the First, Second, Third and part (a) of
the Fourth Preliminary Objections of the Government of the United
States are concerned. He is, however, unable to concur in the
reasoning of the Judgment relating to the Second Preliminary
Objection since, in his opinion, the Judgment should have been
based not on the question of reciprocity, which is of very great
importance, but upon the factual circumstances which show that
the legal character of the dispute between the Swiss Government
and the Government of the United States was clearly defined only
after July 28th, 1948, the date of the entry into force of the Swiss
Declaration.

Judge Kojevnikov is further of the opinion that the Third
Objection should have been upheld by the Court, not only as a
contention relating to the admissibility of the Application, but also
with regard to the jurisdiction of the Court.

Finally, he considers that part (b) of the Fourth Preliminary
Objection, having regard to its subject-matter, ought not to have
been rejected but, in the present case, should have been joined to the merits if the Court had not upheld the Third Objection.

M. Carry, Judge ad hoc, states that he regrets that he cannot subscribe to the decisions taken by the Court on the Third and part (a) of the Fourth Objections of the Government of the United States. He agrees generally with the dissenting opinion of President Klaestad.

He considers that in any event the Third Objection should not have been upheld in so far as it was directed against the alternative claim of the Swiss Government relating to arbitration or conciliation. He regards that claim as separate and distinct from the principal claim, since it did not relate to the merits of the dispute but only to the procedure for its settlement. By this claim the Court was invited to pass only upon the arbitrability of the dispute, not on the obligation of the United States to return the assets of Interhandel. That latter question was within the exclusive jurisdiction of the tribunal to be seised. It follows, in his opinion, that the rule relating to the exhaustion of local remedies was not applicable to the alternative claim of the Swiss Government, inasmuch as, by that claim, the applicant State sought to secure from the international tribunal a result different from that which Interhandel is seeking to obtain in the American courts. The question of exhaustion of local remedies is one which could arise only before the arbitral tribunal seised of the case: the Court should not, in his opinion, encroach upon the jurisdiction of that tribunal.

Judges Hackworth, Córdova, Wellington Koo and Sir Percy Spender, availing themselves of the right conferred upon them by Article 57 of the Statute, append to the Judgment of the Court statements of their separate opinions.

Vice-President Zafrulla Khan states that he agrees with Judge Hackworth.

President Klaestad and Judges Winiarski, Armand-Ugon, Sir Hersch Lauterpacht and Spiropoulos, availing themselves of the right conferred upon them by Article 57 of the Statute, append to the Judgment of the Court statements of their dissenting opinions.

(Initialled) H. K.

(Initialled) G.-C.
Investigation of certain incidents affecting the British trawler Red Crusader


United Nations, Reports of International Arbitral Awards, vol. XXIX, p. 523
Investigation of certain incidents affecting the British trawler Red Crusader


Enquête portant sur certains incidents ayant affecté le chalutier britannique Red Crusader


23 March 1962

VOLUME XXIX, pp.521-539
INVESTIGATION OF CERTAIN INCIDENTS AFFECTING THE BRITISH TRAWLER RED CRUSADER

ENQUÊTE PORTANT SUR CERTAINS INCIDENTS AYANT AFFECTÉ LE CHALUTIER BRITANNIQUE RED CRUSADER


Competence of the Commission—determination of facts concerning the position of boats and respective movements—evaluation of techniques and means to determine the positions of the boats—reliance on the evidence and information received from experts.

Illegal fishing—fishing vessel in the area governed by the Exchange of Notes dated 27 April 1959—arrest of vessel—firing without warning and creating danger to human life on board without proved necessity exceeded legitimate use of force.

Compétence de la Commission—détermination des faits relatifs à la position des bateaux et à leurs mouvements respectifs—évaluation des techniques et des moyens pour déterminer les positions des bateaux—crédit accordé aux preuves et informations obtenues des experts.


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On March 3rd, 1962, the British Government and the Danish Government, represented by Mr. B. Jacobsen for the Danish Government, Mr. F. A. Vallat, C.M.G., Q.C., assisted by The Rt. Hon. Sir Reginald Manningham-Buller, Bart., Q.C., Mr. Eustace Roskill, Q.C., Mr. B. Sheen, Mr. N. H. Marshall, Mr. C. Sim, and Lt. Cdr. J. C. E. White, R.N. for the British Government, respectively, held their first meeting at 10.00 hours at the Peace Palace in The Hague, with Professor Charles De Visscher, President, and Professor André Gros and Captain C. Moolenburgh, Members.

At this first meeting of the Commission it was agreed, in presence of the Agents, Mr. B. Jacobsen for the Danish Government, Mr. F. A. Vallat, C.M.G., Q.C., for the British Government, and Mr. H. J. Sørensen, C.M.G., for the United Kingdom Government, that the Commission would investigate the circumstances of the arrest of the British trawler, "Red Crusader", on the night of the 29th of May, 1961, including the question whether the "Red Crusader" was fishing, or with her fishing gear, within the limits of the area round the Faroe Islands, and whether the "Red Crusader" was fishing, or with her fishing gear, within the limits of the area round the Faroe Islands; and that the Commission would also investigate the facts and incidents that occurred thereafter before the "Red Crusader" reached Aberdeen.

The exchange of notes of the 15th November, 1961 requests the Commission to investigate and report to the two Governments:

1. The facts leading up to the arrest of the British trawler, "Red Crusader", on the night of the 29th of May, 1961, including the question whether the "Red Crusader" was fishing, or with her fishing gear, within the limits of the area round the Faroe Islands; and whether the "Red Crusader" was fishing, or with her fishing gear, within the limits of the area round the Faroe Islands; and that the Commission would also investigate the facts and incidents that occurred thereafter before the "Red Crusader" reached Aberdeen.

2. The circumstances of the arrest, and the facts and incidents that occurred thereafter before the "Red Crusader" reached Aberdeen.
Mr. A. E. Wood, Skipper of the "Red Crusader", Commander T. A. Q. Griffiths, R.N., Commanding Officer of H.M.S. "Troubridge", Lt.Cdr. R. G. Perchard, R.N., Officer on H.M.S. "Troubridge".

One expert was called by the British Delegation:
Mr. George John MacDonald, Technical Manager, Marconi International Marine Communications Company Limited.

After examination by the British Counsel and by Mr. Eustace Roskill, Q.C. the witnesses and the expert were cross-examined by the Danish Agent and, in some cases, re-examined.

The oral statements and replies took place from March 14th to March 16th, 1962.

The Commission decided to divide the presentation of evidence into three Chapters, to facilitate its work:
(a) facts leading up to the arrest of the "Red Crusader", (b) events between the arrest of the "Red Crusader" and the meeting with the British naval vessels; (c) facts and incidents from that moment up to the arrival of the "Red Crusader" in Aberdeen.

The same division is followed in the present Report.

CHAPTER ONE
Facts leading up to the arrest of the "Red Crusader" and circumstances of the arrest

It will be noted that this first phase of the presentation of evidence corresponds to both sub-paragraphs 1 and 2 and paragraph (b) of the Exchange of Notes of April 27th, 1959. The Commission considers that the following events took place on May 29th, before the stopping and the arrest of the "Red Crusader".

On that day, May 29th, at 10.37 hours, the Faeroe Island Naval District heard a signal in code, communicated to them by the Danish Coast Guard Station, that the "Red Crusader", which was under the charge of the Fisheries Inspectors, had been reported to be in the area of the Faeroe Islands, and that the vessels had been stopped by Danish vessels.

According to the Exchange of Notes of April 27th, 1959, between the Danish and the British Governments, the Danish vessels, under the charge of the Fisheries Inspectors, were entitled to stop and search any vessel suspected of fishing in the area of the Faeroe Islands, and to take such action as they considered necessary to prevent such fishing.

In the case of the "Red Crusader", the Danish vessels stopped the vessel and arrested the crew, after having searched the vessel and found evidence of fishing.

The Commission has to decide whether the "Red Crusader" was fishing or not, and to elucidate the circumstances of the arrest.

In this first chapter, two matters will be successively examined:
1. Positions of the ships. 2. Movements of the ships.
The Commission noted that the manufacturers of the Decca 12 radar sets claimed a maximum range accuracy of plus or minus 2% of the maximum range in use. The same accuracy was stated for the Marconi Marine Radio Locator IV, except for ships at sea, where there was a maximum range accuracy of plus or minus 5% of the maximum range in use. The accuracy of the radar sets was also compared with that of optical range finders, which were considered to be the most accurate method of range measurement. The Commission noted that the accuracy of the Decca 12 radar sets was better than that of the optical range finders, but this was not necessarily the case for the Marconi Marine Radio Locator IV.

The Commission regretted that the information received from the radar experts who gave their opinion on the radar set 293 was not exactly the same as that stated by the Danish witnesses who gave their opinion on the same type of radar. The Commission was of the opinion that it is necessary to take into account a range accuracy of plus or minus 5% of the maximum range in use in all radar sets. The Commission also noted that the radar sets Decca 12 and Marconi Marine Radio Locator IV, manufactured in Great Britain, had been used and tested under the Marine Radar Performance Standards 1948. It was a fact that the Decca 12 was rated at 110% of the Decca 12 in 1948, which was not possible to check any more.

The Commission noted that the radar sets 293, which were developed during the last War for use in British and Allied warships, had a range accuracy of plus or minus 5% of the maximum range in use. The radar sets were working on the New Rotterdam Waterway, which corresponded to the opinion of the radar experts who gave their opinion on this type of radar.

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For the radar 293 on board "Niels Ebbesen" the Commission accepts a fixed correction of plus 0.35 mile and a plus or minus correction of 5% of the maximum range on the scale in use.

The bearing accuracy of the navigation radar sets on a moving ship should not be considered greater than 2 degrees, although the Performance Specifications 1948, and also the manufacturers, claim that the bearings on objects at the maximum range in use should be accurate to 1 degree.

These considerations cause the Commission to state that on the basis of the radar distances and bearings of "Red Crusader" from "Niels Ebbesen", one can be certain that the position of the starboat side of the "Red Crusader" was within a zone 2 miles wide (Decca 12) with a maximum top-angle of 4° from the position of "Niels Ebbesen".

In order to avoid all complications which might arise from using the data on Exhibit 5, although the Commission is of the opinion that this document was never made such a manoeuvre, as it would break his gear into two parts, the Commission was informed of the observations that these distances were not used in the Danish evidence prepared for the Court in Thorshavn, nor in the Memorial with Exhibits for the Commission, as it was known that the range finder on board "Niels Ebbesen" was not properly adjusted and had a play in the transversal transmission of the range marks.

The Commission is aware of Skipper Wood's evidence, that he would never make such a manoeuvre, as it would break his gear into two parts, while the Commission's evidence concerning the action of the fishermen of the different countries fishing in the North and Irish Seas, et cetera, have their own code for warning their countrymen, when a fishery protection cruiser appears on their scene, that they generally plot their positions not very accurately, but that the bearings are quite accurate. In many cases the fishermen plot their positions not very accurately, but that the bearings are quite accurate.

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In this chapter the Commission has so far dealt with the double-angle fixes and the radar readings. At several places in the tape-recording (Exhibit 16) distances from "Niels Ebbesen" were used in the course of this investigation when it was known that the range finder on board "Niels Ebbesen" was not properly adjusted and had a play in the transversal transmission of the range marks.

Therefore the Commission, after a comparison of the tapes, prepared for the Court in Thorshavn, which included the original Exhibits, concluded that the earlier positions of "Red Crusader" were further inside the blue line than her position at 21.27 hours, although the Commission was informed that those distances were not used in the Danish evidence prepared for the Court in Thorshavn, nor in the Memorial with Exhibits for the Commission, as it was known that the range finder on board "Niels Ebbesen" was not properly adjusted and had a play in the transversal transmission of the range marks.

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The Commission has been informed that the wind on the evening of May 29th, 1961 was from an Easterly direction. As a trawler always puts her gear overboard on the luff side, it is logical that the rangefinder on board "Niels Ebbesen" saw the starboard side of the trawler, at which he had trained his powerful instrument, to allow her to the shortest time in a North-West direction, the trawler over the starboard helped by the impression of "zig-zagging" on the plotting table in "Niels Ebbesen".

The Commission is aware of the advice printed on "Close's Fishermen's Chart", 1958 edition, in the area in question—"Tow E by N and W by S". In accordance with this advice, "Red Crusader", and also "Millwall" and "Admiral Hawk", stated that their positions not very accurately, but that the bearings are quite accurate. In many cases the fishermen plot their positions not very accurately, but that the bearings are quite accurate.

The Commission is aware of Skipper Wood's evidence, that he would never make such a manoeuvre, as it would break his gear into two parts, while the Commission's evidence concerning the action of the fishermen of the different countries fishing in the North and Irish Seas, et cetera, have their own code for warning their countrymen, when a fishery protection cruiser appears on their scene, that they generally plot their positions not very accurately, but that the bearings are quite accurate. In many cases the fishermen plot their positions not very accurately, but that the bearings are quite accurate.

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Therefore the Commanding Officer of "Niels Ebbesen", Captain E. T. Sølling, eliminated the observations of the range marks.
The range finder, which is a stereoscopic instrument with a 4 m base, was for the last time before the incident occurred on May 29th, 1961, readjusted and checked again by the Danish Naval Dockyard in February 1959. When it was examined by the Danish Gunnery Department in June 1961, it was found that:

1. a great difference existed between the adjustment set on the range finder and the correct setting which should be used for taking measurements;
2. a certain play in the transversal transmission of the central sight would have made it necessary to use the movable range mark as well as the fixed range marks.

The latter cause most probably would increase the measuring errors by about 1—3 theoretical errors, for a trained range-taker. The additional theoretical errors may be expected in this case, provided that the adjustment knob had been properly set.

In the meantime, "Niels Ebbesen" was heading for the ships on the horizon in bearing 292°, steering a course of 292°, which, after some time was changed into 299° and later into 308°, when the bearing to the nearest ship became more Northern.

The distances and bearings from "Niels Ebbesen" to the nearest vessel were measured on the radar sets and plotted on the Danish Chart No. 81 and the plotting table.

The Commission is of the opinion that 4—5 additional theoretical errors may be expected, while the ship is under way.

The wrong setting of the adjustment may cause any completely unpredictable error.

As stated in the evidence of the range-taker and the Gunnery Officer, the range-taker on board "Niels Ebbesen" who was trained on a 4 m base instrument only for a period of two months, had not adjusted the instrument before the incident occurred. On the evening of May 29th, 1961, therefore, the errors which could be expected from the readings on his instruments were unpredictable and could not be relied upon.

The Commission is therefore of the opinion that all deductions made on the basis of the range-taker's observations should be left out of its considerations.

2. Movements

About one hour after the Commanding Officer of "Niels Ebbesen" received a signal from Faroe Island Naval District, that four British fishing vessels had been reported by Myggenaes Lighthouse-keeper at 4—7 miles distance on the fishing grounds at 17.25 hours on May 29th, 1961, his ship left Thorskav to investigate the report.

Steaming through Vestmannaeyjar, "Niels Ebbesen" passed Sydregjov at 20.34 hours and came into the open between Mølen and Slettenaes at about 20.55 hours flying her ensign and fisheries pennant.
was not at all certain of the signals that must be given in circumstances which often occur at sea.

Therefore the Commission is unable to accept the Skipper's statements with regard to the siren signals given by "Niels Ebbesen".

His statement that he was unable to read the flash signal given to him by searchlight, as the searchlight was not properly trained, is not in agreement with other evidence. On the tape-recording it can be seen that "Niels Ebbesen" changed course to starboard before the signal by searchlight was sent. This brought the trawler on 2 points on the port bow. It is therefore logical that the searchlight on the port side was used, and the evidence given by Skipper Wood, that he would have seen the searchlight signals from starboard much better than those from port is not justified.

Skipper Wood's suggestion that these signals were meant for "Millwood" is unfounded. The searchlight was trained by an experienced Chief Petty Officer, who had to aim the apparatus at "the blue trawler", which proved to be "Red Crusader". The Commission is unable to accept that this experienced naval man trained the searchlight at the black hull of the "Millwood", when the dark blue "Red Crusader" was nearer to his ship.

During the proceedings it was submitted that if the "Red Crusader" had been inside the blue line for a certain period, this was unintentional and caused by drifting in a South-Easterly direction during a necessary repair of the trawl.

In view of the evidence submitted, the Commission cannot accept that an accident to the trawl has been established as a fact.

As a result of its investigation on Chapter One, the Commission finds:

(1) that no proof of fishing inside the blue line has been established, in spite of the fact that the trawl was in the water inside the blue line from about 21.00 hours until 21.14 hours on May 29th, 1961;

(2) that the "Red Crusader" was with her gear not stowed inside the blue line from about 21.00 hours until 21.14 hours on May 29th, 1961;

(3) that the first signal to stop was given by "Niels Ebbesen" at 21.39 hours and that this signal and the later stop-signals were all given outside the blue line.

CHAPTER TWO
Events between the arrest of the "Red Crusader" and the meeting with the British naval vessels

It will not be necessary to deal at great length with some parts of this period, the facts of which have been agreed upon by both Parties.

The Captain of "Niels Ebbesen" sent Lieutenant Bech, Fishery Officer, and Corporal Kropp, Signalman, on board the "Red Crusader" by a boat launched at about 22.19 hours. Lieutenant Bech stayed aboard the "Red Crusader" for approximately twenty minutes (arriving back on "Niels Ebbesen" at about 22.40 hours), during which time the distance of the "Red Ebbesen" to Baret Head was checked on the radar of the trawler. Lieutenant Bech measured 8.95 miles and the Skipper 8.9 miles. At the same time, 22.28 hours, Lieutenant Andersson checked both radars on board "Niels Ebbesen" and observed 8.4 miles on the display unit of Decca 12 and 8.0 miles on that of radar 293. By a double-angle fix taken at 22.29 hours the distance was found to be 8.6 miles on Chart No. 81 (Exhibit 6); confirmation of the distance was requested from "Red Crusader" and the reply was the same, 8.9 miles to Baret Head. At the time, on Skipper Wood's chart no positions or indications relevant to the incident of May 29th were plotted.

Immediately after the arrival of Skipper Wood and Lieutenant Bech on board "Niels Ebbesen" a conference was held in Captain Sølling's cabin, which lasted until just before 23.20 hours, when the Skipper was taken back to "Red Crusader".

During that conference Captain Sølling informed Skipper Wood that his trawler was under arrest and gave the reasons which, in his view, justified such arrest. Skipper Wood denied that he had ever been fishing inside the blue line.

There cannot have been any doubt left in Skipper Wood's mind at the end of this conference: he was ordered to follow the "Niels Ebbesen" and to go to Thorshavn to be examined and tried by a Faroese Court immediately on arrival there. The Skipper did not refuse to accept the order but, on the contrary, obeyed it by receiving on board the "Red Crusader" an officer and rating of the "Niels Ebbesen", in accordance with the normal procedure which he knew to be used by Danish Fishery Protection vessels in similar cases; there could not be any misunderstanding concerning the significance of the presence on board the trawler of the Danish officer and rating.

Skipper Wood, having returned to his trawler at 23.22 hours with Lieutenant Bech and Corporal Kropp, followed the "Niels Ebbesen" towards Thorshavn at full speed, about one mile astern. Radio-telephone communication was established between "Niels Ebbesen" and Lieutenant Bech on "Red Crusader" and it was agreed to call every half-hour.

There can be no other explanation of Skipper Wood's change of mind than his own. He thought that he had not been fishing illegally and that a trial at Thorshavn would not give him a fair chance.

At 02.58 hours Skipper Wood asked Lieutenant Bech to send a message to "Niels Ebbesen" reporting that he was not going to enter Thorshavn, and at 03.05 hours Lieutenant Bech sent another message to the "Niels Ebbesen" saying that he was locked up. Both these messages indicate the time when Skipper Wood decided to put his plan into operation.

The Commission will examine successively two matters:

(a) the situation of the Danish officer and rating on board the "Red Crusader";
The Commission finds that the situation of Lieutenant Bech and Corporal Kropp on the “Red Crusader” was as follows:

On his own admission, Skipper Wood wanted to keep Lieutenant Bech off the bridge to avoid not only any interference in the direction of the trawler but also any altercation with him, at the very moment when he attempted to escape from the “Niels Ebbesen”. This could only be achieved by an effective seclusion and not by an illusory or apparent one.

Skipper Wood has admitted his intention to break away and to proceed back to Aberdeen, discussing it with his crew out of the hearing of Lieutenant Bech and Corporal Kropp and making plans accordingly.

There is, therefore, neither any reason whatsoever to think that, having locked the door leading from the passage outside the Skipper’s cabin into the wheelhouse, to achieve the two purposes mentioned above, Skipper Wood left open the other exit from his quarters, nor to believe that Lieutenant Bech, if he had found that exit open, would not have taken the opportunity of regaining his freedom.

The Commission finds that Lieutenant Bech was thus kept effectively locked up inside the Skipper’s quarters in “Red Crusader” for about an hour before 04.08 hours, when the Skipper reopened the door from the wheelhouse to his quarters and let him out.

The measures taken against Corporal Kropp were different. It was not necessary for Skipper Wood, in order to realize his double purpose, to lock him up. Neither his rank, nor his age, made the same degree of coercion necessary. But it is quite clear that the “invitation” to go down aft, where he was escorted by members of the crew, was equivalent to an order. He was kept there for a period of about one hour under the courteous but efficient guard of some members of the crew.

The facts concerning the firing are as follows:

At 03.22 hours one round of 127 mm. gun-shot was fired astern and to the right of the trawler, at a distance estimated at 2.100 metres with the elevation 24/25.

At 03.23 hours the first stop-signals were given by steamwhistle—signal K.

At 03.25 hours one round of 127 mm. gun-shot was fired ahead and to the left, at the same estimated distance with the elevation 24/120.

At 03.26 hours the signal K was repeated by steamwhistle.

It is established that no signal by radio, steamwhistle, blank shot or otherwise was attempted earlier than 03.23 hours and it is also clear that these two shots, as well as the first two machine-gun shots astern, fired at 03.40 hours, were intended to be warning shots to stop and were not aimed to hit the “Red Crusader”.

The distance between the two ships had decreased to 0.9 miles at 03.30 hours and to 0.45 miles at 03.38 hours, when the Captain of “Niels Ebbesen” gave the order to fire at the “Red Crusader”.

At 03.40 hours a warning was given by portable loud-hailer to the “Red Crusader”, as well as the order to stop, which appear in full in the tape-recording (Exhibit 16) with the indication of the firing of two shots in the middle of the recording (the two machine-gun shots referred to above).

It was from this time only that firing was directed at the “Red Crusader” in the following manner:

- 03.40 hours 8 machine-gun shots at the “Red Crusader”'s scanner, by single shot (Exhibit 16 to the Danish Memorial, page 20); Two hits verified later.
- 03.41 hours New hailing to “Red Crusader” and order to stop.
- 03.42 hours 21 machine-gun shots at “Red Crusader”’s mast, also by single shot—no hits found later.
- 03.44 hours 1 round of 40 mm. gun at masthead light—no hit.
- 03.47 hours 1 round of 40 mm. gun at mast—no hit.
- 03.47 hours New hailing to “Red Crusader”: “Stop, or I have to shoot you in your hull”.
- 03.51 hours 2 rounds of 40 mm. gun at stem—one hit a little abaft of nameplate.
- 03.53 hours 1 round of 40 mm. gun at stem—no hit.

The firing, which took place in Danish territorial waters, then ceased by order of Captain Sølling. It is agreed that the gun-shots fired were solid shots but not explosive shells.

No slowing down of the “Red Crusader” is indicated in any evidence and the trawler did not stop before the meeting with the British naval vessels.

As a result of its investigation on Chapter Two, the Commission finds:

1. that the “Red Crusader” was arrested. This conclusion is established by Captain Sølling’s declarations as well as by the evidence given by Skipper Wood. Even if the Skipper formally denied his guilt, his answers clearly implied that he considered at the time that he had been duly arrested for illegal fishing. Notes made in the Skipper’s red pocket-book (Annex 12 to the British Counter-Memorial) and the “Red Crusader”’s log-book also leave no doubt on that point.

2. that Skipper Wood, after having obeyed for a certain time the order given him by Captain Sølling, changed his mind during the trip to Thorshavn and put into effect a plan concerted with his crew, whereby he attempted to
escape and to evade the jurisdiction of an authority which he had at first, rightly, accepted.

(3) that, during this attempt to escape, the Skipper of the “Red Crusader” took steps to seclude Lieutenant Bech and Corporal Kropp during a certain period and had the intention to take them to Aberdeen.

(4) that, in opening fire at 03.22 hours up to 03.53 hours, the Commanding Officer of the “Niels Ebbesen” exceeded legitimate use of armed force on two counts:

(a) firing without warning of solid gun-shot;

(b) creating danger to human life on board the “Red Crusader” without proved necessity, by the effective firing at the “Red Crusader” after 03.40 hours.

The escape of the “Red Crusader” in flagrant violation of the order received and obeyed, the seclusion on board the trawler of an officer and rating of the crew of “Niels Ebbesen”, and Skipper Wood’s refusal to stop may explain some resentment on the part of Captain Sølling. Those circumstances, however, cannot justify such a violent action.

The Commission is of the opinion that other means should have been attempted, which, if duly persisted in, might have finally persuaded Skipper Wood to stop and revert to the normal procedure which he himself had previously followed.

(5) that the cost of the repair of the damage caused by the firing at and hitting of the “Red Crusader” submitted by the British Government has been considered reasonable by the Danish Agent.

CHAPTER THREE

Events after the meeting with the British naval vessels

In an Aide-Memoire of the Danish Government dated June 2nd, 1961, as well as in the Danish Counter-Memorial, certain naval officers of Her Majesty’s Navy were criticized for interfering with the lawful authority exercised by the “Niels Ebbesen” over a trawler legally arrested by that vessel. The imputations related first to the circumstances of the return to the “Niels Ebbesen” of the boarding party put on the “Red Crusader” and secondly to the question of interference by H.M.S. “Troubridge” with an attempt by the “Niels Ebbesen” to return the boarding party to the “Red Crusader”. On both points the Commission notes that the Danish Counter-Memorial had reserved final conclusions until presentation of evidence during the oral proceedings.

The Commission has taken note of the withdrawal by the Danish Delegation of any charges concerning the question of the return of Lieutenant Bech and Corporal Kropp to the “Niels Ebbesen” and of any implication which could, at a certain moment in the proceedings, have resulted from these charges. It will simply be recorded that some misunderstanding arose on board the “Red Crusader” at the moment of embarking in H.M.S. “Troubridge”’s boat. The reasons of this misunderstanding are somewhat difficult and in any case useless to define, taking into consideration the declarations made by the Danish Delegation at the meetings of March 13th, 15th and 16th, 1962.

Moreover, the Commission feels that the return of the boarding party to “Niels Ebbesen”, whatever its cause, was in fact the best solution; nothing would have been gained by the taking to Aberdeen of a Danish naval officer and a Danish rating on board a British trawler which had escaped from the jurisdiction of Danish and Faroese authorities.

The second imputation was the existence or non-existence of interference by H.M.S. “Troubridge” with a possible attempt by the “Niels Ebbesen” to put back the boarding party on “Red Crusader”. The Commission on this second point also has only to take note of the withdrawal of any allegation by the Danish Government relating to that question.

As a result of the proceedings in connection with Chapter Three, the Commission finds:

that Commander Griffiths and the other Officers of the British Royal Navy made every effort to avoid any recourse to violence between “Niels Ebbesen” and “Red Crusader”. Such an attitude and conduct were impeccable.

The Hague, the twenty-third day of March, one thousand nine hundred and sixty-two.

[Signed] Ch. De Visscher
President of the Commission
[Signed] André Gros
[Signed] C. Moolenburgh
Members of the Commission
International Court of Justice

Aegean Sea Continental Shelf
(Greece v. Turkey)
Judgment

I.C.J. Reports 1978
INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

AEGEAN SEA
CONTINENTAL SHELF CASE
(GREECE v. TURKEY)

JUDGMENT OF 19 DECEMBER 1978

1978

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DU PLATEAU CONTINENTAL
DE LA MER ÉGÉE
(GRÈCE c. TURQUIE)

ARRÊT DU 19 DÉCEMBRE 1978

Official citation:
Aegean Sea Continental Shelf,
Judgment, I.C.J. Reports 1978, p. 3.

Mode officiel de citation:
Plateau continental de la mer Égée,
arrêt, C.I.J. Recueil 1978, p. 3.
INTERNATIONAL COURT OF JUSTICE

YEAR 1978

19 December 1978

AEGEAN SEA
CONTINENTAL SHELF CASE
(GREECE v. TURKEY)

JURISDICTION OF THE COURT

Pursuit of negotiations during judicial proceedings; no impediment to exercise of jurisdiction—Existence of legal dispute.

Jurisdiction of the Court—Question of applicability of 1928 General Act for Pacific Settlement of International Disputes and relevance of reservation in Applicant’s instrument of accession—Reciprocal enforcement of the reservation in the procedural circumstances of the case.

Interpretation of reservation—Whether single reservation or two distinct and autonomous reservations—Grammatical interpretation—Intention of reserving State having regard to the context—Generic meaning of term “disputes relating to territorial status”—Scope follows evolution of the law—Present dispute regarding entitlement to and delimitation of continental shelf areas relates to territorial status of Greece.

Joint communiqué issued by Heads of Government as basis of jurisdiction—Question of form not conclusive—Interpretation in the light of the context.

JUDGMENT

Present: President Jiménez de Aréchaga; Vice-President Nagendra Singh; Judges Forster, Gros, Lachs, Dillard, de Castro, Morozov, Sir Humphrey Waldock, Ruda, Mosler, Elias, Tarazi; Judge ad hoc Stassinopoulos; Registrar Aquarone.

In the case concerning the Aegean Sea continental shelf, between the Hellenic Republic, represented by H.E. Mr. Sotirios Konstantopoulos, Ambassador of Greece to the Netherlands, as Agent, assisted by Mr. Constantin Economides, Legal Adviser and Head of the Legal Department of the Greek Ministry of Foreign Affairs, as Agent, advocate and counsel, Mr. D. P. O’Connell, Q.C., Member of the English Bar, Chichele Professor of Public International Law in the University of Oxford, Mr. Roger Pinto, Professor in the Faculty of Law and Economics, University of Paris, Mr. Paul De Visscher, Professor in the Faculty of Law, University of Louvain, Mr. Prosper Weil, Professor in the Faculty of Law and Economics, University of Paris, Mr. Dimitrios Evrigenis, Dean of the Faculty of Law and Economics, University of Thessaloniki, as advocates and counsel, H.E. Mr. Constantin Stavropoulos, Ambassador, as counsel, Mr. Emmanuel Roucounas, Professor in the Faculty of Law, University of Athens, as advocate and counsel, and by Mr. Christos Macheritsas, Special Counsellor, Legal Department of the Greek Ministry of Foreign Affairs, as expert adviser, and the Republic of Turkey, The Court, composed as above, delivers the following Judgment:

1. By a letter of 10 August 1976, received in the Registry of the Court the same day, the Minister for Foreign Affairs of the Hellenic Republic transmitted to the Registrar an Application instituting proceedings against the Republic of Turkey in respect of a dispute concerning the delimitation of the continental shelf.
appertaining to Greece and Turkey in the Aegean Sea, and the rights of the parties thereover. In order to found the jurisdiction of the Court, the Application relied on, firstly, Article 17 of the General Act for the Pacific Settlement of International Disputes of 1928, read together with Article 36, paragraph 1, and Article 37 of the Statute of the Court; and secondly, a joint communiqué issued at Brussels on 31 May 1975, following an exchange of views between the Prime Ministers of Greece and Turkey.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was at once communicated to the Government of Turkey. In accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. Pursuant to Article 31, paragraph 3, of the Statute of the Court, the Government of Greece chose Mr. Michel Stassinopoulos, former President of the Hellenic Republic, former President of the Council of State, to sit as judge ad hoc in the case. The Government of Turkey did not seek to exercise the right conferred on it by that Article to choose a judge ad hoc.

4. On 10 August 1976, the same day as the Application was filed, the Agent of Greece filed in the Registry of the Court a request for the indication of interim measures of protection under Article 33 of the General Act of 1928 for the Pacific Settlement of International Disputes, Article 41 of the Statute, and Article 66 of the Rules of Court as adopted on 6 May 1946 and amended on 10 May 1973.

5. On 26 August 1976, a letter, dated 25 August 1976, was received in the Registry from the Secretary-General of the Turkish Ministry of Foreign Affairs, enclosing the “Observations of the Government of Turkey on the request by the Government of Greece for provisional measures of protection dated The Hague, 10 August 1976”. In these observations, the Turkish Government, inter alia, contended that the Court had no jurisdiction to entertain the Application.

6. By an Order dated 11 September 1976, the Court, after finding that the circumstances were not such as to require the exercise of its power under Article 41 of the Statute to indicate interim measures of protection, decided that the written proceedings should first be addressed to the question of the jurisdiction of the Court to entertain the dispute.

7. By an Order dated 14 October 1976 the President of the Court fixed time-limits for the written proceedings on the question of jurisdiction, namely, 18 April 1977 for the filing of a Memorial by Greece, and 24 October 1977 for the filing of a Counter-Memorial by Turkey. By a further Order dated 18 April 1977, at the request of Greece these time-limits were extended by the President to 18 July 1977 and 24 April 1978 respectively. The Memorial of the Government of Greece was filed within the extended time-limit fixed therefor, and was communicated to the Government of Turkey. No Counter-Memorial was filed by the Government of Turkey and, the written proceedings being thus closed, the case was ready for hearing on 25 April 1978, the day following the expiration of the time-limit fixed for the Counter-Memorial of Turkey.

8. On 24 April 1978, the date fixed for the filing of the Counter-Memorial of Turkey, a letter dated the same day was received in the Registry from the Ambassador of Turkey to the Netherlands, in which it was stated, inter alia, that it was evident that the Court had no jurisdiction to entertain the Greek Appli-
that the activities of Turkey described in paragraphs 25 and 26 of the Application constitute infringements of the sovereign and exclusive rights of Greece to explore and exploit its continental shelf or to authorize scientific research respecting the continental shelf;
(vi) that Turkey shall not continue any further activities as described above in subparagraph (iv) within the areas of the continental shelf which the Court shall adjudge appertain to Greece."

in the Memorial:

"... the Government of Greece requests the Court to adjudge and declare that, whether, on the basis of Article 17 of the General Act for the Pacific Settlement of International Disputes, 1928, read with Articles 36, paragraph 2, and 37 of the Statute of the Court, or on the basis of the joint communiqué of Brussels dated 31 May 1975, the Court is competent to entertain the dispute between Greece and Turkey on the subject of the delimitation of the continental shelf appertaining to the two countries in the Aegean Sea”.

13. At the close of the oral proceedings, the following written submission was filed in the Registry of the Court on behalf of the Government of Greece:

"The Government of Greece submits that the Court be pleased to declare itself competent to entertain the dispute between Greece and Turkey on the delimitation of the respective areas of continental shelf appertaining to either country in the Aegean."

14. No pleadings were filed by the Government of Turkey, and it was not represented at the oral proceedings; no formal submissions were therefore made by that Government. The attitude of the Government of Turkey with regard to the question of the Court’s jurisdiction has however been defined in its communications to the Court of 25 August 1976, 24 April 1978, and 10 October 1978. The last-mentioned communication was received in the Registry on the morning of the second day of the public hearings, and was transmitted to the Agent of Greece by the Registrar later the same day. In these circumstances account can be taken of its contents only to the extent that the Court finds appropriate in discharging its duty, under Article 53 of the Statute, to satisfy itself as to its jurisdiction to entertain the Application.

* * *

15. It is to be regretted that the Turkish 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. Nevertheless, the Court, in accordance with its Statute and its settled jurisprudence, must examine proprio motu the question of its own jurisdiction to consider the Application of the Greek Government. Furthermore, in the present case the duty of the Court to make this examination on its own initiative is reinforced by the terms of Article 53 of the Statute of the Court. According to this provision, whenever one of the parties does not appear before the Court, or fails to defend its case, the Court, before finding upon the merits, must satisfy itself that it has jurisdiction. Before proceeding further, however, the evolution of the main events leading to the bringing of this dispute before the Court must be outlined.

* * *

16. Towards the end of 1973 the Turkish Government granted licences to carry out exploration for petroleum in submarine areas of the Aegean Sea, including areas which encroached upon the continental shelf which, according to the Greek Government, appertains to certain Greek islands. By a Note Verbale of 7 February 1974, the Greek Government, basing itself on international law as codified by Articles 1 (b) and 2 of the 1958 Geneva Convention on the Continental Shelf, questioned the validity of the licences granted by Turkey, reserved its sovereign rights over the continental shelf adjacent to the coasts of the said islands, and contended that the continental shelf required to be delimited between the two States on a basis of equidistance by means of a median line. The Turkish Government replied, by a Note Verbale of 27 February 1974, that “the Greek Islands situated very close to the Turkish coast do not possess a [continental shelf of their own”, and disputed the applicability of the principle of equidistance; while reserving its rights, it stated that it considered it appropriate to seek by means of agreement a solution in conformity with the rules of international law. In its reply of 24 May 1974, the Greek Government indicated that it was not opposed to a delimitation based on the provisions of present day positive international law, “as codified by the 1958 Geneva Convention on the Continental Shelf”; the Turkish Government in its turn, on 5 June 1974, stated that it was the duty of the two Governments to use every endeavour to bring about agreed solutions of the various problems arising by reason of the fact that they were neighbours in the Aegean Sea; it expressed readiness to enter into negotiations for the delimitation of the continental shelf between the two countries.

17. On 29 May 1974 the Turkish vessel Cansarli began a programme of exploration in waters which were wholly or partly superjacent to the continental shelf in the Aegean Sea which, according to the Greek Government, appertains to Greece. The Greek Government, in a Note of 14 June 1974, observed that this exploration was a breach of Greece’s exclusive sovereign rights and lodged a vigorous protest. The Turkish Government, in its reply of 4 July 1974, refused to accept the Greek protest. Another protest in respect of further licences for exploration was made by Greece
on 22 August 1974; Turkey refused to accept it on 16 September 1974, and repeated the suggestion of negotiations.

18. On 27 January 1975 the Greek Government proposed to the Turkish Government that the differences over the applicable law as well as over the substance of the matter be referred to the International Court of Justice, and it stated that, without prejudice to its right to initiate Court proceedings unilaterally, it saw considerable advantages in reaching jointly with the Turkish Government a special agreement for reference to the Court. On 6 February 1975 the Turkish Government answered expressing the hope that the Government of Greece would “agree, with priority, to enter into negotiations...on the question of the Aegean Sea continental shelf”, adding that in principle it considered favourably the proposal to refer the dispute jointly to the Court. To this effect it proposed talks between the two Governments at ministerial level. On 10 February 1975 the Greek Government agreed that talks should be held in order to draft the terms of a special agreement.

19. On 17-19 May 1975 the Ministers for Foreign Affairs of Greece and Turkey met in Rome and gave initial consideration to the text of a special agreement concerning the submission of the matter to the International Court of Justice. On 31 May 1975 the Prime Ministers of the two countries met in Brussels and issued the joint communiqué relied on as conferring jurisdiction in this case, the terms of which will be examined in detail later in the present Judgment. They also defined the general lines on the basis of which the subsequent meetings of the representatives of the two Governments would take place and decided to bring forward the date of a meeting of experts concerning the question of the continental shelf of the Aegean Sea.

20. In a Note of 30 September 1975 the Turkish Government reiterated the view it had advanced at the meeting in Rome, that it would not be in the interest of the two countries to submit the dispute to the Court without first attempting meaningful negotiations. It recalled that in Rome it had also expressed the view that delimitation negotiations should take place parallel with the preparation of a special agreement, and that it had been agreed that those issues which could not be resolved by negotiations would be jointly submitted to the Court. In a Note of 2 October 1975 the Greek Government contended that it had been agreed in Brussels on 31 May 1975 that the issue would first be formally submitted to the Court and that talks with a view to an eventual agreed solution were not excluded to follow.

21. In a Note of 18 November 1975 the Turkish Government disputed this interpretation and invited the Greek Government to conduct meaningful negotiations for an agreed equitable settlement, as well as for considering joint submission of unresolved but well-defined legal issues, if necessary, to the Court. In a Note of 19 December 1975 the Greek Government expressed the view that since negotiation was in any case necessary in order to proceed with the drafting of the special agreement, it was understood that if in the course of that negotiation proposals were made for the elimination of points of disagreement concerning delimitation, those proposals would be given appropriate consideration. In accordance with the views expressed in the above communications, meetings of experts took place in Berne from 31 January to 2 February and on 19 and 20 June 1976, but no agreement was reached.

22. On 13 July 1976 a Turkish Government press release was issued concerning researches that would be undertaken by the Turkish seismic research vessel MİsSİMİK I in the Turkish territorial sea and the high seas, and in a statement on Turkish radio on 24 July 1976 the Turkish Foreign Minister indicated that these researches would be carried out in the areas of the Aegean claimed by Turkey, and could extend to all areas of the Aegean outside the territorial waters of Greece. When the vessel pursued its researches into areas where, in the view of the Greek Government, the continental shelf appertains to Greece, that Government made a diplomatic protest to the Turkish Government in a Note Verbale dated 7 August 1976, and on 10 August 1976 referred the matter simultaneously to the International Court of Justice and to the Security Council.

23. On 25 August 1976 the Security Council adopted resolution 395 (1976) to which the Court has referred in its Order of 11 September 1976. The operative part of the Security Council resolution called on the two Governments “to resume direct negotiations over their differences” and appealed to them “to do everything within their power to ensure that this results in mutually acceptable solutions” (para. 3). Paragraph 4 of this resolution invited:

“... the Governments of Greece and Turkey in this respect to continue to take into account the contribution that appropriate judicial means, in particular the International Court of Justice, are qualified to make to the settlement of any remaining legal differences that they may identify in connection with their present dispute”.

24. While the present case was pending before the Court, Greece and Turkey resumed their negotiations, in accordance with the Security Council resolution. Their Ministers for Foreign Affairs met in New York on 1 October 1976 and agreed that the question of the delimitation of the Aegean Sea continental shelf should be the subject of negotiations between the two Governments with the aim of reaching a mutually acceptable settlement. There followed a meeting in Berne between representatives of the two Governments from 2 to 11 November 1976, which outlined the procedure for future negotiations. It was also agreed that the negotiations would be confidential.
25. The subsequent meeting of Ministers for Foreign Affairs of the two States in Brussels ended in a Joint Communiqué published on 11 December 1976 which expressed satisfaction with the previous meeting in Berne. At their next meeting on 29 January 1977 at Strasbourg, the two Ministers for Foreign Affairs exchanged views on the subject of the negotiations relating to the question of the continental shelf which were to begin in London on 31 January 1977. The Ministers met again at Strasbourg on 28 April 1977 and decided to continue negotiations on the subject of the delimitation of the continental shelf, fixing a meeting of their experts, which took place in Paris at the beginning of June 1977. Again on 9 December 1977 the Ministers agreed in Brussels that there should shortly be a meeting of the experts on the question of the continental shelf. This meeting took place in Paris in mid-February 1978.

26. The Prime Ministers of Greece and Turkey met at Montreux on 10-11 March 1978 and at Washington on 29 May 1978; they decided that a meeting between the Secretaries-General of the Foreign Ministries of Greece and Turkey should take place in Ankara on 4-5 July 1978. These officials, after their meeting in July, decided to meet again in Athens in September 1978. In Athens they agreed that "the bilateral talks related to the continental shelf question should be resumed at the appropriate level on or about the 1 of December 1978".

* * *

27. In his letter of 24 April 1978 to the Registrar, the Ambassador of Turkey to the Netherlands stated inter alia:

"It should, in the view of the Government of Turkey, be recalled that that Application was filed although the two Governments had not yet begun negotiations on the substantive issue, as is clearly apparent from the contents of the Notes exchanged by the two Governments. It was however always contemplated between them that they would seek, through meaningful negotiations, to arrive at an agreement which would be acceptable to both parties."

The letter recalled that the Security Council, by its resolution 395 (1976), called upon both Governments "to settle their problems primarily by means of direct negotiations in order that these might result in mutually acceptable solutions". It argued that it was in pursuance of that resolution that the Berne Agreement of 11 November 1976 provided in Article 1 that:

"The two Parties agree that the negotiations shall be frank, thoroughgoing and pursued in good faith with a view to reaching an agreement based on their mutual consent with regard to the delimitation of the continental shelf as between themselves."

28. After recalling the 10-11 March 1978 meeting at Montreux between the Prime Ministers, the letter claimed that:

"The necessary conditions for the conduct of frank and serious negotiations, and the spirit which should motivate the parties concerned, with a view to the settlement of their problems by such negotiations, are not reconcilable with the continuation of international judicial proceedings."

Furthermore, in a Note Verbale to the Greek Government of 29 September 1978 concerning the Greek request for a postponement of the beginning of the oral proceedings in the case, the Turkish Government objected to the postponement, and expressed the opinion that:

"...the discontinuance of the proceedings and the removal of the case from the list of the International Court of Justice would be more conducive to the creation of a favourable political climate for an agreed settlement."

29. The Turkish Government's attitude might thus be interpreted as suggesting that the Court ought not to proceed with the case while the parties continue to negotiate and that the existence of active negotiations in progress constitutes an impediment to the Court's exercise of jurisdiction in the present case. The Court is unable to share this view. Negotiation and judicial settlement are enumerated together in Article 33 of the Charter of the United Nations as means for the peaceful settlement of disputes. The jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement have been pursued pari passu. Several cases, the most recent being that concerning the Trial of Pakistani Prisoners of War (I.C.J. Reports 1973, p. 347), show that judicial proceedings may be discontinued when such negotiations result in the settlement of the dispute. Consequently, the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function.

30. The above-mentioned observations of the Turkish Government might also be interpreted as making the point that there is no dispute between the parties while negotiations continue, so that the Court could not for that reason be seised of jurisdiction in this case. As the Court recognized in its Order of 11 September 1976, the existence of a dispute can hardly be open to doubt in the present case. Counsel for Greece correctly stated that there is in fact a double dispute between the parties:

"There is a dispute about what the continental shelf boundaries in the Aegean Sea should be, and there is a dispute as to the method whereby this first dispute should be settled—whether by negotiation
alone or by submission to a tribunal competent to exercise jurisdiction in the matter, either following upon negotiations or even in the absence of them.”

31. Again, in the Turkish Ambassador's letter of 24 April 1978, the further argument is advanced that the dispute between Greece and Turkey is "of a highly political nature". But a dispute involving two States in respect of the delimitation of their continental shelf can hardly fail to have some political element and the present dispute is clearly one in which "the parties are in conflict as to their respective rights". Greece has asked the Court to pronounce on its submissions "in accordance with the... principles and rules of international law". Turkey, for its part, has invoked legal grounds in reply to the Greek claim, such as the existence of "special circumstances". It is clear from the submissions in the Greek Application and Memorial, as well as in the observations in the various Turkish diplomatic communications to Greece, that Greece and Turkey are in conflict as to the delimitation of the spatial extent of their sovereign rights over the continental shelf in the Aegean Sea. Thus there are certain sovereign rights being claimed by both Greece and Turkey, one against the other and it is manifest that legal rights lie at the root of the dispute that divides the two States. The Court therefore finds that a legal dispute exists between Greece and Turkey in respect of the continental shelf in the Aegean Sea.

* * *

32. The Court will now proceed to the consideration of its jurisdiction with respect to this dispute. In paragraph 32 of the Application the Greek Government has specified two bases on which it claims to found the jurisdiction of the Court in the present dispute. Although it is said in paragraph 3 of the Greek Memorial on the question of jurisdiction that these two bases "mutually strengthen each other", they are quite distinct and will therefore be examined separately.

33. The first basis of jurisdiction is formulated in paragraph 32 (1) of the Application as follows:

"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. Respectively on 14 September 1931 and 26 June 1934, Greece and Turkey acceded to this instrument, which is still in force for both of them. The texts of these accessions were accompanied by declarations which are irrelevant to the present case."

34. Article 17 of the General Act of 1928 forms part of Chapter II of the Act, entitled "Judicial Settlement", and reads as follows:
36. The Turkish Government, on the other hand, in the observations which it transmitted to the Court with its letter to the Registrar of 25 August 1976, contested the Greek Government’s right to invoke Article 17 of the General Act in the present case on both counts. It there took the position that the General Act is no longer in force and that, whether or not the General Act is in force, it is inapplicable as between Greece and Turkey. In this connection, the Turkish Government has emphasized “that at no time during the exchanges of documents and discussions concerning the continental shelf areas of the Aegean Sea has any Greek representative made any mention of the General Act of 1928”.

37. In 1948, the General Assembly of the United Nations undertook a study of the text of the General Act of 1928 with a view to restoring its full efficacy, since this had been impaired in some respects as a result of the dissolution of the League of Nations and the disappearance of its organs. On 29 April 1949, the General Assembly adopted resolution 268A-III, by which it instructed the Secretary-General to prepare the text of a “Revised General Act for the Pacific Settlement of International Disputes” incorporating the amendments which it had adopted, and to hold it open to accession by States. Explaining the reasons for this instruction, the Preamble to the resolution, inter alia, stated:

“Whereas the amendments hereafter mentioned are of a nature to restore to the General Act its original efficacy;

Whereas these amendments will only apply as between States having acceded to the General Act as thus amended and, as a consequence, will not affect the rights of such States, parties to the Act as established on 26 September 1928, as should claim to invoke it in so far as it might still be operative.”

38. The question of the status of the General Act of 1928 as a convention in force for the purpose of Article 37 of the Statute of the Court has already been raised, though not decided, in previous cases before the Court. In the Nuclear Tests cases Australia and New Zealand each took the position that the 1928 Act continues in force for States which have not denounced it in conformity with Article 45 of the Act, whereas France informed the Court that, as a result of the dissolution of the League of Nations, it considered the Act to be no longer in force (I.C.J. Pleadings, Nuclear Tests, Vol. II, p. 348). Similarly, in the Trial of Pakistani Prisoners of War case, Pakistan invoked the 1928 Act as a basis for the exercise of the Court’s jurisdiction in that case, whereas in a letter to the Court, the respondent State, India, stated that the 1928 Act “is either not in force or, in any case, its efficacy is impaired by the fact that the organs of the League of Nations and the Permanent Court of International Justice to which it refers have now disappeared” (I.C.J. Pleadings, Trial of Pakistani Prisoners of War, p. 143). The Court also has cognizance of the fact that on 10 January 1974 the Secretary-General of the United Nations received a communication from the Government of the French Republic reaffirming its view as stated above, and notifying him that, with respect to any State or any institution that might contend that the General Act is still in force, the letter was to be taken as constituting a denunciation of the Act in conformity with Article 45 thereof. The Court is further aware that in a letter to the Secretary-General, received on 8 February 1974, the United Kingdom, after referring to the fact that doubts had been raised as to the continued legal force of the General Act, gave notice of its denunciation of the Act in accordance with Article 45, paragraph 2, in so far as it might be considered as still in force, and that by a notification of 15 September 1974 India informed the Secretary-General that it had never regarded itself as bound by the Act since its independence, whether by succession or otherwise. At the same time, the Court observes that a considerable number of other States, listed by the Secretary-General as at 31 December 1977 as having acceded to the Act, have not up to the present date taken steps to denounce it nor voiced any doubts regarding the status of the Act today.

39. Although under Article 59 of the Statute “the decision of the Court has no binding force except between the parties and in respect of that
41. The Greek Government has advanced the contention at the public hearings that reservation (b) should, in any event, be left out of consideration altogether by the Court because the question of its effect on the application of the General Act with respect to the present dispute was not raised by Turkey as a preliminary objection in conformity with Article 67 of the Rules of Court. Consequently, in its view, since Turkey has not filed a preliminary objection in accordance with the conditions laid down in Article 67 of the Rules, it cannot be regarded as having “enforced” the reservation in conformity with Article 39, paragraph 3, of the General Act.

42. The Greek Government recognizes that “the Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law” (Mavrommatis Palestine Concessions, P.C.I.J., Series A, No. 2, at p. 34); and also that in previous cases where the respondent has not appeared, the Court has taken into account all the elements before it, including those supplied by extra-procedural communications from the respondent, for the purpose of satisfying itself as to whether its jurisdiction was established. It further recognizes that, even when the respondent has not informed the Court of its attitude, the Court has proprio motu enquired into the possible objections to its jurisdiction in the case. It maintains, however, that in previous cases the Court has never gone further than to take account of “objections”, “legal arguments” or “contentions” advanced by the respondent or conceived of by the Court (cf. Fisheries Jurisdiction, I.C.J. Reports 1973, at pp. 7-8; Nuclear Tests, I.C.J. Reports 1974, at pp. 257 and 461). It then asks whether, in a case like the present, the Court can go so far as to substitute itself for the absent government by enforcing proprio motu in place of that government the reservation of the Applicant, thus assimilating the extra-procedural expression of a desire to take advantage of the reservation to the procedural expression of a decision to enforce it. To do so, the Greek Government suggests, would be to take liberties with the provisions both of Article 39, paragraph 3, of the General Act and of Article 67 of the Rules.

43. The procedural objection advanced by Greece to reservation (b)’s being taken into consideration does not appear to the Court to be convincing. According to the information before the Court, no mention was made of the General Act during the negotiations, so that the first mention of the Act by Greece in the present dispute was in its Application filed on 10 August 1976, with which it also filed a request for interim measures of protection. It was only then that the Turkish Government had occasion to consider its position regarding the application of the General Act to the present dispute. On 18 August 1976, the Greek and Turkish Governments were informed, in conformity with Article 66, paragraph 8, of the Rules of Court, that public hearings would open on 25 August 1976 to afford the parties the opportunity of presenting their observations on the Greek request for the indication of provisional measures. On 23 August the
Registrar, at the direction of the Court, informed the Turkish Ambassador to the Netherlands that his Government had the right to address to the Court in writing any observations that it might have on the Greek request. It was in these circumstances that, by its letter of 25 August 1976, the Turkish Government transmitted to the Court the document entitled “Observations of the Government of Turkey on the request by the Government of Greece for provisional measures of protection dated The Hague, 10 August 1976”. In those observations the Turkish Government specifically referred to the right conferred upon it by Article 39, paragraph 3, of the General Act to invoke Greece’s reservation (b) on the basis of reciprocity, and then stated: “In conformity with this provision, Turkey opposes reservation (b).” In the view of the Court, that formal statement, made in response to a communication from the Court, must be considered as constituting an “enforcement” of the reservation within the meaning of, and in conformity with, Article 39, paragraph 3, of the Act.

44. The Turkish Government, it is true, was not represented at the public hearings on Greece’s request for the indication of provisional measures, and did not afterwards file a preliminary objection or take any steps in the proceedings. But there is no provision in the Rules of Court which excludes the submission of written observations on a request for provisional measures; nor is there any provision which excludes the raising of questions of jurisdiction in written observations submitted in proceedings on the indication of provisional measures. On the contrary, in view of the urgency of a request for provisional measures, written communications not submitted through an agent but either directly or through the Ambassador in The Hague have invariably been admitted by the Court; while one of the very purposes of such communications has commonly been to raise questions as to the competence of the Court with respect to the particular case (Anglo-Iranian Oil Co., I.C.J. Reports 1951, p. 91; Fisheries Jurisdiction, I.C.J. Reports 1972, pp. 14 and 32; Nuclear Tests, I.C.J. Reports 1973, pp. 100 and 136-137; Trial of Pakistani Prisoners of War, I.C.J. Reports 1973, p. 329).

45. In the present case, the Turkish Government’s observations were immediately communicated to the Greek Agent, and they were referred to by counsel for Greece during the hearings concerning the request for interim measures. Indeed, counsel for Greece then expressly recognized that by reason of the title given to the document the Turkish Government had placed itself “within the context of Article 66, paragraph 8, of the Rules of Court”, adding:

“Thus, not only has an opportunity of presenting observations been given to Turkey, but Turkey has in fact, in the letter which it has sent to the Court and in the document, availed itself of that opportunity of presenting observations.”

46. The Court itself, in its Order of 11 September 1976 took due notice of the Turkish Government’s observations (I.C.J. Reports 1976, p. 5, paras. 7 and 8). It also called attention to the invocation by Turkey of reservation (b) in Greece’s instrument of accession, and set out the text of the reservation (ibid., p. 8, para. 19). In that Order, moreover, the Court expressly stated that, “having regard to the position taken by the Turkish Government in its observations communicated to the Court on 26 August 1976, that the Court has no jurisdiction to entertain the Greek Application”, it was “necessary to resolve first of all the question of the Court’s jurisdiction with respect to the case” (ibid., p. 13, para. 45). Accordingly, after giving its finding on the request for interim measures, the Court went on to decide that the present proceedings should be addressed to “the question of the Court’s jurisdiction to entertain the dispute”.

47. In the procedural circumstances of the case it cannot be said that the Court does not now have before it an invocation by Turkey of reservation (b) which conforms to the provisions of the General Act and of the Rules of Court. Nor can it be said that the Court substitutes itself for the Turkish Government if it now takes cognizance of a reservation duly invoked in limine litis in the proceedings on the request for interim measures. It would not discharge its duty under Article 53 of the Statute if it were to leave out of its consideration a reservation, the invocation of which by the Respondent was properly brought to its notice earlier in the proceedings. It follows that the Court has now to examine the scope of reservation (b) and its application to the present dispute.

* * *

48. The text of the reservations in Greece’s instrument of accession reads as follows:

“Sont exclus des procédures décrites par l’Acte général, sans en excepter celle de conciliation visée à son chapitre I:

a) les différends nés de faits antérieurs, soit à l’adhésion de la Grèce, soit à l’adhésion d’une autre Partie avec laquelle la Grèce viendrait à avoir un différend;

b) les différends portant sur des questions que le droit international laisse à la compétence exclusive des États et, notamment, les différends ayant trait au statut territorial de la Grèce, y compris ceux relatifs à ses droits de souveraineté sur ses ports et ses voies de communication.”

[Translation]

“The following disputes are excluded from the procedures described in the General Act, including the procedure of conciliation referred to in Chapter I:

21
disputes resulting from facts prior either to the accession of Greece or to the accession of another Party with whom Greece might have a dispute;

(b) disputes concerning questions which by international law are solely within the domestic jurisdiction of States, and in particular disputes relating to the territorial status of Greece, including disputes relating to its rights of sovereignty over its ports and lines of communication.”

49. The Greek Government maintains on various grounds that reservation (b) cannot be considered as covering the present dispute regarding the continental shelf of the Aegean Sea. One of those grounds consists of a contention that, when read correctly according to its terms, reservation (b) does not cover all disputes relating to the territorial status of Greece but only such as both relate to its territorial status and at the same time concern “questions which by international law are solely within the domestic jurisdiction of States”. On this basis, it argues that, as the delimitation of the continental shelf cannot be considered a question “solely within the domestic jurisdiction of States”, the subject-matter of the present dispute is not covered by reservation (b). Since this ground is based on an essentially grammatical interpretation of the reservation, the Court will examine it first.

50. The grammatical argument hinges upon the interpretation of the words “et, notamment,” (“and in particular”) which precede the reference to “les différends ayant trait au statut territorial de la Grèce” (disputes relating to the territorial status of Greece). Those words are said by the Greek Government to make it plain that the reference to “disputes relating to the territorial status of Greece” was not intended to designate an autonomous category of disputes additional to the category of disputes concerning matters solely within domestic jurisdiction. The effect of those words, according to the Greek Government, is to show that in reservation (b) “disputes relating to the territorial status of Greece” are included within the description of disputes concerning matters solely within domestic jurisdiction, and are there mentioned merely as a particular example of such disputes which it was desired to emphasize.

51. In support of this interpretation of the words “et, notamment,” the Greek Government invokes the authority of Robert’s Dictionnaire alphabétique et analogique de la langue française (Vol. IV) which explains “notamment” as meaning “d’une manière qui mérite d’être notée” (in a way which deserves to be noted), and adds in brackets: “sert le plus souvent à attirer l’attention sur un ou plusieurs objets particuliers faisant partie d’un ensemble précédemment désigné ou sous-entendu” (most often used to draw attention to one or more particular objects forming part of a previously

designated or understood whole). Particular stress is then laid by the Greek Government on the phrases given by Robert to illustrate the use of the word notamment, in the majority of which the word is preceded by the word et, but still denotes merely a particular instance of a wider genus or category. The Greek Government also cites similar examples of this use of “et notamment” given in the Dictionnaire de l’Académie française and in Litttré, Dictionnaire de la langue française. On the basis of this linguistic evidence, it maintains that the natural, ordinary and current meaning of this expression absolutely precludes the Greek reservation from being read as covering disputes regarding territorial status in addition to, and quite separately from, disputes regarding matters of domestic jurisdiction.

52. The grammatical interpretation of reservation (b) advanced by Greece leads to a result which is legally somewhat surprising. Disputes concerning matters of “domestic jurisdiction” and disputes relating to “territorial status” are different concepts which, in treaty provisions, including Article 39, paragraph 2, of the General Act, and in reservations to treaties or to acceptances of jurisdiction under Article 36, paragraph 2, of the Statute, have been kept quite separate and distinct. Furthermore, the integration of “disputes relating to territorial status” within the category of disputes concerning matters of “domestic jurisdiction”, largely deprives the former of any significance. Consequently, only if the grammatical arguments were compelling and decisive would the Court be convinced that such is the effect which ought to be given to the words “et, notamment,” in reservation (b). But those arguments do not appear to the Court to be so compelling as has been suggested.

53. In the first place, the grammatical argument overlooks the commas placed both before and after “notamment”. To put the matter at its lowest, one possible purpose of these commas might have been to make it clear that in the phrase “et, notamment, les différends” etc., the word “et” is intended to be a true conjunctive introducing a category of “différends” additional to those already specified.

54. Another point overlooked by the argument is that the meaning attributed to “et, notamment,” by Greece is grammatically not the only, although it may be the most frequent, use of that expression. Robert’s Dictionnaire itself goes no further than to say of the word notamment that it is “most often” used to draw attention to one of several particular objects forming part of a collectivity previously indicated or implied. The question whether in the present instance the expression “et, notamment,” has the meaning attributed to it by Greece thus depends on the context in which those words were used in Greece’s instrument of accession and is not a matter simply of their preponderant linguistic usage. Even a purely grammatical interpretation of reservation (b), therefore, leaves open the possibility that the words “et, notamment, les différends ayant trait au statut territorial de la Grèce” were intended to specify an autonomous category of disputes additional to those concerning matters of domestic jurisdiction,
which were also specifically “excluded from the procedures described in the General Act”.

55. In any event, “the Court cannot base itself on a purely grammatical interpretation of the text” (Anglo-Iranian Oil Co., I.C.J. Reports 1952, p. 104). A number of considerations of a substantive character point decisively to the conclusion that reservation (b) in fact contained two separate and autonomous reservations. One is that the making of reservations to the General Act was expressly authorized and regulated by Article 39, which allowed only the reservations “exhaustively enumerated” in paragraph 2 of the Article, namely:

“(a) Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said Party may have a dispute;
(b) Disputes concerning questions which by international law are solely within the domestic jurisdiction of States;
(c) Disputes concerning particular cases or clearly specified subject-matters, such as territorial status, or disputes falling within clearly defined categories.”

When a multilateral treaty thus provides in advance for the making only of particular, designated categories of reservations, there is clearly a high probability, if not an actual presumption, that reservations made in terms used in the treaty are intended to relate to the corresponding categories in the treaty. Nor does the fact that the instrument of accession includes in a single paragraph two categories of disputes which are listed in the treaty as separate categories, by itself, in any way diminish that probability. When making reservations under the General Act, States have not, as a rule, meticulously followed the pattern of reservations set out in Article 39, paragraph 2; and they have not infrequently grouped together in one paragraph two or more reservations listed separately in the Act.

56. In the present instance, the very structure of reservation (b) hardly seems consistent with an intention to make “disputes relating to the territorial status of Greece”, which are placed by the General Act in one category, merely an example of disputes concerning questions of domestic jurisdiction, which are placed by the Act in a quite different category. If that had been the intention at the time, it would have been natural for those who drafted Greece’s instrument of accession to put the words y compris (including) where the words et, notamment, (and in particular) in fact appear in reservation (b) and the words et, notamment, where the words y compris are now found. But that is not how reservation (b) was drafted.

57. A further consideration is that Greece’s declaration accepting compulsory jurisdiction under the optional clause of the Statute of the Permanent Court contained a provision which, indisputably, was an autonomous reservation of “disputes relating to the territorial status of Greece”. That declaration, made on 12 September 1929, only two years before Greece’s accession to the General Act, was stated to be subject to two reservations:

“(a) disputes relating to the territorial status of Greece, including disputes relating to its rights of sovereignty over its ports and lines of communication;
(b) disputes relating directly or indirectly to the application of treaties or conventions accepted by Greece and providing for another procedure”.

It can hardly be supposed that Greece should at the same time have intended to give a scope to its reservation of “disputes relating to the territorial status of Greece” which differed fundamentally from that given to it both in the General Act and in its declaration under the optional clause. That Greece should have had such an intention seems all the more improbable in that in 1934 and again in 1938 it renewed its declaration under the optional clause without modifying in any way the form of its reservation of “disputes relating to the territorial status of Greece”.

58. The Greek Government has suggested that an improvement in the political climate of the time enabled Greece to dispense with an autonomous reservation of disputes relating to its territorial status, and to content itself with the integration of those disputes into its domestic jurisdiction reservation. But this would not explain why Greece should then have maintained an autonomous reservation of disputes relating to territorial status in its acceptance of the optional clause. Another difficulty is that accession to the General Act involved an even wider risk of claims than acceptance of the optional clause; for the pacific settlement procedures of the General Act are not limited to the judicial settlement of legal disputes. They also provide for conciliation with respect to disputes “of every kind”, and even for the possibility, under certain conditions, of arbitration of political disputes on the basis that the arbitrators may decide ex aequo et bono. It hardly seems likely, therefore, that Greece should have intended to have curtailed the protection given by its reservation of disputes relating to territorial status, when subjecting itself to the wider range of procedures contained in the Act.

59. Equally unconvincing is a suggestion that, although the scope of the “territorial status” reservation was reduced by its incorporation in the reservation of questions of domestic jurisdiction, Greece thereby obtained a “reinforced barrage”, a “qualitatively enhanced protection” and a “doubly-bolted” door against the claims which it was particularly concerned to guard against. This suggestion takes no account of the legal implications of incorporating “disputes relating to territorial status” into a reservation of questions of “domestic jurisdiction”, as those had been explained by the Permanent Court in 1923 in its Advisory Opinion on the Nationality Decrees Issued in Tunis and Morocco (P.C.I.J., Series B, No. 4). The
Permanent Court there observed that the question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question and depends upon “the development of international relations”. It pointed out that a matter which is not, in principle, regulated by international law and is thus a matter within the State’s domestic jurisdiction, will cease to be such if the State has undertaken obligations towards other States with respect to that matter. Consequently, and in the light of historical circumstances now to be described, it is hardly conceivable that Greece intended to reduce the scope of its “territorial status” reservation by integrating it into its “domestic jurisdiction” reservation.

60. Greece’s main preoccupation in the years following the First World War, so the Court was informed, was to guard against the revival of Bulgarian aspirations to recover direct access to the Aegean Sea which it had lost as a result of the territorial changes effected by the peace treaties. By the Treaty of Neuilly of 27 November 1919, Bulgaria had renounced all its rights and titles over areas of Thrace, but the Principal Allied and Associated Powers at the same time “undertook to ensure the economic outlets of Bulgaria to the Aegean Sea” (Art. 48). Article 4 of the Treaty of Sevres of 10 August 1920 relating to Thrace, put into force by Protocol XVI of the Lausanne Conference, provided that Greece “in order to ensure to Bulgaria free access to the Aegean Sea” recognized her freedom of transit “over the territories and in the ports assigned to Greece under the present Treaty”. The expectation that Bulgaria might seek to secure a revision of this territorial settlement was the source of Greece’s preoccupation and, also, as will be shown shortly, its motive for inserting in its declaration under the optional clause a reservation of disputes relating to its territorial status. In the present connection, however, what needs to be emphasized is that the territorial settlement, against the revision of which Greece’s “territorial status” reservation was designed to provide a safeguard, consisted essentially of a complex of rights and obligations established by treaties. Consequently, having regard to the implications of the Nationality Decrees Opinion, that territorial settlement was by its very nature one which could not legally be considered as capable of falling within the concept of questions of domestic jurisdiction. It follows that, by integrating its territorial status reservation into its reservation of questions of domestic jurisdiction, Greece would automatically have deprived itself of the protection which the former reservation would otherwise have given it against attempts to use the General Act as a means of effecting a revision of the territorial settlement established by the peace treaties.

61. This basic objection to the Greek Government’s way of interpreting reservation (b) is not removed by another suggestion made in the public hearings. This was that the series of treaties connected with the territorial arrangements and the treatment of minorities provided their own special procedures for the settlement of disputes, which had priority over those of the General Act under Article 29, so that an autonomous reservation of disputes relating to territorial status was not really indispensable to Greece. The difficulty with this suggestion, however, is that these procedures by no means covered all possible claims relating to territorial status and to rights of sovereignty over ports and lines of communication. It is true that the Treaty of Neuilly provided for recourse to the Permanent Court or to other methods of pacific settlement on questions relating to minorities and certain other matters, but special procedures were never established for the settlement of disputes concerning the parts of the Treaty dealing with Bulgaria’s economic outlet to the Aegean Sea.

62. The Court is not, therefore, convinced by the several explanations which have been put forward to account for the difference between Greece’s territorial status reservation in its declaration under the optional clause and that in its instrument of accession to the General Act, if the latter instrument is given the meaning contended for by Greece. It also appears significant that no support for any of these explanations can be found in the contemporary evidence placed before the Court relating to the making of Greece’s declaration under the optional clause in 1929 and to the deposit of its instrument of accession in 1931. This evidence will now be examined.

* * *

63. During the public hearings on its request for interim measures, the Greek Government submitted to the Court a document referred to by counsel as “the travaux préparatoires of the reservation”. This was a letter addressed by M. Politis to the Greek Foreign Minister on 9 September 1928, setting out the reservations which he recommended that Greece should make to its acceptance of the Permanent Court’s jurisdiction under the optional clause. M. Politis was at that time the Rapporteur for the drafting of the General Act which was then nearing completion, and in that letter he said, inter alia:

“I think that it would be wise to safeguard ourselves against an eventual application of Bulgaria on matters related to our territorial status, to the access (of Bulgaria) to the Aegean and to the protection of Bulgarian-speaking minorities in Greece.”

He went on to suggest a possible text of a declaration to give effect to his recommendation which contained the following three reservations:

(a) disputes relating to the territorial status of Greece;
(b) disputes relating to its rights of sovereignty over its ports and lines of communication;
(c) disputes for the settlement of which the treaties signed by it provide another procedure.
64. That letter confirms in the clearest manner the Greek Government’s explanation of its motive in introducing a “territorial status” reservation into its declaration under the optional clause. But it also shows that this reservation was originally conceived of and formulated as a specific and autonomous reservation. In the actual declaration the second reservation, “disputes relating to its rights of sovereignty over its ports and lines of communication”, was tacked on to, and specifically “included” in, the first reservation of “disputes relating to territorial status”. The reason, no doubt, was that the disputes covered by the second reservation were realized to be cases of “disputes relating to the territorial status of Greece”. At any rate, this change in the presentation of the first and second reservations only served to emphasize both the generic and the autonomous character of Greece’s reservation of disputes relating to its “territorial status”. Another point which may be deduced from M. Politis’s letter is that he clearly did not think a reservation of disputes for the settlement of which treaties provided another procedure would necessarily cover all disputes relating to Greece’s “territorial status”; otherwise, he would not have recommended the inclusion of two separate, autonomous reservations to cover specifically each of these two categories of disputes.

65. In response to a question put by the Court on 9 October 1978, the Greek Government submitted certain internal documents relating to the preparation of Greece’s instrument of accession to the General Act. These documents included a first draft of the projet de loi to be presented to the Greek Chambre des députés for ratification of the instrument of accession, the text of the projet de loi as finally presented, and the exposé des motifs explaining the projet de loi to the Chambre des députés; all of the documents being accompanied by certified translations into the French language.

66. The Court considers that the intention to make an autonomous reservation as to matters relating to territorial status is put beyond doubt by the explanation of the reservation which was given by the Government to the Chambre des députés in the exposé des motifs accompanying the projet de loi. The final paragraph of this document stated:

“We have judged it necessary to proceed to that accession subject to certain reservations. The latter are those enumerated in Article 2 of the projet de loi submitted, and consist, on the one hand, of the repetition of one of the two reservations we formulated when we accepted the compulsory jurisdiction of the Permanent Court—reservation (b)—the other being established in Article 29 of the Act; and, on the other hand, of the reservations enumerated in Article 39 of the Act.”

67. Accordingly, when the Chambre des députés authorized the deposit of Greece’s instrument of accession to the General Act, it could only have believed that Greece was making its accession subject to precisely the same reservation of disputes relating to its territorial status as the Chambre had previously authorized for its declaration under the optional clause. It seems reasonable to assume that, if any change had been intended in the scope of the “territorial status” reservation, to which particular importance was attached by Greece, some indication and explanation of that change would have been included in the exposé des motifs. But there is no evidence of such a change of intention either in the exposé des motifs or in any other contemporary document before the Court.

68. Having regard to the several considerations which have been mentioned by the Court, as well as to the explanation of reservation (b) given in the exposé des motifs, the Court feels bound to conclude that the wording of reservation (b) did not have the effect of integrating the reservation of disputes relating to territorial status into the reservation of disputes concerning questions of domestic jurisdiction. On the contrary, the Court finds that reservation (b) comprises two reservations, one of disputes concerning questions of domestic jurisdiction and the other a distinct and autonomous reservation of “disputes relating to the territorial status of Greece, including disputes relating to its rights of sovereignty over its ports and lines of communication”. Accordingly, it is on this basis that the Court will now consider the application of reservation (b) to the present dispute. Moreover, as only this autonomous reservation of disputes relating to territorial status is relevant in connection with the present dispute, any further reference to reservation (b) by the Court will be exclusively to the second part which concerns disputes relating to Greece’s territorial status.

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69. The Greek Government maintains that a restrictive view has to be taken of the meaning of the expression “disputes relating to the territorial status of Greece” in reservation (b) by reason of the historical context in which that expression was incorporated into the reservation. In this
connection, it invokes the jurisprudence of this Court and the Permanent Court concerning the interpretation of unilateral declarations of acceptance of the Court's jurisdiction (Anglo-Iranian Oil Co., I.C.J. Reports 1951, p. 104; Rights of Minorities in Upper Silesia, P.C.I.J., Series A, No. 15, p. 22; Phosphates in Morocco, P.C.I.J., Series A/B, No. 74, pp. 22-24). According to this jurisprudence it is indeed clear that in interpreting reservation (b) regard must be paid to the intention of the Greek Government at the time when it deposited its instrument of accession to the General Act; and it was with that jurisprudence in mind that the Court asked the Greek Government to furnish it with any available evidence of explanations of the instrument of accession given at that time.

70. The Court has already referred to M. Politis's letter to the Greek Foreign Minister of 9 September 1928 setting out the reservations which he recommended Greece should make to its declaration under the optional clause of Article 36 of the Statute. One of his recommendations concerned "disputes relating to the territorial status of Greece" and another "disputes relating to its rights of sovereignty over its ports and lines of communication". The Greek Government is therefore justified in asking the Court to conclude that it was the same motive which inspired their inclusion also in reservation (b) of Greece's accession to the General Act. It goes further, however, and asks the Court to interpret reservation (b) in the light of that motive, so as to restrict its scope to matters of territorial status connected with attempts to revise the territorial arrangements established by the peace treaties of the First World War. Moreover, in support of this interpretation of reservation (b), the Greek Government has also laid stress on the general historical context in which reservations of questions relating to territorial status had come into use in the League of Nations period.

71. Disputes concerning territorial status were expressly mentioned in Article 39, paragraph 2, of the General Act as an example of the "clearly specified subject-matters" in regard to which reservations to the Act were to be permitted. Consequently, it is reasonable to presume that there is a close link between the concepts of territorial status in the General Act and in Greece's instrument of accession to it; and that presumption is all the stronger when it is recalled that M. Politis was the Rapporteur for the drafting of the General Act as well as the author of the letter of 9 September 1928 which prompted Greece's recourse to a reservation under the optional clause relating to territorial status. Thus, the meaning with which the expression "territorial status" was used in Article 39 of the General Act may clearly have a bearing on its meaning in Greece's instrument of accession.

72. Counsel for Greece went into the historical evidence in detail more especially the use of the expression in the numerous bilateral treaties of pacific settlement of the inter-war period, and in the proceedings of the League of Nations connected with the drafting of the Locarno Protocol. The propositions which they advanced on the basis of that evidence were, briefly, as follows. First, the reason for the appearance of expressions such as "territorial status", "territorial integrity", "territorial situation", "maintenance of frontiers" in treaties of the period, whether in the context of reservations to pacific settlement provisions, or of territorial guarantees, was prevailing apprehension of attempts to modify the post-war settlements. Secondly, although the actual expressions used might vary, their meaning was essentially the same, namely territorial situations or régimes established by treaties. Thirdly, when the expression "territorial status" occurred in reservations to treaties of pacific settlement, what the States had in mind was "disputes which were likely to arise out of territorial claims by neighbours dissatisfied with existing solutions". Indeed, it was said that the term "territorial status" in those reservations was simply "a 'code-word' for intangibility of the frontiers and territorial statuses established by the international instruments in force". The general conclusion which the Greek Government then asked the Court to draw from that evidence was that:

"Everything that is known of the contemporary understanding of such terms as 'territorial status', 'territorial situation' and 'territorial integrity' in the 1920s indicates that these expressions are to be given a restrictive interpretation limited to the maintenance of the status quo established by treaties, normally as the result of post-war settlement." (Emphasis added.)

73. In the view of the Court, the historical evidence may justifiably be said to show that in the period in question the motive which led States to include in treaties provisions regarding "territorial status" was, in general, to protect themselves against possible attempts to modify territorial settlements established by the peace treaties. But it does not follow that they intended those provisions to be confined to questions connected with the revision of such settlements. Any modification of a territorial "status" or "situation" or "frontier" is unpalatable to a State; and the strong probability is that a State which had recourse to a reservation of disputes relating to territorial status, or the like, intended it to be quite general. Article 39 of the General Act, it is true, was designed to regulate the formulation of reservations and to exclude vague or subjective reservations. But in making express mention of disputes relating to territorial status as an example of disputes concerning a clearly specified subject-matter, Article 39 said nothing of this example being exclusively directed against attempts to revise the territorial settlements established by the peace treaties.
74. In the opinion of the Court, the historical evidence adduced by Greece does not suffice to establish that the expression “territorial status” was used in the League of Nations period, and in particular in the General Act of 1928, in the special, restricted sense contended for by Greece. The evidence seems rather to confirm that the expression “territorial status” was used in its ordinary, generic sense of any matters properly to be considered as relating to the integrity and legal régime of a State’s territory. It is significant in this regard that in the analysis of treaty provisions made in the Systematic Survey of Arbitral Conventions and Treaties of Mutual Security, published in 1927 by the Secretariat of the League of Nations (one of the documents used in connection with the drafting of the General Act), reservations of disputes relating to “territorial integrity”, “territorial status” and “frontiers” were examined together as having the same or a very similar meaning. The Systematic Survey of Treaties for the Pacific Settlement of International Disputes 1928-1948 prepared by the Secretariat of the United Nations and published in 1948, also groups together, under the title “Disputes relating to territorial status”, provisions concerning “territorial status”, “territorial questions”, “territorial integrity”, “present frontiers”. As to the legal writers of the League of Nations period, the Greek Government itself laid stress on the fact that they consistently linked together treaty provisions excepting questions relating to “territorial status”, “territorial integrity” and “existing frontiers”.

75. It follows that for the same reasons the Court is unable to accept the contention advanced in the Memorial that if the authors of the General Act, or of the arbitration treaties containing a territorial status reservation:

“had contemplated excluding any disputes concerning the spatial delimitation of State jurisdictions, they would not have failed clearly to mention the familiar category of frontier disputes rather than resort to the term of territorial status which was a very specific one in the practice of the time” (Memorial, para. 236).

In the view of the Court, the term “territorial status” in the treaty practice of the time did not have the very specific meaning attributed to it by the Greek Government. As the nature of the word “status” itself indicates, it was a generic term which in the practice of the time was understood as embracing the integrity and frontiers, as well as the legal régime, of the territory in question. This is implicit in the very wording of reservation (b) itself which treats disputes relating to Greece’s “rights of sovereignty over its ports and lines of communication” as included in its reservation of disputes relating to its “territorial status”. These disputes by their nature related to the interpretation and application of existing treaties rather than to their revision.

75. Accordingly, the expression “relating to the territorial status of

Greece” in reservation (b) is to be understood as a generic term denoting any matters properly to be considered as comprised within the concept of territorial status under general international law, and therefore includes not only the particular legal régime but the territorial integrity and the boundaries of a State. It is therefore in accordance with this interpretation of the words “disputes relating to the territorial status of Greece” that the Court is called on to determine whether reservation (b) does or does not have the effect of excluding the present dispute from the scope of Greece’s accession to the General Act of 1928.

* *

77. The Greek Government, however, has advanced a further historical argument by which it seeks to convince the Court that there can be no question of the applicability of reservation (b) with respect to the present dispute. This is that the very idea of the continental shelf was wholly unknown in 1928 when the General Act was concluded, and in 1931 when Greece acceded to the Act. It also refers in this connection to the arbitral award in the Petroleum Development Ltd. v. Sheikh of Abu Dhabi case (International Law Reports 1951, p. 144 at p. 152), where the arbitrator held that the grant of a mineral oil concession in 1939 was not to be understood as including the continental shelf. In appreciating the intention of a party to an instrument there is an essential difference between a grant of rights of exploration and exploitation over a specified area in a concession and the wording of a reservation to a treaty by which a State excludes from compulsory procedures of pacific settlement disputes relating to its territorial status. While there may well be a presumption that a person transferring valuable property rights to another intends only to transfer the rights which he possesses at that time, the case appears to the Court to be quite otherwise when a State, in agreeing to subject itself to compulsory procedures of pacific settlement, excepts from that agreement a category of disputes which, though covering clearly specified subject-matters, is of a generic kind. Once it is established that the expression “the territorial status of Greece” was used in Greece’s instrument of accession as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time. This presumption, in the view of the Court, is even more compelling when it is recalled that the 1928 Act was a convention for the pacific settlement of disputes designed to be of the most general kind and of continuing duration, for it hardly seems conceivable that in such a convention terms like “domestic jurisdiction” and “territorial status” were intended to have a fixed content regardless of the subsequent evolution of international law.
78. The Greek Government invokes as a basis for the Court’s jurisdiction in the present case Article 17 of the General Act under which the parties agreed to submit to judicial settlement all disputes with regard to which they “are in conflict as to their respective rights”. Yet the rights that are the subject of the claims upon which Greece requests the Court in the Application to exercise its jurisdiction under Article 17 are the very rights over the continental shelf of which, as Greece insists, the authors of the General Act could have had no idea whatever in 1928. If the Greek Government is correct, as it undoubtedly is, in assuming that the meaning of the generic term “rights” in Article 17 follows the evolution of the law, so as to be capable of embracing rights over the continental shelf, it is not clear why the similar term “territorial status” should not likewise be liable to evolve in meaning in accordance with “the development of international relations” (P.C.I.J., Series B, No. 4, p. 24). It may also be observed that the claims which are the subject-matter of the Application relate more particularly to continental shelf rights claimed to appertain to Greece in virtue of its sovereignty over certain islands in the Aegean Sea, including the islands of the “Dodecanese group” (para. 29 of the Application). But the Dodecanese group was not in Greece’s possession when it acceded to the General Act in 1931; for those islands were ceded to Greece by Italy only in the Peace Treaty of 1947. In consequence, it seems clear that, in the view of the Greek Government, the term “rights” in Article 17 of the General Act has to be interpreted in the light of the geographical extent of the Greek State today, not of its extent in 1931. It would then be a little surprising if the meaning of Greece’s reservation of disputes relating to its “territorial status” was not also to evolve in the light of the change in the territorial extent of the Greek State brought about by “the development of international relations”.

79. Furthermore, the close and necessary link that always exists between a jurisdictional clause and reservations to it, makes it difficult to accept that the meaning of the clause, but not of the reservation, should follow the evolution of the law. In the present instance, this difficulty is underlined by the fact that alongside Greece’s reservation of disputes relating to its “territorial status” in reservation (b) is another reservation of disputes relating to questions of “domestic jurisdiction”, the content of which, as the Court has already had occasion to note, is “an essentially relative question” and undoubtedly “depends upon the development of international relations” (paragraph 59 above). Again, the Court can see no valid reason why one part of reservation (b) should have been intended to follow the evolution of international relations but not the other, unless such an intention should have been made plain by Greece at the time.

80. Having regard to the foregoing considerations, the Court is of the opinion that the expression in reservation (b) “disputes relating to the territorial status of Greece” must be interpreted in accordance with the rules of international law as they exist today, and not as they existed in 1931. It follows that in interpreting and applying reservation (b) with respect to the present dispute the Court has to take account of the evolution which has occurred in the rules of international law concerning a coastal State’s rights of exploration and exploitation over the continental shelf. The Court is, therefore, now called upon to examine whether, taking into account the developments in international law regarding the continental shelf, the expression “disputes relating to the territorial status of Greece” should or should not be understood as comprising within it disputes relating to the geographical—the spatial—extent of Greece’s rights over the continental shelf in the Aegean Sea.

* * *

81. In order to determine whether the present dispute falls within the scope of reservation (b), the Court must first clarify the question that calls for decision. The question is not, as Greece seems to assume, whether continental shelf rights are territorial rights or are comprised within the expression “territorial status”. The real question for decision is, whether the dispute is one which relates to the territorial status of Greece. Accordingly, a linguistic argument presented by the Greek Government, and based on the definitions of the words “statut” (status) and “territorial” in the Dictionnaire de la terminologie du droit international, appears to the Court to be only of marginal interest. No doubt, it is true the expression territorial status is commonly used in international law with reference to a legal condition or régime of a territory; but although the expression, as Article 39, paragraph 2, of the General Act itself indicates, denotes a category or concept covering clearly specified subject-matters, it is not an expression which can be said to have rigid legal connotations. On the contrary, the Court considers it to be a generic expression which comprises within its meanings various legal conditions and relations of territory. The answer to the question whether any given matter is properly to be considered as relating to the territorial status of a State must, therefore, depend on the particular circumstances of the case.

* *

82. The subject-matter of the present dispute, as appears from the first two—and principal—submissions in the Application, would require the Court to decide two questions:

(1) whether certain Greek islands in the Aegean Sea “as part of the territory of Greece, are entitled to the portion of the continental shelf which appertains to them according to the applicable principles and rules of international law”; and

(2) what is “the course of the boundary (or boundaries) between the portions of the continental shelf appertaining to Greece and Turkey in
the Aegean Sea in accordance with the principles and rules of international law which the Court shall determine to be applicable to the delimitation of the continental shelf in the aforesaid areas of the Aegean Sea”.

In maintaining that the subject-matter of the dispute embraced by Greece’s submissions does not fall within the scope of reservation (b), the Greek Government puts its case in two ways. First, it contends that the dispute concerns the delimitation of the continental shelf boundary between Greece and Turkey, and that delimitation is entirely extraneous to the notion of territorial status (Memorial, para. 236); and, secondly, it contends that, the continental shelf not being part of the territory of the coastal State under the applicable rules of international law, the present dispute regarding rights over the continental shelf cannot be considered as one relating to “territorial status”.

83. The contention based on the proposition that delimitation is entirely extraneous to the notion of territorial status appears to the Court to encounter certain difficulties. Above all, it seems to overlook the basic character of the present dispute, clearly stated though it is in the first submission in Greece’s Application. The basic question in dispute is whether or not certain islands under Greek sovereignty are entitled to a continental shelf of their own and entitle Greece to call for the boundary to be drawn between those islands and the Turkish coast. The very essence of the dispute, as formulated in the Application, is thus the entitlement of those Greek islands to a continental shelf, and the delimitation of the boundary is a secondary question to be decided after, and in the light of, the decision upon the first basic question. Moreover, it is evident from the documents before the Court that Turkey, which maintains that the islands in question are mere protuberances on the Turkish continental shelf and have no continental shelf of their own, also considers the basic question to be one of entitlement.

84. Quite apart from the fact that the present dispute cannot, therefore, be viewed as one simply relating to delimitation, it would be difficult to accept the broad proposition that delimitation is entirely extraneous to the notion of territorial status. Any disputed delimitation of a boundary entails some determination of entitlement to the areas to be delimited, and the historical evidence adduced by the Greek Government itself shows that in the treaty practice in the League of Nations period, the notions of “territorial integrity”, “frontiers” and “territorial status” were regarded as closely associated.

85. The dispute relates to the determination of the respective areas of continental shelf over which Greece and Turkey are entitled to exercise the sovereign rights recognized by international law. It is therefore necessary to establish the boundary or boundaries between neighbouring States, that is to say, to draw the exact line or lines where the extension in space of the sovereign powers and rights of Greece meets those of Turkey. Whether it is a land frontier or a boundary line in the continental shelf that is in question, the process is essentially the same, and inevitably involves the same element of stability and permanence, and is subject to the rule excluding boundary agreements from fundamental change of circumstances.

86. The second contention mentioned in paragraph 82 above does not put the question to be decided in its correct context. The question for decision is whether the present dispute is one “relating to the territorial status of Greece”, not whether the rights in dispute are legally to be considered as “territorial” rights; and a dispute regarding entitlement to and delimitation of areas of continental shelf tends by its very nature to be one relating to territorial status. The reason is that legally a coastal State’s rights over the continental shelf are both appurtenant to and directly derived from the State’s sovereignty over the territory abutting on that continental shelf. This emerges clearly from the emphasis placed by the Court in the North Sea Continental Shelf cases on “natural prolongation” of the land as a criterion for determining the extent of a coastal State’s entitlement to continental shelf as against other States abutting on the same continental shelf (I.C.J. Reports 1969, pp. 31 et seq.); and this criterion, the Court notes, has been invoked by both Greece and Turkey during their negotiations concerning the substance of the present dispute. As the Court explained in the above-mentioned cases, the continental shelf is a legal concept in which “the principle is applied that the land dominates the sea” (I.C.J. Reports 1969, p. 51, para. 96); and it is solely by virtue of the coastal State’s sovereignty over the land that rights of exploration and exploitation in the continental shelf can attach to it, ipso jure, under international law. In short, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State. It follows that the territorial régime—the territorial status—of a coastal State comprises, ipso jure, the rights of exploration and exploitation over the continental shelf to which it is entitled under international law. A dispute regarding those rights would, therefore, appear to be one which may be said to “relate” to the territorial status of the coastal State.

87. The particular circumstances of the present dispute have also to be taken into account. The basic question at issue, as the Court has already mentioned, is the one formulated in the first submission in the Application, and it requires the Court to decide whether certain named Greek islands in the Aegean Sea, “as part of the territory of Greece”, are entitled to a portion of continental shelf. Earlier in the Application, under the heading “The Subject of the Dispute”, it is explained that in 1974, when the Greek Government in a diplomatic Note asserted its claim to continental shelf rights in respect of these islands, the Turkish Government retorted that the islands “do not possess a [continental] shelf of their own”. The two
Governments, as appears from the Application, maintained their respective positions in the diplomatic negotiations which followed, and in a Note of 22 May 1976 the Greek Government recalled that it had emphasized as two of the fundamental legal points in the dispute: (a) "the territorial and political unity of the continental and insular parts of the Greek State"; (b) "the existence of a continental shelf appurtenant to the [Greek] islands concerned". In the same Note, it had also recalled and rejected the Turkish Government's reference to the islands as "mere protuberances on the Turkish continental shelf" having no continental shelf of their own. Summarizing its legal position in paragraph 29 of the Application, the Greek Government names the islands concerned and reaffirms its contention that they "are an integral part of Greek territory which is entitled to the portion of [the] continental shelf which appertains to them". It then expressly rests its claims to continental shelf in respect of those islands upon "the territorial and political unity of Greece".

88. It follows that the claims and contentions advanced by Greece in its first submission directly relate to its territorial status as this was established by the various treaties through which was constituted the corpus of the territory of the Greek State today. These claims and contentions, as appears from the Application and the diplomatic correspondence, are directly contested by Turkey and form the very core of the present dispute. Consequently, it is difficult to escape the conclusion that, on this ground alone, the present dispute is one which "relate[s] to the territorial status of Greece".

89. In the present case, moreover, quite apart from the question of the status of the above-mentioned Greek islands for the purpose of determining Greece's entitlement to continental shelf, the Court notes that during the hearings in 1976 the Greek Government referred to a certain straight base-line claimed by Turkey which is, however, contested by Greece. Although it recognized that the resulting discrepancy between the Greek and Turkish views of the limits of Turkey's territorial sea in the area is not great, it observed that the discrepancy "obviously affects the question of the delimitation of the continental shelf". The question of the limits of a State's territorial sea, as the Greek Government itself has recognized, is indisputably one which not only relates to, but directly concerns territorial status.

90. Having regard to the various considerations set out above, the Court is of the opinion that the present dispute is one which "relate[s] to the territorial status of Greece" within the meaning of reservation (b) in Greece's instrument of accession to the General Act. It accordingly finds that Turkey's invocation of the reservation on the basis of reciprocity has the effect of excluding the present dispute from the application of Article 17 of the Act.

91. In examining the application of the General Act to the present dispute, the Court has not overlooked a suggestion that the Act has never been applicable as between Turkey and Greece by reason of the existence of the Greco-Turkish Treaty of Friendship, Neutrality, Conciliation and Arbitration signed at Ankara on 30 October 1930 (League of Nations, Treaty Series, Vol. 125, No. 2841). This Treaty provided for a general system of procedures for the pacific settlement of disputes between the two countries similar to, but in some respects different from, those provided in the General Act. It entered into force by exchange of ratifications on 5 October 1931, and under Article 28 it was expressed to continue in force for successive periods of five years, unless denounced. The length of these periods was extended to ten years by an "Additional Treaty" of 27 April 1938, which at the same time provided that "the mutual engagements, bilateral or plurilateral", which the parties had contracted should "continue to produce their full effect irrespective of the provisions of the present Treaty" (League of Nations, Treaty Series, Vol. 193, No. 4493). By these Treaties and by the General Act, therefore, Greece and Turkey appear, prima facie, to have provided for two parallel systems of pacific settlement, for so long as the 1930 Treaty and the General Act might continue in force, and both Greece and Turkey have stated that they consider the 1930 Treaty still to be in force.

92. Consequently, if the question of the effect of the 1930 Treaty on the applicability of the General Act as between Greece and Turkey had called for decision in the present proceedings, the Court would have been confronted with the problem of the co-existence of different instruments establishing methods of peaceful settlement, a question discussed in the Electricity Company of Sofia and Bulgaria case (P.C.I.J., Series A/B, No. 77). In that event it might also have been necessary to examine the relation between the obligations of the two States under the 1930 and 1938 Treaties and those under the General Act in the light of the pertinent provisions of those instruments—a point which was the subject of a question put by two Members of the Court during the hearings.

93. However, the fact already established by the Court that, by reason of Turkey's invocation of reservation (b) to the Greek accession, the General Act is not applicable to the present dispute, and the fact that the 1930 Treaty has not been invoked as a basis for the Court's jurisdiction in the present proceedings, dispense the Court from any need to enter into these questions.

94. In paragraph 32 (2) of the Application the Greek Government specified as the second basis on which it claims to establish the Court's jurisdiction:
“The joint communiqué of Brussels of 31 May 1975, which followed previous exchange of views, states that the Prime Ministers of Greece and Turkey have decided that the problems dividing the two countries should be resolved peacefully ‘et, au sujet du plateau continental de la mer Ègée, par la Cour internationale de La Haye’. The two Governments thereby jointly and severally accepted the jurisdiction of the Court in the present matter, pursuant to Article 36 (1) of the Statute of the Court.”

95. The Brussels Communiqué of 31 May 1975 does not bear any signature or initials, and the Court was informed by counsel for Greece that the Prime Ministers issued it directly to the press during a press conference held at the conclusion of their meeting on that date. The Turkish Government, in the observations which it transmitted to the Court on 25 August 1976, considered it “evident that a joint communiqué does not amount to an agreement under international law”, adding that “If it were one, it would need to be ratified at least on the part of Turkey” (para. 15). The Greek Government, on the other hand, maintains that a joint communiqué may constitute such an agreement. To have this effect, it says, “It is necessary, and it is sufficient, for the communiqué to include—in addition to the customary forms, protestations of friendship, recital of major principles and declarations of intent—provisions of a treaty nature” (Memorial, para. 279). Counsel for Greece, moreover, referred to the issue of joint communiqués as “a modern ritual which has acquired full status in international practice”.

96. On the question of form, the Court need only observe that it knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement (cf. Arts. 2, 3 and 11 of the Vienna Convention on the Law of Treaties). Accordingly, whether the Brussels Communiqué of 31 May 1975 does or does not constitute such an agreement essentially depends on the nature of the act or transaction to which the Communiqué gives expression; and it does not settle the question simply to refer to the form—a communiqué—in which that act or transaction is embodied. On the contrary, in determining what was indeed the nature of the act or transaction embodied in the Brussels Communiqué, the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up.

97. The relevant paragraphs of the Brussels Communiqué read as follows:

“In the course of their meeting the two Prime Ministers had an opportunity to give consideration to the problems which led to the existing situation as regards relations between their countries. They decided [ont décidé] that those problems should be resolved [doivent être résolus] peacefully by means of negotiations and as regards the continental shelf of the Aegean Sea by the International Court at The Hague. They defined the general lines on the basis of which the forthcoming meetings of the representatives of the two Governments would take place.

In that connection they decided to bring forward the date of the meeting of experts concerning the question of the continental shelf of the Aegean Sea and that of the experts on the question of air space.”

98. In presenting the Communiqué as constituting a definitive agreement between the Prime Ministers to submit the present dispute to the Court, the Greek Government places particular emphasis on the words “décide” and the words “doivent être résolus” in the original—French—text of the second paragraph. These words, it says, are words of “decision” and of “obligation” indicative of a mutual commitment on the part of the Prime Ministers to refer the dispute to the Court. Specifically, it claims that the “agreement” embodied in the Communiqué “is more than an undertaking to negotiate” and directly “confers jurisdiction on the Court” (Memorial, Part 2, Section III, Heading A). It likewise claims that the Communiqué “commits the parties to conclude any implementing agreement needed for the performance of the obligation” (ibid., Heading B), and that the refusal by one party to conclude such an agreement “permits the other party to seise the Court unilaterally” (ibid., Heading C). In its view, moreover, no implementing agreement is required by the Communiqué which, it says, “enables the parties to resort to the Court by Application no less than by special agreement” (ibid., Heading D). Finally, if it is considered that “a complementary agreement is a legal prerequisite for seisin of the Court”, it maintains that “the two parties are under obligation to negotiate in good faith the conclusion of such an agreement” (ibid., Heading E).

99. The Turkish Government, in the observations transmitted to the Court on 25 August 1976, not only denies that the Communiqué constitutes “an agreement under international law” (para. 15) but also maintains that in any event the two Governments cannot be said to have thereby “jointly and severally accepted the jurisdiction of the Court in the present matter” when they have never agreed on the scope of the “matter” to be submitted to the Court (para. 14). Examination of the text, it maintains, shows that the intention was quite different, and that the Communiqué was “far from amounting to agreement by one State to submit to the jurisdiction of the Court upon the unilateral application of the other State” (ibid.). According to the Government of Turkey:

“... it is clear that there was no commitment to submit to the Court without a special agreement because the following paragraph said in this connection that the two Prime Ministers had decided to accelerate the meeting of the experts concerning the question of the continental shelf of the Aegean Sea” (ibid.).
This means, in its view, that “priority was given to negotiations” on the substance of the question of the continental shelf, and nothing was said in that connection “even about the negotiation of a special agreement” to submit the question to the Court (ibid.). It also points to the subsequent efforts of Greece to secure the negotiation of such an agreement as confirmation of the correctness of Turkey’s interpretation of the Communiqué (para. 16).

100. This divergence of views as to the interpretation of the Brussels Communiqué makes it necessary for the Court to consider what light is thrown on its meaning by the context in which the meeting of 31 May 1975 took place and the Communiqué was drawn up. The first mention of the Court, according to the evidence, was in a Greek Note Verbale of 27 January 1975, that is some four months before the meeting of the two Prime Ministers in Brussels. In that Note the Greek Government proposed that the differences over the applicable law as well as over the substance of the matter should be referred to the Court, adding:

“Indeed, the Greek Government, without prejudice to their right to initiate Court proceedings unilaterally, would see considerable advantage in reaching jointly with the Turkish Government a special agreement . . .” (Application, Ann. II, No. 9, emphasis added.)

101. Replying on 6 February 1975, the Turkish Government referred to “meaningful negotiations” as “a basic method for the settlement of international disputes” and said that, because of the absence of such negotiations, “the issues relating to the disputes have neither been fully identified nor elucidated”. It then continued:

“However, in principle, the Turkish Government favourably considers the Greek Government’s proposal to refer the dispute over the delimitation of the Aegean continental shelf jointly to the International Court of Justice. To this effect and to elaborate the terms under which the matter shall be referred to the said Court, Turkey proposes high level talks to be initiated between the two Governments . . .” (Ibid., Ann. II, No. 10, emphasis added.)

On 10 February 1975, commenting on the Turkish reply, the Greek Government noted with satisfaction that “the Turkish Government accept in principle their proposal that the question of the delimitation of the continental shelf of the Aegean Sea be submitted jointly to the International Court of Justice in The Hague” (Ibid., No. 11, emphasis added). It also agreed that “following suitable preparation, talks should be held in order to draft the terms of the special agreement (compromisun) required to that effect” (Ibid.). This led the Turkish Prime Minister, when explaining the matter to the Turkish Grand National Assembly on 3 March 1975 to say:

“The Greeks have answered positively to our proposal concerning talks prior to our going to The Hague. These [talks] did not start yet. The object of the talks will be the special agreement (compromisun) which will define the basis of the case.” (Memorial, para. 268.)

102. According to the information before the Court, those were the respective positions which the two Governments had taken up a short time before their Foreign Ministers met in Rome on 17-19 May 1975 to discuss, inter alia, the question of the continental shelf in the Aegean Sea. Furthermore, in the light of the diplomatic exchanges, the Greek Government can hardly have been left in any doubt as to the nature of the proposal regarding the Court which the Turkish Government would understand to be the subject of the discussions at the Rome meeting: namely, a joint submission of the dispute to the Court by agreement.

103. Reference is made to the proceedings at the Rome meeting in a later Greek Note Verbale of 2 October 1975, from which it appears that the Greek delegation submitted a draft text of a compromisun for negotiation, but the Turkish delegation said that they were not yet ready to discuss it and needed more time to prepare themselves. The meeting ended with the issue by the two Foreign Ministers on 19 May 1975 of a brief Joint Communiqué, which included the following statements:

“The questions relating to the continental shelf of the Aegean Sea were discussed and initial consideration was given to the text of a special agreement concerning the submission of the matter to the International Court of Justice . . .

It was agreed that the meetings between experts would be continued in the near future.” (Application, Ann. III, No. 1.)

According to the above-mentioned Note Verbale of 2 October 1975, a committee of experts was to meet at the earliest possible date “to negotiate the special agreement”, and to explore a Turkish idea in regard to joint exploitation. The Turkish Government also referred to the Rome meeting, in a Note of 18 November 1975. It there spoke of the Greek delegation having:

“. . . agreed to seek a negotiated settlement of the differences, bearing also in mind the Turkish proposal for joint exploration and exploitation of resources, and to try to prepare, if necessary, a draft special agreement for the joint reference to the International Court of Justice of those aspects of the situation which, they might agree, were the points of genuine disagreement between the two sides” (Ibid., Ann. IV, No. 3).
104. The Court can see nothing in the terms of the Rome Communiqué of 19 May 1975, or in the subsequent accounts of the meeting given by the two Governments, which might indicate that Turkey was then ready to contemplate, not a joint submission of the dispute to the Court, but a general acceptance of the Court’s jurisdiction with respect to it. On the contrary, the positions of the Greek and Turkish Governments on this point appear to have been quite unchanged when, only a few days later on 31 May 1975, the two Prime Ministers began their meeting in Brussels.

105. Consequently, it is in that context—a previously expressed willingness on the part of Turkey jointly to submit the dispute to the Court, after negotiations and by a special agreement defining the matters to be decided—that the meaning of the Brussels Joint Communiqué of 31 May 1975 has to be appraised. When read in that context, the terms of the Communiqué do not appear to the Court to evidence any change in the position of the Turkish Government in regard to the conditions under which it was ready to agree to the submission of the dispute to the Court. It is true that the Communiqué records the decision of the Prime Ministers that certain problems in the relations of the two countries should be resolved peacefully by means of negotiations, and as regards the continental shelf of the Aegean Sea by the Court. As appears however from paragraph 97 above, they also defined the general lines on the basis of which the forthcoming meetings of the representatives of the two Governments would take place and decided in that connection to bring forward the date of the meeting of experts. These statements do not appear to the Court to be inconsistent with the general position taken up by Turkey in the previous diplomatic exchanges: that it was ready to consider a joint submission of the dispute to the Court by means of a special agreement. At the same time, the express provision made by the Prime Ministers for a further meeting of experts on the continental shelf does not seem easily reconcilable with an immediate and unqualified commitment to accept the submission of the dispute to the Court unilaterally by Application. In the light of Turkey’s previous insistence on the need to “identify” and “elucidate” the issues in dispute, it seems unlikely that its Prime Minister should have undertaken such a commitment in such wide and imprecise terms.

106. The information before the Court concerning the negotiations between the experts and the diplomatic exchanges subsequent to the Brussels Communiqué appears to confirm that the two Prime Ministers did not by their “decision” undertake an unconditional commitment to submit the continental shelf dispute to the Court. The two sides, it is true, put somewhat different interpretations upon the meaning of the Communiqué; the Turkish side insisting upon the need for meaningful negotiations on the substance of the dispute before any submission to the Court, the Greek side pressing for the case to be taken directly to the Court. From the first, however, the Turkish side consistently maintained the position that reference of the dispute to the Court was to be contemplated only on the basis of a joint submission after the conclusion of a special agreement defining the issues to be resolved by the Court. Even the Greek Government, while arguing in favour of immediate submission of the dispute to the Court, referred to the draft of a special agreement as “necessary” for submitting the issue to the Court (Notes Verbales of 2 October and 19 December 1975, Application, Ann. IV, Nos. 2 and 4). It is also significant that nowhere in the diplomatic exchanges or in the negotiations between the experts does the Greek Government appear to have invoked the Joint Communiqué as an already existing and complete, direct title of jurisdiction. Furthermore, although in a Note Verbal of 27 January 1975, before any Joint Communiqué existed, the Greek Government expressly reserved its “right to initiate Court proceedings unilaterally” (presumably having in mind the General Act), the Court has not found any mention by Greece, prior to the filing of the Application, of the possibility that the dispute might be submitted to the Court unilaterally on the basis of the Joint Communiqué.

107. Accordingly, having regard to the terms of the Joint Communiqué of 31 May 1975 and to the context in which it was agreed and issued, the Court can only conclude that it was not intended to, and did not, constitute an immediate commitment by the Greek and Turkish Prime Ministers, on behalf of their respective Governments, to accept unconditionally the unilateral submission of the present dispute to the Court. It follows that, in the opinion of the Court, the Brussels Communiqué does not furnish a valid basis for establishing the Court’s jurisdiction to entertain the Application filed by Greece on 10 August 1976.

108. In so finding, the Court emphasizes that the sole question for decision in the present proceedings is whether it does, or does not, have jurisdiction to entertain the Application filed by Greece on 10 August 1976. Having concluded that the Joint Communiqué issued in Brussels on 31 May 1975 does not furnish a basis for establishing the Court’s jurisdiction in the present proceedings, the Court is not concerned, nor is it competent, to pronounce upon any other implications which that Communiqué may have in the context of the present dispute. It is for the two Governments themselves to consider those implications and what effect, if any, is to be given to the Joint Communiqué in their further efforts to arrive at an amicable settlement of their dispute. Nothing that the Court has said may be understood as precluding the dispute from being brought before the Court if and when the conditions for establishing its jurisdiction are satisfied.
109. For these reasons,

THE COURT,

by 12 votes to 2,

finds that it is without jurisdiction to entertain the Application filed by the Government of the Hellenic Republic on 10 August 1976.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this nineteenth day of December, one thousand nine hundred and seventy-eight, in three copies, of which one will be placed in the archives of the Court and the others transmitted to the Government of the Hellenic Republic and to the Government of the Republic of Turkey respectively.

(Signed) E. Jiménez de Aréchaga,
President.

(Signed) S. Aquarone,
Registrar.

Vice-President Nagendra Singh and Judges Gros, Lachs, Morozov and Tarazi append separate opinions or declarations to the Judgment of the Court.

Judge de Castro and Judge ad hoc Stassinopoulos append dissenting opinions to the Judgment of the Court.

(Initialled) E. J. de A.

(Initialled) S. A.
International Court of Justice

Military and Paramilitary Activities in and against Nicaragua
(Nicaragua v. United States of America)
Jurisdiction and Admissibility, Judgment

_I.C.J. Reports 1984_
CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA
(NICARAGUA v. UNITED STATES OF AMERICA)

JURISDICTION OF THE COURT AND ADMISSIBILITY OF THE APPLICATION

JUDGMENT OF 26 NOVEMBER 1984

1984

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DES ACTIVITÉS MILITAIRES
ET PARAMILITAIRES AU NICARAGUA
ET CONTRE CELUI-CI
(NICARAGUA c. ÉTATS-UNIS D’AMÉRIQUE)

COMPÉTENCE DE LA COUR
ET RECEVABILITÉ DE LA REQUÊTE

ARRÊT DU 26 NOVEMBRE 1984

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INTERNATIONAL COURT OF JUSTICE
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26 November 1984

CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA
(NICARAGUA v. UNITED STATES OF AMERICA)

JURISDICTION OF THE COURT AND ADMISSION OF THE APPLICATION

Jurisdiction of the Court — Article 36, paragraphs 2 and 5, of the Statute — Declaration under Article 36 of Permanent Court Statute by State which did not ratify Protocol of Signature of that Statute — Declaration valid but not binding — Effect of Article 36, paragraph 5, of International Court of Justice Statute — Significance of travaux préparatoires — Conduct of States concerned — Significance of publications of the Court and of the United Nations.

Claim of estoppel barring invocation of jurisdiction under Article 36, paragraph 2, of the Statute.

Nature and effect of Optional-Clause declarations — Modification or termination of Optional-Clause declarations containing proviso for six months' notice of termination — Effect of reciprocity on declarations containing differing provisions for termination — Declaration made without limit of time — Reasonable notice of termination required.

Reservation attached to Optional-Clause declaration excluding disputes arising under multilateral treaty unless “all parties to the treaty affected by the decision are before the Court” — Meaning — Impossibility of identification of States “affected” at jurisdictional phase — Application of Article 79, paragraph 7, of Rules of Court.

Bilateral treaty conferring jurisdiction over “dispute not satisfactorily settled by diplomacy” — Reliance on compromissory clause not necessarily preceded by negotiations.

Admissibility of application — Alleged requirement that all “indispensable parties” must be before the Court — Claim alleged to be one of unlawful use of armed force — Competence of United Nations Security Council — Right of individual or collective self-defence — Pursuance of proceedings before the Court and Security Council pari passu — Judicial function claimed to be unable to deal with situations involving ongoing conflict — Proof of facts and possibility of implementation of Judgment — Prior exhaustion of negotiating processes not a precondition for seising the Court.

JUDGMENT

Present: President ELIAS; Vice-President SETTE-CAMARA; Judges LACHS, MOROZOVA, NAGENDRA SINGH, RUDA, MOSLER, ODA, AGO, EL-KHANI, SCHWEBEL, Sir Robert JENNINGS, DE LACHARRIÈRE, MBAYE, BEDIAOUT; Judge ad hoc COLLARD; Registrar TORRES BERNARDEZ.

In the case concerning military and paramilitary activities in and against Nicaragua, between the Republic of Nicaragua, represented by H.E. Mr. Carlos Argüello Gómez, Ambassador, as Agent and Counsel,
Mr. Ian Brownlie, Q.C., F.B.A., Chichele Professor of Public International Law in the University of Oxford; Fellow of All Souls College, Oxford,
Hon. Abram Chayes, Felix Frankfurter Professor of Law, Harvard Law School; Fellow, American Academy of Arts and Sciences,
Mr. Alain Pellet, Professor at the University of Paris-Nord and the Institut d'Études Politiques de Paris,
Mr. Paul S. Reichler, Reichler and Appelbaum, Washington, D.C.; Member of the Bar of the United States Supreme Court; Member of the Bar of the District of Columbia,
as Counsel and Advocates,
Mr. Augusto Zamora Rodríguez, Legal Adviser to the Foreign Ministry of the Republic of Nicaragua,
Miss Judith C. Appelbaum, Reichler and Appelbaum, Washington, D.C.; Member of the Bars of the District of Columbia and the State of California,
Mr. Paul W. Khan, Reichler and Appelbaum, Washington, D.C., Member of the Bar of the District of Columbia
as Counsel and
the United States of America,
represented by
Hon. Davis R. Robinson, Legal Adviser, United States Department of State,
as Agent and Counsel,
Mr. Daniel W. McGovern, Principal Deputy Legal Adviser, United States Department of State,
Mr. Patrick M. Norton, Assistant Legal Adviser, United States Department of State,
as Deputy-Agents and Counsel,
Mr. Ted A. Borek, Assistant Legal Adviser, United States Department of State,
Mr. Myres S. McDougall, Sterling Professor of Law Emeritus, Yale University, Yale Law School, New Haven, Connecticut; Distinguished Visiting Professor of Law, New York Law School, New York, New York,
Mr. John Norton Moore, Walter L. Brown Professor of Law, University of Virginia School of Law, Charlottesville, Virginia,
Mr. Fred L. Morrison, Professor of Law, the Law School of the University of Minnesota, Minneapolis, Minnesota,
Mr. Stefan A. Riesenfeld, Professor of Law, University of California, School of Law, Berkeley, California, and Hastings College of the Law, San Francisco, California,
Mr. Louis B. Sohn, Woodruff Professor of International Law, University of Georgia School of Law, Athens, Georgia; Bemis Professor of International Law Emeritus, Harvard Law School, Cambridge, Massachusetts,
as Counsel,
Ms. Frances A. Armstrong, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,
Mr. Michael J. Danaher, Member of the Bar of the State of California,
Ms. Joan E. Donoghue, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,
Ms. Mary W. Ennis, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,
Mr. Peter M. Olson, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,
Mr. Jonathan B. Schwartz, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,
Ms. Jamison M. Selby, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,
Mr. George Taft, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,
Ms. Gayle R. Teicher, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,
as Attorney-Advisers.

The Court,
composed as above,
delivers the following Judgment:

1. On 9 April 1984 the Ambassador of the Republic of Nicaragua to the Netherlands filed in the Registry of the Court an Application instituting proceedings against the United States of America in respect of a dispute concerning responsibility for military and paramilitary activities in and against Nicaragua. In order to found the jurisdiction of the Court the Application relied on declarations made by the Parties accepting the compulsory jurisdiction of the Court under Article 36 of its Statute.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was at once communicated to the Government of the United States of America. In accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. At the same time as the Application was filed, the Republic of Nicaragua also filed a request for the indication of provisional measures under Article 41 of the Statute. By a letter from the United States Ambassador at The Hague to the Registrar dated 13 April 1984, and in the course of the oral proceedings held on the request by Nicaragua for the indication of provisional measures, the United States of America contended (inter alia) that the Court was without jurisdiction to deal with the Application, and requested that the proceedings be terminated by the removal of the case from the list. By an Order dated 10 May 1984, the Court requested the request of the United States for removal of the case from the list, indicated, pending its final decision in the proceedings, certain provisional measures, and decided that, until the Court delivers its final judgment in the case, it would keep the matters covered by the Order continuously under review.

4. By the said Order of 10 May 1984, the Court further decided that the written proceedings in the case should first be addressed to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application. By an Order dated 14 May 1984, the President of the Court fixed time-limits for the filing of a Memorial by the Republic of Nicaragua and a Counter-Memorial by the United States of America on the questions of jurisdiction and admissibility and these pleadings were duly filed within the time-limits fixed.

5. In the Memorial, the Republic of Nicaragua contended that, in addition to the basis of jurisdiction relied on in the Application, a Treaty of Friendship, Commerce and Navigation signed by the Parties in 1956 provides an independent basis for jurisdiction under Article 36, paragraph 1, of the Statute of the Court.

6. On 15 August 1984, prior to the closure of the written proceedings on the questions of jurisdiction and admissibility, the Republic of El Salvador filed a Declaration of Intervention in the case under Article 63 of the Statute. In a letter from the Agent of El Salvador dated 10 September 1984, which El Salvador requested should be considered as a part of its Declaration of Intervention, El Salvador stated that, if the Court were to find that it has jurisdiction and that the Application is admissible, it reserved the right "in a later substantive phase of the case to address the interpretation and application of the conventions to which it is a party relevant to that phase". Having been supplied with the written obser-
vations of the Parties on the Declaration pursuant to Article 83 of the Rules of Court, the Court, by an Order dated 4 October 1984, decided not to hold a hearing on the Declaration of Intervention, and decided that that Declaration was inadmissible as much as it related to the current phase of the proceedings.

7. On 8-10 and 15-18 October 1984 the Court held public sittings at which it was addressed by the following representatives of the Parties:

For Nicaragua:
- H.E. Mr. Carlos Argüello Gómez,
- Hon. Abram Chayes,
- Mr. Ian Brownlie,
- Mr. Paul S. Reichler,
- Mr. Alain Pellet.

For the United States of America:
- Hon. Davis R. Robinson,
- Mr. Patrick M. Norton,
- Mr. Myres McDougal,
- Mr. Louis B. Sohn,
- Mr. John Norton Moore.

8. In the course of the written proceedings the following Submissions were presented by the Parties:

On behalf of Nicaragua,
at the end of the Memorial:

"Nicaragua submits that:

A. The jurisdiction of the Court to entertain the dispute presented in the Application is established by the terms of the declaration of Nicaragua of 24 September 1929 under Article 36 (5) and the declaration of the United States of 14 August 1946 under Article 36 (2) of the Statute of the International Court of Justice.

B. Nicaragua's declaration of 24 September 1929 is in force as a valid and binding acceptance of the compulsory jurisdiction of the Court.

C. The attempt by the United States to modify or terminate the terms of its declaration of 14 August 1946 by a letter dated 6 April 1984 from Secretary of State George Shultz to the Secretary-General of the United Nations was ineffective to accomplish either result.

D. The Court has jurisdiction under Article XXIV (2) of the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua of 24 May 1958 over claims presented by this Application falling within the scope of the Treaty.

E. The Court is not precluded from adjudicating the legal dispute presented in the Application by any considerations of admissibility and the Application is admissible."

On behalf of the United States of America,
at the end of the Counter-Memorial:

"May it please the Court, on behalf of the United States of America, to adjudge and declare, for each and all of the foregoing reasons, that the

9. In the course of the oral proceedings the following Submissions were presented by the Parties:

On behalf of Nicaragua,

(hearing of 10 October 1984):

"Maintaining the arguments and submissions contained in the Memorial presented on 30 June 1984 and also the arguments advanced in the oral hearings on behalf of Nicaragua:

The Government of Nicaragua requests the Court to declare that jurisdiction exists in respect of the Application of Nicaragua filed on 9 April 1984, and that the subject-matter of the Application is admissible in its entirety."

On behalf of the United States of America,

(hearing of 16 October 1984):

"May it please the Court, on behalf of the United States of America, to adjudge and declare, for each and all of the reasons presented in the oral argument of the United States and in the Counter-Memorial of the United States of 17 August 1984, that the claims set forth in Nicaragua's Application of 9 April 1984, (1) are not within the jurisdiction of the Court and (2) are inadmissible."

10. In accordance with Article 60, paragraph 2, of the Rules of Court, the two Parties communicated to the Court the written text of their final submissions as set out above.

* * *

11. The present case concerns a dispute between the Government of the Republic of Nicaragua and the Government of the United States of America occasioned, Nicaragua contends, by certain military and paramilitary activities conducted in Nicaragua and in the waters off its coasts, responsibility for which is attributed by Nicaragua to the United States. In the present phase the case concerns the jurisdiction of the Court to entertain and pronounce upon this dispute, and the admissibility of the Application by which it was brought before the Court. 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.

12. To found the jurisdiction of the Court in the present proceedings, Nicaragua in its Application relied on Article 36 of the Statute of the Court and the declarations, described below, made by the Parties accepting compulsory jurisdiction pursuant to that Article. In its Memorial, Nicaragua, relying on a reservation contained in its Application (para. 26) of the right to "supplement or to amend this Application", also contended that
the Court has jurisdiction under Article XXIV, paragraph 2, of a Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956.

13. Article 36, paragraph 2, of the Statute of the Court provides that:

"The States parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

(a) the interpretation of a treaty;
(b) any question of international law;
(c) the existence of any fact which, if established, would constitute a breach of an international obligation;
(d) the nature or extent of the reparation to be made for the breach of an international obligation."

The United States made a declaration, pursuant to this provision, on 14 August 1946, containing certain reservations, to be examined below, and expressed to

"remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration."

On 6 April 1984 the Government of the United States of America deposited with the Secretary-General of the United Nations a notification, signed by the United States Secretary of State, Mr. George Shultz, referring to the Declaration deposited on 26 August 1946, and stating that:

"the aforesaid declaration shall not apply to disputes with any Central American State or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them may agree.

Notwithstanding the terms of the aforesaid declaration, this proviso shall take effect immediately and shall remain in force for two years, so as to foster the continuing regional dispute settlement process which seeks a negotiated solution to the interrelated political, economic and security problems of Central America."

This notification will be referred to, for convenience, as the “1984 notification”.

14. In order to be able to rely upon the United States Declaration of 1946 to found jurisdiction in the present case, Nicaragua has to show that it is a “State accepting the same obligation” within the meaning of Article 36, paragraph 2, of the Statute. For this purpose, Nicaragua relies on a

Declaration made by it on 24 September 1929 pursuant to Article 36, paragraph 2, of the Statute of the Permanent Court of International Justice. That Article provided that:

"The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the Protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court"

in any of the same categories of dispute as listed in paragraph 2 of Article 36 of the Statute of the postwar Court, set out above. Nicaragua relies further on paragraph 5 of Article 36 of the Statute of the present Court, which provides that:

"Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."

15. The circumstances of Nicaragua’s Declaration of 1929 were as follows. The Members of the League of Nations (and the States mentioned in the Annex to the League of Nations Covenant) were entitled to sign the Protocol of Signature of the Statute of the Permanent Court of International Justice, which was drawn up at Geneva on 16 December 1920. That Protocol provided that it was subject to ratification, and that instruments of ratification were to be sent to the Secretary-General of the League of Nations. On 24 September 1929, Nicaragua, as a Member of the League, signed this Protocol and made a declaration under Article 36, paragraph 2, of the Statute of the Permanent Court which read:

[Translation from the French]

"On behalf of the Republic of Nicaragua I recognize as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice.

Geneva, 24 September 1929.

(Signed) T. F. Medina.”

16. According to the documents produced by both Parties before the Court, on 4 December 1934, a proposal for the ratification of (inter alia) the Statute of the Permanent Court of International Justice and of the Protocol of Signature of 16 December 1920 was approved by the “Ejecutivo” (executive power) of Nicaragua. On 14 February 1935, the Senate of Nicaragua decided to ratify these instruments, its decision being published in La Gaceta, the Nicaraguan official journal, on 12 June 1935, and on 11 July 1935 the Chamber of Deputies of Nicaragua adopted a similar deci-
sion, similarly published on 18 September 1935. On 29 November 1939, the Ministry of External Relations of Nicaragua sent the following telegram to the Secretary-General of the League of Nations:

“ESTATUTO Y PROTOCOLO CORTE PERMANENTE JUSTICIA INTERNACIONAL LA HAYA YA FUERON RATIFICADOS PUNTO ENVIRASELE OPORTUNAMENTE INSTRUMENTO RATIFICACION-RELACIONES.”

[Translation]

(Statute and Protocol Permanent Court International Justice The Hague have already been ratified. Will send in due course Instrument Ratification. Relations.)

The files of the League of Nations however contain no record of an instrument of ratification ever having been received. No evidence has been adduced before the Court to show that such an instrument of ratification was ever despatched to Geneva. On 16 December 1942, the Acting Legal Adviser of the Secretariat of the League of Nations wrote to the Foreign Minister of Nicaragua to point out that he had not received the instrument of ratification “dout le dépôt est nécessaire pour faire naître effectivement l’obligation” (the deposit of which is necessary to cause the obligation to come into effective existence). In the Nicaraguan Memorial, it was stated that “Nicaragua never completed ratification of the old Protocol of Signature”; at the hearings, the Agent of Nicaragua explained that the records are very scanty, and he was therefore unable to certify the facts one way or the other. He added however that if instruments of ratification were sent, they would most likely have been sent by sea, and, the Second World War being then in progress, the attacks on commercial shipping may explain why the instruments appear never to have arrived. After the war, Nicaragua took part in the United Nations Conference on International Organization at San Francisco and became an original Member of the United Nations, having ratified the Charter on 6 September 1945; on 24 October 1945 the Statute of the International Court of Justice, which is an integral part of the Charter, came into force.

17. On the basis of these facts, the United States contends, first, that Nicaragua never became a party to the Statute of the Permanent Court of International Justice, and that accordingly it could not and did not make an effective acceptance of the compulsory jurisdiction of the Permanent Court; the 1929 acceptance was therefore not “still in force” within the meaning of the French version of Article 36, paragraph 5, of the Statute of the present Court. In the contention of the United States, the expression in the French version of the Statute corresponding to “still in force” in the English text, namely “pour une durée qui n’est pas encore expirée”, also requires that a declaration be binding under the Statute of the Permanent Court in order to be deemed an acceptance of the jurisdiction of the present Court under Article 36, paragraph 5, of its Statute.

18. Nicaragua does not contend that its 1929 Declaration was in itself sufficient to establish a binding acceptance of the compulsory jurisdiction of the Permanent Court of International Justice, for which it would have been necessary that Nicaragua complete the ratification of the Protocol of Signature of the Statute of that Court. It rejects however the interpretation of Article 36, paragraph 5, of the Statute of the present Court advanced by the United States: Nicaragua argues that the phrase “which are still in force” or “pour une durée qui n’est pas encore expirée” was designed to exclude from the operation of the Article only declarations that had already expired, and has no bearing whatever on a declaration, like Nicaragua’s, that had not expired, but which, for some reason or another, had not been perfected. Consistently with the intention of the provision, which in Nicaragua’s view was to continue the pre-existing situation as regards declarations of acceptance of compulsory jurisdiction, Nicaragua was in exactly the same situation under the new Statute as it was under the old. In either case, ratification of the Statute of the Court would perfect its Declaration of 1929. Nicaragua contends that the fact that this is the correct interpretation of the Statute is borne out by the way in which the Nicaraguan declaration was handled in the publications of the Court and of the United Nations Secretariat; by the conduct of the Parties to the present case, and of the Government of Honduras, in relation to the dispute in 1957-1960 between Honduras and Nicaragua in connection with the arbitral award made by the King of Spain in 1906, which dispute was eventually determined by the Court; by the opinions of publicists; and by the practice of the United States itself.

19. With regard to Nicaragua’s reliance on the publications of the Court, it may first be noted that in the Sixteenth Report (the last) of the Permanent Court of International Justice, covering the period 15 June 1939 to 31 December 1945, Nicaragua was included in the “List of States having signed the Optional Clause” (p. 358), but it was recorded on another page (p. 50) that Nicaragua had not ratified the Protocol of Signature of the Statute, and Nicaragua was not included in the list of “States bound by the Clause” (i.e., the Optional Clause) on the same page. The first Yearbook, that for 1946-1947, of the present Court contained (p. 110) a list entitled “Members of the United Nations, other States parties to the Statute and States to which the Court is open. (An asterisk denotes a State bound by the compulsory jurisdiction clause)”, and Nicaragua was included in that list, with an asterisk against it, and with a footnote (common to several States listed) reading “Declaration made under Article 36 of the Statute of the Permanent Court and deemed to be still in force (Article 36, 5, of Statute of the present Court)”. On another page (p. 210), the text of Nicaragua’s 1929 Declaration was reproduced, with the following footnote:

“According to a telegram dated November 29th, 1939, addressed to the League of Nations, Nicaragua had ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice
(December 16th, 1920), and the instrument of ratification was to follow. Notification concerning the deposit of the said instrument has not, however, been received in the Registry.”

The Yearbook 1946-1947 also includes a list (p. 221) entitled “List of States which have recognized the compulsory jurisdiction of the International Court of Justice or which are still bound by their acceptance of the Optional Clause of the Statute of the Permanent Court of International Justice (Article 36 of the Statute of the International Court of Justice)” and this list includes Nicaragua (with a footnote cross-reference to the page where its 1929 Declaration is reproduced).

20. Subsequent Yearbooks of the Court, up to and including I.C.J. Yearbook 1954-1955, list Nicaragua among the States with regard to which there were “in force” declarations of acceptance of the compulsory jurisdiction of the Court, made in accordance with the terms either of the Permanent Court of International Justice Statute or of the Statute of the present Court (see, e.g., Yearbook 1954-1955, p. 39); however, a reference was also given to the page of the Yearbook 1946-1947 at which the text of Nicaragua’s 1929 Declaration was printed (ibid., p. 187). Nicaragua also continued to be included in the list of States recognizing compulsory jurisdiction (ibid., p. 195). In the Yearbook 1955-1956, the reference to Nicaragua in this list (p. 195) had a footnote appended to it reading as follows:

“According to a telegram dated November 29th, 1939, addressed to the League of Nations, Nicaragua had ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice (December 16th, 1920), and the instrument of ratification was to follow. It does not appear, however, that the instrument of ratification was ever received by the League of Nations.”

A note to the same effect has been included in subsequent Yearbooks up to the present time.

21. In 1968 the Court began the practice, which has continued up to the present time, of transmitting a Report to the General Assembly of the United Nations for the past year. Each of these Reports has included a paragraph recording the number of States which recognize the jurisdiction of the Court as compulsory, and Nicaragua has been mentioned among these. For a number of years the paragraph referred to such States as having so recognized the Court’s jurisdiction “in accordance with declarations filed under Article 36, paragraph 2, of the Statute”. No reference has been made in these Reports to the issue of ratification of the Protocol of Signature of the Statute of the Permanent Court.

22. Nicaragua also places reliance on the references made to it in a number of publications issued by the Secretariat of the United Nations, all of which include it as a State whose declaration of acceptance of the jurisdiction of the Permanent Court has attracted the operation of Article 36, paragraph 5, of the Statute of the present Court. These publications are

the Second Annual Report of the Secretary-General to the General Assembly; the annual volume entitled Signatures, Ratifications, Acceptances, Accessions, etc., concerning the Multilateral Conventions and Agreements in respect of which the Secretary-General acts as Depository; the Yearbook of the United Nations; and certain ancillary official publications.

23. The United States contention as to these publications is, as to those issued by the Registry of the Court, that the Registry took great care not to represent any of its listings as authoritative; the United States draws attention to the caveat in the Preface to the I.C.J. Yearbook that it “in no way involves the responsibility of the Court”, to the footnotes quoted in paragraphs 19 and 20 above, and to a disclaimer appearing for the first time in the Yearbook 1956-1957 (p. 207) reading as follows:

“The texts of declarations set out in this Chapter are reproduced for convenience of reference only. The inclusion of a declaration made by any State should not be regarded as an indication of the view entertained by the Registry or, a fortiori, by the Court, regarding the nature, scope or validity of the instrument in question.”

It concludes that it is clear that successive Registrars and the Yearbooks of the Court never adopted, and indeed expressly rejected, Nicaragua’s contention as to the effect of Article 36, paragraph 5, of the Statute. So far as the United Nations publications are concerned, the United States points out that where they cite their source of information, they invariably refer to the I.C.J. Yearbook, and none of them purport to convey any authority.

24. In order to determine whether the provisions of Article 36, paragraph 5, can have applied to Nicaragua’s Declaration of 1929, the Court must first establish the legal characteristics of that declaration and then compare them with the conditions laid down by the text of that paragraph.

25. So far as the characteristics of Nicaragua’s declaration are concerned, the Court notes that, at the time when the question of the applicability of the new Statute arose, that is, on its coming into force, that declaration was certainly valid, for under the system of the Permanent Court of International Justice a declaration was valid on condition that it had been made by a State “either when signing or ratifying” the Protocol of Signature of the Statute “or at a later moment”, whereas under the present Statute, declarations under Article 36, paragraph 2, can only be made by “States parties to the present Statute”. Since Nicaragua had signed that Protocol, its declaration concerning the compulsory jurisdiction of the Permanent Court, which was not subject to ratification, was undoubtedly
valid from the moment it was received by the Secretary-General of the League of Nations (cf. Right of Passage over Indian Territory, I.C.J. Reports 1957, p. 146). The Statute of the Permanent Court did not lay down any set form or procedure to be followed for the making of such declarations, and in practice a number of different methods were used by States. Nevertheless this declaration, though valid, had not become binding under the Statute of the Permanent Court. It may be granted that the necessary steps had been taken at national level for ratification of the Protocol of Signature of the Statute. But Nicaragua has not been able to prove that it accomplished the indispensable step of sending its instrument of ratification to the Secretary-General of the League of Nations. It did announce that the instrument would be sent: but there is no evidence to show whether it was. Even after having been duly informed, by the Acting Legal Adviser of the League of Nations Secretariat, of the consequences that this might have upon its position vis-à-vis the jurisdiction of the Permanent Court, Nicaragua failed to take the one step that would have easily enabled it to be counted beyond question as one of the States that had recognized the compulsory jurisdiction of the Permanent Court of International Justice. Nicaragua has in effect admitted as much.

26. The Court therefore notes that Nicaragua, having failed to deposit its instrument of ratification of the Protocol of Signature of the Statute of the Permanent Court, was not a party to that treaty. Consequently the Declaration made by Nicaragua in 1929 had not acquired binding force prior to such effect as Article 36, paragraph 5, of the Statute of the International Court of Justice might produce.

27. However, while the declaration had not acquired binding force, it is not disputed that it could have done so, for example at the beginning of 1945, if Nicaragua had ratified the Protocol of Signature of the Statute of the Permanent Court. The correspondence brought to the Court's attention by the Parties, between the Secretariat of the League of Nations and various Governments including the Government of Nicaragua, leaves no doubt as to the fact that, at any time before the making of Nicaragua's declaration and the day on which the new Court came into existence, if not later, ratification of the Protocol of Signature would have sufficed to transform the content of the 1929 Declaration into a binding commitment: no one would have asked Nicaragua to make a new declaration. It follows that such a declaration as that made by Nicaragua had a certain potential effect which could be maintained indefinitely. This durability of potential effect flowed from a certain characteristic of Nicaragua's declaration: being made "unconditionally", it was valid for an unlimited period. Had it provided, for example, that it would apply for only five years to disputes arising after its signature, its potential effect would admittedly have disappeared as from 24 September 1934. In sum, Nicaragua's 1929 Declaration was valid at the moment when Nicaragua became a party to the Statute of the new Court; it had retained its potential effect because Nicaragua, which could have limited the duration of that effect, had expressly refrained from doing so.

28. The characteristics of Nicaragua's declaration have now to be compared with the conditions of applicability of Article 36, paragraph 5, as laid down in that provision. The first condition concerns the relationship between the declarations and the Statute. Article 36, paragraph 5, refrains from stipulating that declarations must have been made by States parties to the Statute of the Permanent Court; it is sufficient for them to have been made "under" (in French, "en application de") Article 36 of that Statute. But those who framed the new text were aware that under that Article, a State could make such a declaration "either when signing or ratifying the Protocol . . . or at a later moment", i.e., that a State could make a declaration when it had not ratified the Protocol of Signature of the Statute, but only signed it. The chosen wording therefore does not exclude but, on the contrary, covers a declaration made in the circumstances of Nicaragua's declaration. Apart from this relationship with the Statute of the Permanent Court, the only condition which declarations have to fulfill is that they should be "still in force" (in English) or "faits pour une durée qui n'est pas encore expirée" (in French). The Parties have devoted much argument to this apparent discrepancy between the two versions, its real meaning and the interpretation which the Court should adopt as correct. Drawing opposite conclusions from the jurisprudence of the Court, as contained in particular in the case concerning the Aerial Incident of 27 July 1955 (Israel v. Bulgaria), they have expatiated on the respective arguments by which, they allege, it supports their own case.

29. The Court must in the first place observe that this is the first time that it has had to take a position on the question whether a declaration which did not have binding force at the time of the Permanent Court is or is not to be numbered among those to which Article 36, paragraph 5, of the Statute of the International Court of Justice applies. The case of the Aerial Incident of 27 July 1955 featured quite a different issue – in a nutshell, whether the effect of a declaration that had unquestionably become binding at the time of the Permanent Court could be transposed to the International Court of Justice when the declaration in question had been made by a State which had not been represented at the San Francisco Conference and had not become a party to the Statute of the present Court until long after the extinction of the Permanent Court. In view of this difference in the issues, the Court does not consider that its decision in the Aerial Incident case, whatever may be its relevance in other respects, provides any pointers to precise conclusions on the limited point now in issue. The most that could be pointed out on the basis of the discussions surrounding the Aerial Incident case is that, at that time, the United States took a particularly broad view of the separability of an Optional-Clause declaration and its institutional foundation by contending that an Optional-Clause declaration (of a binding character) could have outlived by many years the court to which it related. But the present case also involves a problem of separability, since the question to be decided is the extent to which an Optional-Clause declaration (without binding force) can be separated
from the institutional foundation which it ought originally to have possessed, so as to be grafted onto a new institutional foundation.

30. Having thus stressed the novelty of the problem, the Court will refer to the following considerations in order to reach a solution. First, it does not appear possible to reconcile the two versions of Article 36, paragraph 5, by considering that both versions refer to binding declarations. According to this interpretation, upheld by the United States, Article 36, paragraph 5, should be read as if it mentioned “binding” declarations. The French text, in this view, would be the equivalent of the English text, for logically it would imply that declarations *d*ont *la* *d*urée *n*’*e*st pas encore *expirée* are solely those which have acquired binding force. The Court, however, considers that it must interpret Article 36, paragraph 5, on the basis of the actual terms used, which do not include the word “binding”. According to the *travaux préparatoires* the word “binding” was never suggested; and if it had been suggested for the English text, there is no doubt that the drafters would never have let the French text stand as finally worded. Furthermore, the Court does not consider the French text to imply that *la* *d*urée *n*’*e*st pas encore *expirée* (the unexpired period) is that of a commitment of a binding character. It may be granted that, for a period to continue or expire, it is necessary for some legal effect to have come into existence. But this effect does not necessarily have to be of a binding nature. A declaration validly made under Article 36 of the Statute of the Permanent Court had a certain validity which could be preserved or destroyed, and it is perfectly possible to read the French text as implying only this validity.

31. Secondly, the Court cannot but be struck by the fact that the French Delegation at the San Francisco Conference called for the expression “still in force” to be translated, not by “encore en vigueur” but by the term: “pour une durée qui n’est pas encore expirée”. In view of the excellent equivalence of the expressions “encore en vigueur” and “still in force”, the deliberate choice of the expression “pour une durée qui n’est pas encore expirée” seems to denote an intention to widen the scope of Article 36, paragraph 5, so as to cover declarations which have not acquired binding force. Other interpretations of this proposal are not excluded, but it may be noted that both “encore en vigueur” and “pour une durée qui n’est pas encore expirée” would exclude a declaration, like that of France, which had been binding but which had expired by lapse of time. It can only be said, on the other hand, that the English version does not require (any more than does the French version) that the declarations concerned should have been made by States parties to the Statute of the Permanent Court and does not mention the necessity of declarations having any binding character for the provision to be applicable to them. It is therefore the Court’s opinion that the English version in no way expressly excludes a valid declaration of unexpired duration, made by a State not party to the Protocol of Signature of the Statute of the Permanent Court, and therefore not of a binding character.

32. The Court will therefore, before deciding on its interpretation, have to examine to what extent the general considerations governing the transfer of the powers of the former Court to the new one, and thus serving to define the object and the purpose of the provisions adopted, throw light upon the correct interpretation of the paragraph in question. As the Court has already had occasion to state in the case of the *Aerial Incident of 27 July 1955* (*Israel v. Bulgaria*), the primary concern of those who drafted the Statute of the present Court was to maintain the greatest possible continuity between it and its predecessor. As the Court then observed:

“the clear intention which inspired Article 36, paragraph 5, was to continue in being something which was in existence, to preserve existing acceptances, to avoid that the creation of a new Court should frustrate progress already achieved” (*I.C.J. Reports* 1959, p. 145).

33. In the present case, the Parties, in their pleadings and in the course of the hearings, have drawn attention to certain statements bearing witness to this general preoccupation; for example the report to his Government of the Chairman of the New Zealand delegation to the San Francisco Conference, who stressed that the primary concern had been “to maintain so far as possible the progress towards compulsory jurisdiction”. If, for a number of circumstantial reasons, it seemed necessary to abolish the former Court and to put the new one in its place, at least the delegates to the San Francisco Conference were determined to see that this operation should not result in a step backwards in relation to the progress accomplished towards adopting a system of compulsory jurisdiction. That being so, the question is whether this intention sheds any light upon the present problem of interpretation of Article 36, paragraph 5.

34. In this connection it is undeniable that a declaration by which a State recognizes the compulsory jurisdiction of the Court is “in existence”, in the sense given above, and that each such declaration does constitute a certain progress towards extending to the world in general the system of compulsory judicial settlement of international disputes. Admittedly, this progress has not yet taken the concrete form of a commitment having binding force, but nonetheless, it is by no means negligible. There are no grounds for maintaining that those who drafted the Statute meant to go back on this progress and place it in a category in opposition to the progress achieved by declarations having binding force. No doubt their main aim was to safeguard these latter declarations, but the intention to wipe out the progress evidenced by a declaration such as that of Nicaragua would certainly not square well with their general concern. As the Court said in the very similar matter of the already existing field of conventional compulsory jurisdiction, it was “a natural element of this compromise”
408 MILITARY AND PARAMILITARY ACTIVITIES (JUDGMENT)

261

409 MILITARY AND PARAMILITARY ACTIVITIES (JUDGMENT)

261

37. The Court has no intention of assigning these publications any role in the classification of Nicaragua or the binding character attributed to its 1929 Declaration — indeed the Yearbooks list Nicaragua among the States "still Classification" — their declarations or publications have been categorised as "still Classification" or "in the absence of their contributions to the Yearbook".

261

38. The importance of this lies in the fact that this conclusion, reached by the Permanent Court of International Justice, was based on the application of Article 36, paragraph 5, of the Statute of the Permanent Court of International Justice, as a statutory interpretation of the Statute of the Permanent Court of International Justice, the "non-binding" principle of international law. That is, the Permanent Court of International Justice, in its interpretation of Article 36, paragraph 5, of the Statute of the Permanent Court of International Justice, it was not bound by the law of international law, but by the Court's interpretation of the Statute of the Permanent Court of International Justice. The Court's interpretation of the Statute of the Permanent Court of International Justice was based on the application of Article 36, paragraph 5, of the Statute of the Permanent Court of International Justice, as a statutory interpretation of the Statute of the Permanent Court of International Justice, the "non-binding" principle of international law.
MILITARY AND PARAMILITARY ACTIVITIES (JUDGMENT)

39. Admittedly, Nicaragua itself, according to the information furnished by the State in its response to the information request, was never in status an aftermath of the Petition of the United Nations, submitted by the United Nations on 29 November 1979, it was therefore not clear that Nicaragua's recognition of the compulsory jurisdiction of the Court would be the same as that of the mass of States. As noted, the United Nations was not among the States that had recognized the compulsory jurisdiction of the Court in the case of Nicaragua.

40. The Court, however, having recognized the validity of the Nicaragua v. United States case, and having accepted the jurisdiction of the Court, must now consider whether the Court has jurisdiction over the dispute. The Court has jurisdiction over the case if it can be established that the case falls within the jurisdiction of the Court and if the Court has accepted the jurisdiction of the case in accordance with its Rules of Procedure. The Court has jurisdiction over the case if it can be established that the case falls within the jurisdiction of the Court and if the Court has accepted the jurisdiction of the case in accordance with its Rules of Procedure.

41. Finally, the Court, having accepted the jurisdiction of the case, must now consider whether the Court has jurisdiction over the dispute. The Court has jurisdiction over the case if it can be established that the case falls within the jurisdiction of the Court and if the Court has accepted the jurisdiction of the case in accordance with its Rules of Procedure.

42. The Court, however, having recognized the validity of the Nicaragua v. United States case, and having accepted the jurisdiction of the Court, must now consider whether the Court has jurisdiction over the dispute. The Court has jurisdiction over the case if it can be established that the case falls within the jurisdiction of the Court and if the Court has accepted the jurisdiction of the case in accordance with its Rules of Procedure. The Court has jurisdiction over the case if it can be established that the case falls within the jurisdiction of the Court and if the Court has accepted the jurisdiction of the case in accordance with its Rules of Procedure.

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MILITARY AND PARANOIDAL ACTIVITIES (JUDGMENT)

Nicaragua’s thesis introduces insurmountable uncertainty into the system, and that thesis entails the risk of consensual compulsion jurisdiction, which would ensue. The United States also disputes the significance of the publications and contempts on which Nicaragua bases its contention. The Court’s first observation is that, as regards the requirement of consent, the formality of Article 36, paragraph 2, of the Statute, the only formality the United States has already acknowledged, is the acceptance of the same obligation under that Article. The Tribunal of Prohibition of Aggression, on the other hand, has already determined the absence of any proof of such acceptance.

45. The United States, however, further contends that even if Nicaragua had brought its case within the terms of Article 36, paragraph 2, of the Statute, it would be bound by the decision of the Tribunal of Prohibition of Aggression. The United States’ argument is based on the theory that, under the terms of Article 36, paragraph 2, of the Statute, the decision of the Tribunal of Prohibition of Aggression is binding on all States, including the United States, and that, therefore, the United States is bound by the decision of the Tribunal of Prohibition of Aggression.

46. The Court must inquire whether Nicaragua’s particular circumstances afford any reason for it to act as if the decision of the Tribunal of Prohibition of Aggression were final. The Court has already determined that the decision of the Tribunal of Prohibition of Aggression is not final, and that it is open to review by the Court.

47. The Court therefore recognizes that, so far as the accomplishment of the formality of depositing an optional declaration is concerned, Nicaragua was placed in an exceptional position, since the international organs of the United Nations, by the Court and the Secretary-General of the United Nations, regarded the same as more reliable than they really were. According to the United States, the United States and Nicaragua could not be considered as having deposited a declaration with the United States, and the United States could not be considered as having deposited a declaration with Nicaragua.
only have understood at that point in time that Nicaragua was not bound by the Optional Clause, and that understanding never changed.

50. Secondly, in 1955-1958 there was diplomatic contact between Honduras, Nicaragua and the United States over the dispute which was eventually determined by the Court as the case of the *Arbitral Award Made by the King of Spain on 23 December 1906* (I.C.J. Reports 1960, p. 192). One of the questions then under examination was whether Honduras would be entitled to institute proceedings against Nicaragua in reliance upon the 1929 Declaration and Article 36, paragraph 5, of the Statute, and in this connection the Government of Honduras requested the good offices of the Government of the United States. In a conversation between the Nicaraguan Ambassador in Washington and United States officials on 21 December 1955, “reference was made to the fact that the matter had not been previously referred to the Court because Nicaragua had never agreed to submit to compulsory jurisdiction”, and the Ambassador was recorded to have “indicated that an agreement between the two countries would have to be reached to overcome this difficulty”. The United States interpreted this as a statement of Nicaragua’s understanding that it was not bound by the Optional Clause. Further, on 2 March 1956 the Ambassador is alleged to have observed that there was

“some doubt as to whether Nicaragua would be officially obligated to submit to the International Court because an instrument of ratification of the Court’s jurisdiction was never sent”.

It is contended that the United States relied on these representations by Nicaragua; the United States has produced documents to support the claims that the entire premise of United States diplomatic efforts was that Nicaragua was not a party to the Optional Clause, and observes that in the eventual proceedings before the Court between Nicaragua and Honduras, Nicaragua manifested its hostility to the compulsory jurisdiction of the Court. Nicaragua has made no direct reply to the United States argument of estoppel, which was only fully developed during the oral proceedings; however, the position of Nicaragua as to its own conduct is, as indicated above, that so far from having represented that it was not bound by the Optional Clause, on the contrary its conduct unequivocally constituted consent to be so bound.

51. For the same reason, the Court does not need to deal at length with the contention based on estoppel. The Court has found that the conduct of Nicaragua, having regard to the very particular circumstances in which it was placed, was such as to evince its consent to be bound in such a way as to constitute a valid mode of acceptance of jurisdiction (paragraph 47, above). It is thus evident that the Court cannot regard the information obtained by the United States in 1943, or the doubts expressed in diplomatic contacts in 1955, as sufficient to overturn that conclusion, let alone to support an estoppel. Nicaragua’s contention that since 1946 it has consistently maintained that it is subject to the jurisdiction of the Court, is supported by substantial evidence. Furthermore, as the Court pointed out in the *North Sea Continental Shelf* cases (I.C.J. Reports 1969, p. 26), estoppel may be inferred from the conduct, declarations and the like made by a State which not only clearly and consistently evinced acceptance by that State of a particular régime, but also had caused another State or States, in reliance on such conduct, detrimentally to change position or suffer some prejudice. The Court cannot regard Nicaragua’s reliance on the optional clause in any way contrary to good faith or equity: nor can Nicaragua be taken to come within the criterion of the *North Sea Continental Shelf* case, and the invocation of estoppel by the United States of America cannot be said to apply to it.

* * *

52. The acceptance of jurisdiction by the United States which is relied on by Nicaragua is, as noted above, that dated 14 August 1946. The United States contends however that effect must also be given to the “1984 notification” — the declaration deposited with the Secretary-General of the United Nations on 6 April 1984. It is conceded by Nicaragua that if this declaration is effective as a modification or termination of the Declaration of 14 August 1946, and valid as against Nicaragua at the date of its filing of the Application instituting the present proceedings (9 April 1984), then the Court is without jurisdiction to entertain those proceedings, at least under Article 36, paragraphs 2 and 5, of the Statute. It is however contended by Nicaragua that the 1984 notification is ineffective because international law provides no basis for unilateral modification of declarations made under Article 36 of the Statute of the Court, unless a right to do so has been expressly reserved.

53. The United States insists that the effect of the 1984 notification was a modification and not a termination of its 1946 Declaration. It argues that, notwithstanding the fact that its 1946 Declaration did not expressly reserve a right of modification (as do the declarations made under Article 36 by a number of other States), the 1984 notification effected a valid modification of the 1946 Declaration temporarily suspending the consent of the United States to the adjudication of the claims of Nicaragua. For the United States, declarations under Article 36 are *sui generis*, are not treaties, and are not governed by the law of treaties, and States have the sovereign right to qualify an acceptance of the Court’s compulsory jurisdiction, which is an inherent feature of the Optional-Clause system as reflected in, and developed by, State practice. It is suggested that the Court has recognized the existence of an inherent, extra-statutory, right to modify declarations in any manner not inconsistent with the Statute at any time until the date of filing of an Application. The United States also draws attention to the fact that its declaration dates from 1946, since when, it
asserts, fundamental changes have occurred in State practice under the Optional Clause, and argues that to deny a right of modification to a State which had, in such an older declaration, not expressly reserved such a right would be inequitable and unjustified in the light of those changes in State practice.

54. Nicaragua argues further, in the alternative, that the 1984 notification may be construed as a purported termination of the United States Declaration of 1946 and, in effect, the substitution of a new declaration, and that such an attempt at termination is likewise ineffective. As noted in paragraph 13 above, the 1946 Declaration was to remain in force “for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration”. Accordingly, if the 1984 notification constituted a termination of the 1946 Declaration (whether or not accompanied in effect by the making of a revised declaration) it could only take effect on 6 October 1984, and was as yet ineffective when the Application of Nicaragua was filed on 9 April 1984. Both Parties apparently recognize that a modification of a declaration which only takes effect after the Court has been validly seised does not affect the Court’s jurisdiction: as the Court found in the Nottebohm case,

“Once the Court has been regularly seised, the Court must exercise its powers, as these are defined in the Statute. After that, the expiry of the period fixed for one of the Declarations on which the Application was founded is an event which is unrelated to the exercise of the powers conferred on the Court by the Statute, which the Court must exercise whenever it has been regularly seised and whenever it has not been shown, on some other ground, that it lacks jurisdiction or that the claim is inadmissible” (I.C.J. Reports 1953, p. 122),
and the same reasoning applies to a supervening withdrawal or modification of a declaration.

55. The first answer given by the United States to this contention of Nicaragua is that the 1984 notification was, on its face, not a “termination”, and the six months’ notice proviso was accordingly inapplicable. However, in the view of the United States, even if it be assumed for the sake of argument that the six months’ notice proviso was applicable to the 1984 notification, the modification made by that letter was effective vis-à-vis Nicaragua, even if not effective erga omnes. As already explained, one contention of the United States in relation to its own Declaration of 1946 is that States have a sovereign, inherent, extra-statutory right to modify at any time declarations made under Article 36 of the Statute in any manner not inconsistent with the Statute (paragraph 53, above). Similarly Nicaragua’s 1929 Declaration, being indefinite in duration, not unlimited, is subject to a right of immediate termination, without previous notice by Nicaragua. The United States, on the other hand, while enjoying the inherent right of unilateral modification of its declaration, has bound itself by the proviso in its 1946 Declaration to terminate that declaration only on six months’ notice. On this basis, the United States argues that Nicaragua has not accepted “the same obligation” (for the purposes of Art. 36, para. 2, of the Statute) as the United States six months’ notice proviso, and may not therefore oppose that proviso as against the United States. According to the United States contention, the principles of reciprocity, mutuality and equality of States before the Court permit the United States to exercise the right of termination with the immediate effect implicitly enjoyed by Nicaragua, regardless of the six months’ notice proviso in the United States Declaration. The United States does not claim on this ground to exercise such a right of immediate termination erga omnes, but it does claim to exercise it vis-à-vis Nicaragua.

56. Nicaragua first denies that declarations under Article 36 are always inherently terminable; the general view is said to be that declarations which contain no provision for termination continue in force indefinitely, in contractual terms; the question how far they may be terminable is governed by the principles of the law of treaties applicable to consensual legal relations arising within the system of the Optional Clause. Nicaragua concludes that its declaration was made without limit of time, and that there can be no legal justification for the view that it is subject to unilateral modification. The thesis that Nicaragua has not accepted “the same obligation” as the United States is, Nicaragua suggests, completely baseless. So far as reciprocity is concerned, Nicaragua concludes from its examination of the views of publicists that reciprocity is ex hypothesi inapplicable to time limits, as opposed to express reservations reserving the power to modify or terminate declarations, and that in respect of such express reservations reciprocity can only operate when a specific act of modification or termination is notified by virtue of the express reservation.

57. The terms of the 1984 notification, introducing substantial changes in the United States Declaration of Acceptance of 1946, have been quoted above; they constitute an important element for the development of the Court’s reasoning. The 1984 notification has two salient aspects: on the one hand it states that the 1946 Declaration of acceptance shall not apply to disputes with any Central American State or arising out of or related to events in Central America; on the other hand it states that it is to take effect immediately, notwithstanding the terms of the 1946 Declaration, and is to remain in force for two years.

58. The argument between the Parties as to whether the 1984 notification should be categorized as a modification or as a termination of the 1946 Declaration appears in fact to be without consequence for the purpose of this Judgment. The truth is that it is intended to secure a partial and temporary termination, namely to exempt, with immediate effect, the United States from the obligation to subject itself to the Court’s jurisdiction with regard to any application concerning disputes with Central
266


reciprocity is to be relied on, for the Nicaraguan Declaration to be terminable with immediate effect. But the right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity. Since Nicaragua has in fact not manifested any intention to withdraw its own declaration, the question of what reasonable period of notice would legally be required does not need to be further examined: it need only be observed that from 6 to 9 April would not amount to a "reasonable time".

64. The Court would also recall that in previous cases in which it has had to examine the reciprocal effect of declarations made under the Optional Clause, it has determined whether or not the "same obligation" was in existence at the moment of seising of the Court, by comparing the effect of the provisions, in particular the reservations, of the two declarations at that moment. The Court is not convinced that it would be appropriate, or possible, to try to determine whether a State against which proceedings had not yet been instituted could rely on a provision in another State's declaration to terminate or modify its obligations before the Court was seised. The United States argument attributes to the concept of reciprocity, as embodied in Article 36 of the Statute, especially in paragraphs 2 and 3, a meaning that goes beyond the way in which it has been interpreted by the Court, according to its consistent jurisprudence. That jurisprudence supports the view that a determination of the existence of the "same obligation" requires the presence of two parties to a case, and a defined issue between them, which conditions can only be satisfied when proceedings have been instituted. In the case of *Right of Passage over Indian Territory*, the Court observed that

"when a case is submitted to the Court, it is always possible to ascertain what are, at that moment, the reciprocal obligations of the Parties in accordance with their respective Declarations" (*I.C.J. Reports* 1957, p. 143).

"It is not necessary that the 'same obligation' should be irrevocably defined at the time of the deposit of the Declaration of Acceptance for the entire period of its duration. That expression means no more than that, as between States adhering to the Optional Clause, each and all of them are bound by such identical obligations as may exist at any time during which the Acceptance is mutually binding." (*Ibid.*, p. 144.)

The coincidence or interrelation of those obligations thus remain in a state of flux until the moment of the filing of an application instituting proceedings. The Court has then to ascertain whether, at that moment, the two States accepted "the same obligation" in relation to the subject-matter of the proceedings; the possibility that, prior to that moment, the one enjoyed a wider right to modify its obligation than did the other, is without incidence on the question.

65. In sum, the six months' notice clause forms an important integral part of the United States Declaration and it is a condition that must be complied with in case of either termination or modification. Consequently, the 1984 notification, in the present case, cannot override the obligation of the United States to submit to the compulsory jurisdiction of the Court vis-à-vis Nicaragua, a State accepting the same obligation.

* * *

66. The conclusion just reached renders it unnecessary for the Court to pass upon a further reason advanced by Nicaragua for the ineffectiveness of the 1984 notification. An acceptance of the compulsory jurisdiction of the Court, governed in many respects by the principles of treaty law, cannot, Nicaragua argues, be contracted or varied by a mere letter from the United States Secretary of State. Drawing attention to the provisions of the Constitution of the United States as to the power of making treaties, Nicaragua contends that the 1984 notification is, as a matter of United States law, a nullity, and is equally invalid under the principles of the law of treaties, because it was issued in manifest violation of an internal rule of law of fundamental importance (cf. Art. 46 of the Vienna Convention on the Law of Treaties). However, since the Court has found that, even assuming that the 1984 notification is otherwise valid and effective, its operation remains subject to the six months' notice stipulated in 1946, and hence it is inapplicable in this case, the question of the effect of internal constitutional procedures on the international validity of the notification does not have to be determined.

* * *

67. The question remains to be resolved whether the United States Declaration of 1946, though not suspended in its effects vis-à-vis Nicaragua by the 1984 notification, constitutes the necessary consent of the United States to the jurisdiction of the Court in the present case, taking into account the reservations which were attached to the declaration. Specifically, the United States has invoked proviso (c) to that declaration, which provides that the United States acceptance of the Court's compulsory jurisdiction shall not extend to

"disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before
the Court, or (2) the United States of America specially agrees to jurisdiction.”

This reservation will be referred to for convenience as the “multilateral treaty reservation”. Of the two remaining provisos to the declaration, it has not been suggested that proviso (a), referring to disputes the solution of which is entrusted to other tribunals, has any relevance to the present case. As for proviso (b), excluding jurisdiction over “disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America”, the United States has informed the Court that it has determined not to invoke this proviso, but “without prejudice to the rights of the United States under that proviso in relation to any subsequent pleadings, proceedings, or cases before this Court”.

68. The United States points out that Nicaragua relies in its Application on four multilateral treaties, namely the Charter of the United Nations, the Charter of the Organization of American States, the Montevideo Convention on Rights and Duties of States of 26 December 1933, and the Havana Convention on the Rights and Duties of States in the Event of Civil Strife of 20 February 1928. In so far as the dispute brought before the Court is thus one “arising under” those multilateral treaties, since the United States has not specially agreed to jurisdiction here, the Court may, it is claimed, exercise jurisdiction only if all treaty parties affected by a prospective decision of the Court are also parties to the case. The United States explains the rationale of its multilateral treaty reservation as being that it protects the United States and third States from the inherently prejudicial effects of partial adjudication of complex multiparty disputes. Emphasizing that the reservation speaks only of States “affected by” a decision, and not of States having a legal right or interest in the proceedings, the United States identifies, as States parties to the four multilateral treaties above mentioned which would be “affected”, in a legal and practical sense, by adjudication of the claims submitted to the Court, Nicaragua’s three Central American neighbours, Honduras, Costa Rica and El Salvador.

69. The United States recognizes that the multilateral treaty reservation applies in terms only to “disputes arising under a multilateral treaty”. and notes that Nicaragua in its Application asserts also that the United States has “violated fundamental rules of general and customary international law”. However, it is nonetheless the submission of the United States that all the claims set forth in Nicaragua’s Application are outside the jurisdiction of the Court. According to the argument of the United States, Nicaragua’s claims styled as violations of general and customary international law merely restate or paraphrase its claims and allegations based expressly on the multilateral treaties mentioned above, and Nicaragua in its Memorial itself states that its “fundamental contention” is that the conduct of the United States is a violation of the United Nations Charter and the Charter of the Organization of American States. The evidence of customary law offered by Nicaragua consists of General Assembly resolutions that merely reiterate or elucidate the United Nations Charter; nor can the Court determine the merits of Nicaragua’s claims formulated under customary and general international law without interpreting and applying the United Nations Charter and the Organization of American States Charter, and since the multilateral treaty reservation bars adjudication of claims based on those treaties, it bars all Nicaragua’s claims.

70. Nicaragua on the other hand contends that if the multilateral treaty reservation is given its correct interpretation, taking into account in particular the travaux préparatoires leading to the insertion by the United States Senate of the reservation into the draft text of the 1946 Declaration, the reservation cannot preclude jurisdiction over any part of Nicaragua’s Application. According to Nicaragua, the record demonstrates that the reservation is pure surplusage and does not impose any limitation on acceptance of compulsory jurisdiction by the United States. The amendment whereby the reservation was introduced was conceived, intended and enacted to deal with a specific situation: a multiparty suit against the United States that included parties that had not accepted the Court’s compulsory jurisdiction. Nicaragua contends, not that the reservation is a nullity, but that when its meaning is properly understood, it turns out to be redundant. The United States interpretation of the reservation finds no support, according to Nicaragua, in its legislative history, and would establish a thoroughly unworkable standard inasmuch as it would be necessary to ascertain in what circumstances a State not party to a case should be deemed “affected” by the decision which is yet to be taken by the Court. Nicaragua argues that the supposed interests of those States that the United States alleges might be affected by a decision in this case are either non-existent or plainly beyond the scope of any such decision, and that the communications sent by those States to the Court fail to establish that they would be so affected.

71. Furthermore, Nicaragua denies that its claims based on customary law are no more than paraphrases of its allegations of violation of the United Nations Charter, and emphasizes that the same facts may justify invocation of distinct causes of action. Specifically, the provisions of the United Nations Charter relating to the use of force by States, while they may still rank as provisions of a treaty for certain purposes, are now within
the realm of general international law and their application is not a question exclusively of interpreting a multilateral treaty. The law relating
to the use of force is not contained wholly in the Charter, and in the
practice of States claims of State responsibility involving violence may be
and frequently are formulated without relying on the Charter. Accord-
dingly, Nicaragua submits that the multilateral treaty reservation, even if it
has any relevance or validity, has no application to the claims of Nicaragua
based upon customary international law.

72. The multilateral treaty reservation in the United States Declaration
has some obscure aspects, which have been the subject of comment since its
making in 1946. There are two interpretations of the need for the presence
of the parties to the multilateral treaties concerned in the proceedings
before the Court as a condition for the validity of the acceptance of the
compulsory jurisdiction by the United States. It is not clear whether what
are “affected”, according to the terms of the proviso, are the treaties
themselves or the parties to them. Similar reservations to be found in
certain other declarations of acceptance, such as those of India, El Sal-
vador and the Philippines, refer clearly to “all parties” to the treaties. The
phrase “all parties to the treaty affected by the decision” is at the centre of
the present doubts. The United States interprets the reservation in the
present case as referring to the States parties affected by the decision of the
Court, merely mentioning the alternative interpretation, whereby it is the
treaty which is “affected”, so that all parties to the treaty would have to be
before the Court, as “an a fortiori case”. This latter interpretation need not
therefore be considered. The argument of the United States relates speci-
fically to El Salvador, Honduras and Costa Rica, the neighbour States of
Nicaragua, which allegedly would be affected by the decision of the Court.

73. It may first be noted that the multilateral treaty reservation could
not bar adjudication by the Court of all Nicaragua’s claims, because
Nicaragua, in its Application, does not confine those claims only to viola-
tions of the four multilateral conventions referred to above (paragraph
68). On the contrary, Nicaragua invokes a number of principles of cus-
tomary and general international law that, according to the Application,
have been violated by the United States. The Court cannot dismiss the
claims of Nicaragua under principles of customary and general interna-
tional law, simply because such principles have been enshrined in the texts
of the conventions relied upon by Nicaragua. The fact that the above-
mentioned principles, recognized as such, have been codified or embodied
in multilateral conventions does not mean that they cease to exist and to
apply as principles of customary law, even as regards countries that are
parties to such conventions. Principles such as those of the non-use of
force, non-intervention, respect for the independence and territorial integ-
rity of States, and the freedom of navigation, continue to be binding as part
of customary international law, despite the operation of provisions of
conventional law in which they have been incorporated. Therefore, since
the claim before the Court in this case is not confined to violation of the
multilateral conventional provisions invoked, it would not in any event be
barred by the multilateral treaty reservation in the United States 1946
Declaration.

74. The Court would observe, further, that all three States have made
dclarations of acceptance of the compulsory jurisdiction of the Court, and
are free, at any time, to come before the Court, on the basis of Article 36,
paragraph 2, with an application instituting proceedings against Nicara-
gua — a State which is also bound by the compulsory jurisdiction of the
Court by an unconditional declaration without limit of duration —, if they
should find that they might be affected by the future decision of the Court.
Moreover, these States are also free to resort to the incidental procedures
of intervention under Articles 62 and 63 of the Statute, to the second of
which El Salvador has already unsuccessfully resorted in the jurisdictional
phase of the proceedings, but to which it may revert in the merits phase of
the case. There is therefore no question of these States being defenceless
against any consequences that may arise out of adjudication by the Court,
or of their need to the protection of the multilateral treaty reservation of
the United States.

75. The United States Declaration uses the word “affected”, without
making it clear who is to determine whether the States referred to are, or are
not, affected. The States themselves would have the choice of either insti-
tuting proceedings or intervening for the protection of their interests, in so
far as these are not already protected by Article 59 of the Statute. As for
the Court, it is only when the general lines of the judgment to be given become
clear that the States “affected” could be identified. By way of example we
may take the hypothesis that if the Court were to decide to reject the
Application of Nicaragua on the facts, there would be no third State’s
claim to be affected. Certainly the determination of the States “affected”
could not be left to the parties but must be made by the Court.

76. At any rate, this is a question concerning matters of substance
relating to the merits of the case: obviously the question of what States
may be “affected” by the decision on the merits is not in itself a jurisdic-
tional problem. The present phase of examination of jurisdictional ques-
tions was opened by the Court itself by its Order of 10 May 1984, not by a
formal preliminary objection submitted by the United States; but it is
appropriate to consider the grounds put forward by the United States for
alleged lack of jurisdiction in the light of the procedural provisions for such
objections. That being so, and since the procedural technique formerly
available of joinder of preliminary objections to the merits has been done
away with since the 1972 revision of the Rules of Court, the Court has no
choice but to avail itself of Article 79, paragraph 7, of the present Rules of
Court, and declare that the objection based on the multilateral treaty
reservation of the United States Declaration of Acceptance does not
possess, in the circumstances of the case, an exclusively preliminary char-
acter, and that consequently it does not constitute an obstacle for the Court
to entertain the proceedings instituted by Nicaragua under the Application of 9 April 1984.

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77. It is in view of this finding on the United States multilateral treaty reservation that the Court has to turn to the other ground of jurisdiction relied on by Nicaragua, even though it is prima facie narrower in scope than the jurisdiction deriving from the declarations of the two Parties under the Optional Clause. As noted in paragraphs 1 and 12 above, Nicaragua in its Application relies on the declarations of the Parties accepting the compulsory jurisdiction of the Court in order to found jurisdiction, but in its Memorial it invokes also a 1956 Treaty of Friendship, Commerce and Navigation between Nicaragua and the United States as a complementary foundation for the Court’s jurisdiction. Since the multilateral treaty reservation obviously does not affect the jurisdiction of the Court under the 1956 Treaty, it is appropriate to ascertain the existence of such jurisdiction, limited as it is.

78. The United States objects to this invocation of a jurisdictional basis not specified in the Application instituting proceedings: it argues that in proceedings instituted by means of an application, the jurisdiction of the Court is founded upon the legal grounds specified in that application. An Applicant is not permitted, in the view of the United States, to assert in subsequent pleadings jurisdictional grounds of which it was presumably aware at the time it filed its Application. While Nicaragua in its Application purported to reserve the right to amend that Application, and invokes that reservation to justify adding an alternative jurisdictional basis, the United States contends that it is ineffective, as it cannot alter the requirements of the Statute and Rules of Court.

79. Nicaragua has not advanced any arguments to refute the United States contention that the belated invocation of the 1956 Treaty is impermissible. During the oral proceedings the Agent of Nicaragua merely explained that in order to respect the Court’s indications regarding the necessity of being as concise as possible, Nicaragua had omitted from the oral arguments presented on its behalf a number of arguments developed in the Memorial, and still asserted by Nicaragua. The Agent stated that Nicaragua does maintain that the 1956 Treaty constitutes a “subsidiary basis” for the Court’s jurisdiction in the present proceedings, and the final submissions of Nicaragua incorporated by reference Submission D in the Memorial of Nicaragua, asserting jurisdiction under the Treaty.

80. The Court considers that the fact that the 1956 Treaty was not involved in the Application as a title of jurisdiction does not in itself constitute a bar to reliance being placed upon it in the Memorial. Since the Court must always be satisfied that it has jurisdiction before proceeding to examine the merits of a case, it is certainly desirable that “the legal grounds upon which the jurisdiction of the Court is said to be based” should be indicated at an early stage in the proceedings, and Article 38 of the Rules of Court therefore provides for these to be specified “as far as possible” in the Application. An additional ground of jurisdiction may however be brought to the Court’s attention later, and the Court may take it into account provided the Applicant makes it clear that it intends to proceed upon that basis (Certain Norwegian Loans, I.C.J. Reports 1957, p. 25), and provided also that the result is not to transform the dispute brought before the Court by the application into another dispute which is different in character (Société Commerciale de Belgique, P.C.I.J., Series A/B, No. 78, p. 173). Both these conditions are satisfied in the present case.

81. Article XXIV, paragraph 2, of the Treaty of Friendship, Commerce and Navigation between the United States of America and Nicaragua, signed at Managua on 21 January 1956, reads as follows:

“Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means.”

The treaty entered into force on 24 May 1958 on exchange of ratifications; it was registered with the Secretariat of the United Nations by the United States on 11 July 1960. The provisions of Article XXIV, paragraph 2, are in terms which are very common in bilateral treaties of amity or of establishment, and the intention of the parties in accepting such clauses is clearly to provide for such a right of unilateral recourse to the Court in the absence of agreement to employ some other pacific means of settlement (cf. United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, p. 27, para. 52). In the present case, the United States does not deny either that the Treaty is in force, or that Article XXIV is in general capable of conferring jurisdiction on the Court. It contends however that if the basis of jurisdiction is limited to the Treaty, since Nicaragua’s Application presents no claims of any violations of it, there are no claims properly before the Court for adjudication. In order to establish the Court’s jurisdiction over the present dispute under the Treaty, Nicaragua must establish a reasonable connection between the Treaty and the claims submitted to the Court; but according to the United States, Nicaragua cannot establish such a connection. Furthermore, the United States has drawn attention to the reference in Article XXIV to disputes “not satisfactorily adjusted by diplomacy”, and argues that an attempt so to adjust the dispute is thus a prerequisite of its submission to the Court. Since, according to the United States, Nicaragua has never even raised in negotiations with the United States the application or interpretation of the Treaty to any of the factual or legal allegations in its Application, Nicaragua has
failed to satisfy the Treaty’s own terms for invoking the compromissory clause.

82. Nicaragua in its Memorial submits that the 1956 Treaty has been and was being violated by the military and paramilitary activities of the United States in and against Nicaragua, as described in the Application; specifically, it is submitted that these activities directly violate the following Articles:

Article XIX: providing for freedom of commerce and navigation, and for vessels of either party to have liberty “to come with their cargoes to all ports, places and waters of such other party open to foreign commerce and navigation”, and to be accorded national treatment and most-favored-nation treatment within those ports, places and waters.

Article XIV: forbidding the imposition of restrictions or prohibitions on the importation of any product of the other party, or on the exportation of any product to the territories of the other party.

Article XVII: forbidding any measure of a discriminatory nature that hinders or prevents the importer or exporter of products of either country from obtaining marine insurance on such products in companies of either party.

Article XX: providing for freedom of transit through the territories of each party.

Article I: providing that each party shall at all times accord equitable treatment to the persons, property, enterprises and other interests of nationals and companies of the other party.

83. Taking into account these Articles of the Treaty of 1956, particularly the provision in, inter alia, Article XIX, for the freedom of commerce and navigation, and the references in the Preamble to peace and friendship, there can be no doubt that, in the circumstances in which Nicaragua brought its Application to the Court, and on the basis of the facts there asserted, there is a dispute between the Parties, inter alia, as to the “interpretation or application” of the Treaty. That dispute is also clearly one which is not “satisfactorily adjusted by diplomacy” within the meaning of Article XXIV of the 1956 Treaty (cf. United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, pp. 26-28, paras. 50 to 54). In the view of the Court, it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is deactivated from invoking a compromissory clause in that treaty. The United States was well aware that Nicaragua alleged that its conduct was a breach of international obligations before the present case was instituted; and it is now aware that specific articles of the 1956 Treaty are alleged to have been violated. It would make no sense to require Nicaragua now to institute fresh proceed-

ings based on the Treaty, which it would be fully entitled to do. As the Permanent Court observed.

“the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the party concerned” (Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.J., Series A, No. 6, p. 14).

Accordingly, the Court finds that, to the extent that the claims in Nicaragua’s Application constitute a dispute as to the interpretation or the application of the Articles of the Treaty of 1956 described in paragraph 82 above, the Court has jurisdiction under that Treaty to entertain such claims.

* * *

84. The Court now turns to the question of the admissibility of the Application of Nicaragua. The United States of America contended in its Counter-Memorial that Nicaragua’s Application is inadmissible on five separate grounds, each of which, it is said, is sufficient to establish such inadmissibility, whether considered as a legal bar to adjudication or as “a matter requiring the exercise of prudential discretion in the interest of the integrity of the judicial function”. Some of these grounds have in fact been presented in terms suggesting that they are matters of competence or jurisdiction rather than admissibility, but it does not appear to be of critical importance how they are classified in this respect. These grounds will now be examined; but for the sake of clarity it will first be convenient to recall briefly what are the allegations of Nicaragua upon which it bases its claims against the United States.

85. In its Application instituting proceedings, Nicaragua asserts that:

“The United States of America is using military force against Nicaragua and intervening in Nicaragua’s internal affairs, in violation of Nicaragua’s sovereignty, territorial integrity and political independence and of the most fundamental and universally accepted principles of international law. The United States has created an ‘army’ of more than 10,000 mercenaries ... installed them in more than ten base camps in Honduras along the border with Nicaragua, trained them, paid them, supplied them with arms, ammunition, food and medical supplies, and directed their attacks against human and economic targets inside Nicaragua”,

and that Nicaragua has already suffered and is now suffering grievous consequences as a result of these activities. The purpose of these activities is claimed to be

“to harass and destabilize the Government of Nicaragua so that ultimately it will be overthrown, or, at a minimum, compelled to change those of its domestic and foreign policies that displease the United States”.

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86. The first ground of inadmissibility relied on by the United States is that Nicaragua has failed to bring before the Court parties whose presence and participation is necessary for the rights of those parties to be protected and for the adjudication of the issues raised in the Application. The United States first asserts that adjudication of Nicaragua’s claim would necessarily implicate the rights and obligations of other States, in particular those of Honduras, since it is alleged that Honduras has allowed its territory to be used as a staging ground for unlawful uses of force against Nicaragua, and the adjudication of Nicaragua’s claims would necessarily involve the adjudication of the rights of third States with respect to measures taken to protect themselves, in accordance with Article 51 of the United Nations Charter, against unlawful uses of force employed, according to the United States, in Nicaragua. Secondly, it is claimed by the United States that it is fundamental to the jurisprudence of the Court that it cannot determine the rights and obligations of States without their express consent or participation in the proceedings before the Court. Nicaragua questions whether the practice of the Court supports the contention that a case cannot be allowed to go forward in the absence of “indispensable parties”, and emphasizes that in the present proceedings Nicaragua asserts claims against the United States only, and not against any absent State, so that the Court is not required to exercise jurisdiction over any such State. Nicaragua’s Application does not put in issue the right of a third State to receive military or economic assistance from the United States (or from any other source). As another basis for the indispensable status of third States, the United States contends that facts concerning relevant activities by or against them may not be in the possession or control of a Party. Nicaragua refers to the powers of the Court under Article 44 of the Statute and Article 66 of the Rules of Court, and observes that it would be in the third States’ interest to provide the United States with factual material under their control.

87. This contention was already raised by the United States at the stage of the proceedings on the request for provisional measures when it argued that

“the other States of Central America have stated their view that Nicaragua’s request for the indication of provisional measures directly implicates their rights and interests, and that an indication of such measures would interfere with the Contadora negotiations. These other Central American States are indispensable parties in whose absence this Court cannot properly proceed.” (I.C.J. Reports 1984, p. 184, para. 35.)

The United States then referred to communications addressed to the Court by the Governments of Costa Rica and El Salvador, and a telex message to the United Nations Secretary-General addressed by the Government of Honduras which, according to the United States, “make it quite clear that Nicaragua’s claims are inextricably linked to the rights and interests of those other States”, and added “Any decision to indicate the interim measures requested, or a decision on the merits, would necessarily affect the rights of States not party to the proceedings” (ibid.). It should be pointed out, however, that in none of the communications from the three States mentioned by the United States was there any indication of an intention to intervene in the proceedings before the Court between Nicaragua and the United States of America, and one (Costa Rica) made it abundantly clear that it was not to be regarded as indicating such an intention. At a later date El Salvador did of course endeavour to intervene.

88. There is no doubt that in appropriate circumstances the Court will decline, as it did in the case concerning Monetary Gold Removed from Rome in 1943, to exercise the jurisdiction conferred upon it where the legal interests of a State not party to the proceedings “would not only be affected by a decision, but would form the very subject-matter of the decision” (I.C.J. Reports 1954, p. 32). Where however claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, and made the subject of submissions, the Court has in principle merely to decide upon those submissions, with binding force for the parties only, and no other State, in accordance with Article 59 of the Statute. As the Court has already indicated (paragraph 74, above) other States which consider that they may be affected are free to institute separate proceedings, or to employ the procedure of intervention. There is no trace, either in the Statute or in the practice of international tribunals, of an “indispensable parties” rule of the kind argued for by the United States, which would only be conceivable in parallel to a power, which the Court does not possess, to direct that a third State be made a party to proceedings. The circumstances of the Monetary Gold case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction; and none of the States referred to can be regarded as in the same position as Albania in that case, so as to be truly indispensable to the pursuance of the proceedings.

89. Secondly, the United States regards the Application as inadmissible because each of Nicaragua’s allegations constitutes no more than a reformation and restatement of a single fundamental claim, that the United States is engaged in an unlawful use of armed force, or breach of the peace, or acts of aggression against Nicaragua, a matter which is committed by the Charter and by practice to the competence of other organs, in particular the United Nations Security Council. All allegations of this kind are confined to the political organs of the Organization for consideration and determination; the United States quotes Article 24 of the Charter, which confers upon the Security Council “primary responsibility for the maintenance of international peace and security”. The provisions of the Charter
dealing with the ongoing use of armed force contain no recognition of the possibility of settlement by judicial, as opposed to political, means. Under Article 52 of the Charter there is also a commitment of responsibility for the maintenance of international peace and security to regional agencies and arrangements, and in the view of the United States the Contadora process is precisely the sort of regional arrangement or agency that Article 52 contemplates.

90. Nicaragua contends that the United States argument fails to take account of the fundamental distinction between Article 2, paragraph 4, of the Charter which defines a legal obligation to refrain from the threat or use of force, and Article 39, which establishes a political process. The responsibility of the Security Council under Article 24 of the Charter for the maintenance of international peace and security is “primary”, not exclusive. Until the Security Council makes a determination under Article 39, a dispute remains to be dealt with by the methods of peaceful settlement provided under Article 33, including judicial settlement; and even after a determination under Article 39, there is no necessary inconsistency between Security Council action and adjudication by the Court. From a juridical standpoint, the decisions of the Court and the actions of the Security Council are entirely separate.

91. It will be convenient to deal with this alleged ground of inadmissibility together with the third ground advanced by the United States namely that the Court should hold the Application of Nicaragua to be inadmissible in view of the subject-matter of the Application and the position of the Court within the United Nations system, including the impact of proceedings before the Court on the ongoing exercise of the “inherent right of individual or collective self-defence” under Article 51 of the Charter. This is, it is argued, a reason why the Court may not properly exercise “subject-matter jurisdiction” over Nicaragua’s claims. Under this head, the United States repeats its contention that the Nicaraguan Application requires the Court to determine that the activities complained of constitute a threat to the peace, a breach of the peace, or an act of aggression, and proceeds to demonstrate that the political organs of the United Nations, to which such matters are entrusted by the Charter, have acted, and are acting, in respect of virtually identical claims placed before them by Nicaragua. The United States points to the approach made by Nicaragua to the Security Council on 4 April 1984, a few days before the institution of the present proceedings: the draft resolution then presented, corresponding to the claims submitted by Nicaragua to the Court, failed to achieve the requisite majority under Article 27, paragraph 3, of the Charter. However, this fact, it is argued, and the perceived likelihood that similar claims in future would fail to secure the required majority, does not vest the Court with subject-matter jurisdiction over the Application. Since Nicaragua’s Application in effect asks the Court for a judgment in all material respects identical to the decision which the Security Council did not take, it amounts to an appeal to the Court from an adverse consid-

eration in the Security Council. Furthermore, in order to reach a determination on what amounts to a claim of aggression the Court would have to decide whether the actions of the United States, and the other States not before the Court, are or are not unlawful: more specifically, it would have to decide on the application of Article 51 of the Charter, concerning the right of self-defence. Any such action by the Court cannot be reconciled with the terms of Article 51, which provides a role in such matters only for the Security Council. Nor would it be only in case of a decision by the Court that the inherent right of self-defence would be impaired: the fact that such claims are being subjected to judicial examination in the midst of the conflict that gives rise to them may alone be sufficient to constitute such impairment.

92. Nicaragua observes in this connection that there is no generalized right of self-defence: Article 51 of the Charter refers to the inherent right of self-defence “if an armed attack occurs against a Member of the United Nations”. The factual allegations made against Nicaragua by the United States, even if true, fall short of an “armed attack” within the meaning of Article 51. While that Article requires that actions under it “must be immediately reported to the Security Council” – and no such report has been made – it does not support the claim that the question of the legitimacy of actions assertedly taken in self-defence is committed exclusively to the Security Council. The argument of the United States as to the powers of the Security Council and of the Court is an attempt to transfer municipal-law concepts of separation of powers to the international plane, whereas these concepts are not applicable to the relations among international institutions for the settlement of disputes.

93. The United States is thus arguing that the matter was essentially one for the Security Council since it concerned a complaint by Nicaragua involving the use of force. However, having regard to the United States Diplomatic and Consular Staff in Tehran case, the Court is of the view that the fact that a matter is before the Security Council should not prevent it being dealt with by the Court and that both proceedings could be pursued pari passu. In that case the Court held:

“In the preamble to this second resolution the Security Council expressly took into account the Court’s Order of 15 December 1979 indicating provisional measures; and it does not seem to have occurred to any member of the Council that there was or could be anything irregular in the simultaneous exercise of their respective functions by the Court and the Security Council. Nor is there in this any cause for surprise.” (I.C.J. Reports 1980, p. 21, para. 40.)

The Court in fact went further, to say:

“Whereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendation with regard to a dispute or situation while the Security Council is exercising its functions in
respect of that dispute or situation, no such restriction is placed on the functioning of the Court by any provision of either the Charter or the Statute of the Court. The reasons are clear. It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to the dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute. This is indeed recognized by Article 36 of the Charter, paragraph 3 of which specifically provides that:

‘In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.’” (I.C.J. Reports 1980, p. 22, para. 40.)

94. The United States argument is also founded on a construction, which the Court is unable to share, of Nicaragua’s complaint about the United States use, or threat of the use, of force against its territorial integrity and national independence, in breach of Article 2, paragraph 4, of the United Nations Charter. The United States argues that Nicaragua has thereby invoked a charge of aggression and armed conflict envisaged in Article 39 of the United Nations Charter, which can only be dealt with by the Security Council in accordance with the provisions of Chapter VII of the Charter, and not in accordance with the provisions of Chapter VI. This presentation of the matter by the United States treats the present dispute between Nicaragua and itself as a case of armed conflict which must be dealt with only by the Security Council and not by the Court which, under Article 2, paragraph 4, and Chapter VI of the Charter, deals with pacific settlement of all disputes between member States of the United Nations. But, if so, it has to be noted that, while the matter has been discussed in the Security Council, no notification has been given to it in accordance with Chapter VII of the Charter, so that the issue could be tabled for full discussion before a decision were taken for the necessary enforcement measures to be authorized. It is clear that the complaint of Nicaragua is not about an ongoing armed conflict between it and the United States, but one requiring, and indeed demanding, the peaceful settlement of disputes between the two States. Hence, it is properly brought before the principal judicial organ of the Organization for peaceful settlement.

95. It is necessary to emphasize that Article 24 of the Charter of the United Nations provides that

“In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security…”

The Charter accordingly does not confer exclusive responsibility upon the Security Council for the purpose. While in Article 12 there is a provision for a clear demarcation of functions between the General Assembly and the Security Council, in respect of any dispute or situation, that the former should not make any recommendation with regard to that dispute or situation unless the Security Council so requires, there is no similar provision anywhere in the Charter with respect to the Security Council and the Court. The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.

96. It must also be remembered that, as the Corfu Channel case (I.C.J. Reports 1949, p. 4) shows, the Court has never shied away from a case brought before it merely because it had political implications or because it involved serious elements of the use of force. The Court was concerned with a question of a “demonstration of force” (cf. loc. cit., p. 31) or “violation of a country’s sovereignty” (ibid.); the Court, indeed, found that

“Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.” (Ibid., p. 35.)

What is also significant is that the Security Council itself in that case had “undoubtedly intended that the whole dispute should be decided by the Court” (p. 26).

97. It is relevant also to observe that while the United States is arguing today that because of the alleged ongoing armed conflict between the two States the matter could not be brought to the International Court of Justice but should be referred to the Security Council, in the 1950s the United States brought seven cases to the Court involving armed attacks by military aircraft of other States against United States military aircraft: the only reason the cases were not dealt with by the Court was that each of the Respondent States indicated that it had not accepted the jurisdiction of the Court, and was not willing to do so for the purposes of the case. The United States did not contradict Nicaragua’s argument that the United States indeed brought these suits against the Respondents in this Court, rather than in the Security Council. It has argued further that in both the Corfu Channel case and the Aerial Incident cases, the Court was asked to adjudicate the rights and duties of the parties with respect to a matter that was fully in the past. To a considerable extent this is a question relevant to the fourth ground of inadmissibility advanced by the United States, to be examined below. However the United States also contends that the Corfu Channel case, at least, shows that it was the fact that the incident in question was not part of an ongoing use of armed force that led the Security Council to conclude that its competence was not engaged. In the view of the Court, this argument is not relevant.
98. Nor can the Court accept that the present proceedings are objectionable as being in effect an appeal to the Court from an adverse decision of the Security Council. The Court is not asked to say that the Security Council was wrong in its decision, nor that there was anything inconsistent with law in the way in which the members of the Council employed their right to vote. The Court is asked to pass judgment on certain legal aspects of a situation which has also been considered by the Security Council, a procedure which is entirely consonant with its position as the principal judicial organ of the United Nations. As to the inherent right of self-defence, the fact that it is referred to in the Charter as a "right" is indicative of a legal dimension; if in the present proceedings it becomes necessary for the Court to judge in this respect between the Parties — for the rights of no other State may be adjudicated in these proceedings — it cannot be debarred from doing so by the existence of a procedure for the States concerned to report to the Security Council in this connection.

99. The fourth ground of inadmissibility put forward by the United States is that the Application should be held inadmissible in consideration of the inability of the judicial function to deal with situations involving ongoing conflict. The allegation, attributed by the United States to Nicaragua, of an ongoing conflict involving the use of armed force contrary to the Charter is said to be central to, and inseparable from, the Application as a whole, and is one with which a court cannot deal effectively without overstepping proper judicial bounds. The resort to force during ongoing armed conflict lacks the attributes necessary for the application of the judicial process, namely a pattern of legally relevant facts discernible by the means available to the adjudicating tribunal, establishable in conformity with applicable norms of evidence and proof, and not subject to further material evolution during the course of, or subsequent to, the judicial proceedings. It is for reasons of this nature that ongoing armed conflict must be entrusted to resolution by political processes. The situation alleged in the Nicaraguan Application, in particular, cannot be judicially managed or resolved; continuing practical guidance to the Parties in respect of the measures required of them is critical to the effective control of situations of armed conflict such as is there alleged to exist. But the Court has, it is said, recognized that giving such practical guidance to the Parties lies outside the scope of the judicial function. The United States does not argue that the Application must be dismissed because it presents a "political" question rather than a "legal" question, but rather that an allegation of an ongoing use of unlawful armed force was never intended by the drafters of the Charter to be encompassed by Article 36, paragraph 2, of the Statute. It is also recalled that the circumstances alleged in the Application involve the activities of "groups indigenous to Nicaragua" that have their own motivations and are beyond the control of any State. The United States emphasizes, however, that to conclude that the Court cannot adjudicate the merits of the complaints alleged does not require the conclusion that international law is neither directly relevant nor of fundamental importance in the settlement of international disputes, but merely that in this respect the application of international legal principles is the responsibility of other organs set up under the Charter.

100. Nicaragua contends that, inasmuch as the United States questions whether the Court would have at its disposal vital evidence necessary to resolve the dispute, the problem is not so much the nature of the dispute as the willingness of the Respondent fully to inform the Court about the activities of which it is accused. Nicaragua also points to the Corfu Channel case as showing, as the Court has noted above (paragraph 96), that the Court does exercise its judicial functions in situations of armed conflict. The Court will decide in the light of the evidence produced by the Parties, and enjoys considerable powers in the obtaining of evidence. Nicaragua disputes that the judicial function, being governed by the principle of res judicata, is "inherently retrospective", and therefore inapplicable to a fluid situation. Nicaragua concedes that a judgment delivered by the Court must be capable of execution, but points out that such a judgment does not by itself resolve — and is not intended to resolve — all the difficulties between the parties. The Court is not being asked to bring an armed conflict to an end by nothing more than the power of words.

101. The Court is bound to observe that any judgment on the merits in the present case will be limited to upholding such submissions of the Parties as have been supported by sufficient proof of relevant facts, and are regarded by the Court as sound in law. A situation of armed conflict is not the only one in which evidence of fact may be difficult to come by, and the Court has in the past recognized and made allowance for this (Corfu Channel, I.C.J. Reports 1949, p. 18; United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, p. 10, para. 13). Ultimately, however, it is the litigant seeking to establish a fact who bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved, but is not to be ruled out as inadmissible in limine on the basis of an anticipated lack of proof. As to the possibility of implementation of the judgment, the Court will have to assess whether this question also on the basis of each specific submission, and in the light of the facts as established; it cannot at this stage rule out a priori any judicial contribution to the settlement of the dispute by declaring the Application inadmissible. It should be observed however that the Court "neither can nor should contemplate the contingency of the judgment not being complied with" (Factory at Chorzów, P.C.I.J., Series A, No. 17, p. 63). Both the Parties have undertaken to comply with the decisions of the Court, under Article 94 of the Charter; and

"Once the Court has found that a State has entered into a com-
mitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it." (Nuclear Tests, I.C.J. Reports 1974, p. 272, para. 60; p. 477, para. 63.)

* *

102. The fifth and final contention of the United States under this head is that the Application should be held inadmissible because Nicaragua has failed to exhaust the established processes for the resolution of the conflicts occurring in Central America. In the contention of the United States, the Contadora process, to which Nicaragua is party, is recognized both by the political organs of the United Nations and by the Organization of American States, as the appropriate method for the resolution of the issues of Central America. That process has achieved agreement among the States of the region, including Nicaragua, on aims which go to the very heart of the claims and issues raised by the Application. The United States repeats its contention (paragraph 89, above) that the Contadora process is a "regional arrangement" within the meaning of Article 52, paragraph 2, of the Charter, and contends that under that Article, Nicaragua is obliged to make every effort to achieve a solution to the security problems of Central America through the Contadora process. The exhaustion of such regional processes is laid down in the Charter as a precondition to the reference of a dispute to the Security Council only, in view of its primary responsibility in this domain, but such a limitation must a fortiori apply with even greater force with respect to the Court, which has no specific responsibility under the Charter for dealing with such matters. Nicaragua is, it is claimed, under a similar obligation under Articles 20 and 21 of the Charter of the Organization of American States. Furthermore, Nicaragua is asking the Court to adjudicate only certain of the issues involved in the Contadora process, and this would have the inevitable effect of rendering those issues largely immune to further adjustment in the course of the negotiations, thus disrupting the balance of the negotiating process. The Nicaraguan Application is incompatible with the Contadora process and, given the commitment of both Parties to that process, the international endorsement of it, and its comprehensive, integrated nature, the Court should, it is contended, refrain from adjudicating the merits of the Nicaraguan allegations and hold the Application to be inadmissible.

103. Nicaragua points out that the United States is not taking part in the Contadora process, and cannot shelter behind negotiations between third States in a forum in which it is not participating. The support given by the international community to the Contadora process does not constitute an obstacle to the exercise by the Court of its jurisdiction; and the United Nations Charter and the Charter of the Organization of American States do not require the exhaustion of prior regional negotiations. In reply to this objection of the United States as well as to the third ground of inadmissibility (paragraphs 91 et seq., above), Nicaragua emphasizes the parallel competence of the political organs of the United Nations. The Court may pronounce on a dispute which is examined by other political organs of the United Nations, for it exercises different functions.

104. This issue also was raised at the stage of the request by Nicaragua for provisional measures, when the Court noted that

"The United States notes that the allegations of the Government of Nicaragua comprise but one facet of a complex of interrelated political, social, economic and security matters that confront the Central American region. Those matters are the subject of a regional diplomatic effort, known as the 'Contadora Process', which has been endorsed by the Organization of American States, and in which the Government of Nicaragua participates." (I.C.J. Reports 1984, p. 183, para. 33.)

To this Nicaragua then replied that, while it was

"actively participating in the Contadora Process, and will continue to do so, our legal claims against the United States cannot be resolved, or even addressed, through that Process" (ibid., p. 185, para. 38).

Nicaragua further denied that the present proceedings could prejudice the legitimate rights of any other States or disrupt the Contadora Process, and referred to previous decisions of the Court as establishing the principle that the Court is not required to decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects and that the Court should not decline its essentially judicial task merely because the question before the Court is intertwined with political questions.

105. On this latter point, the Court would recall that in the United States Diplomatic and Consular Staff in Tehran case it stated:

"The Court, at the same time, pointed out that no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important." (I.C.J. Reports 1980, p. 19, para. 36.)

And, a little later, added:

"Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court's functions or jurisdiction be found in the Charter or the Statute of the Court; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and
unwarranted restriction upon the role of the Court in the peaceful solution of international disputes." (I.C.J. Reports 1980, p. 20, para. 37.)

106. With regard to the contention of the United States of America that the matter raised in the Nicaraguan Application was part of the Contadora Process, the Court considers that even the existence of active negotiations in which both parties might be involved should not prevent both the Security Council and the Court from exercising their separate functions under the Charter and the Statute of the Court. It may further be recalled that in the Aegean Sea Continental Shelf case the Court said:

"The Turkish Government's attitude might thus be interpreted as suggesting that the Court ought not to proceed with the case while the parties continue to negotiate and that the existence of active negotiations in progress constitutes an impediment to the Court's exercise of jurisdiction in the present case. The Court is unable to share this view. Negotiation and judicial settlement are enumerated together in Article 33 of the Charter of the United Nations as means for the peaceful settlement of disputes. The jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement have been pursued pari passu. Several cases, the most recent being that concerning the Trial of Pakistani Prisoners of War (I.C.J. Reports 1973, p. 347), show that judicial proceedings may be discontinued when such negotiations result in the settlement of the dispute. Consequently, the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function." (I.C.J. Reports 1978, p. 12, para. 29.)

107. The Court does not consider that the Contadora process, whatever its merits, can properly be regarded as a "regional arrangement" for the purposes of Chapter VIII of the Charter of the United Nations. Furthermore, it is also important always to bear in mind that all regional, bilateral, and even multilateral, arrangements that the Parties to this case may have made, touching on the issue of settlement of disputes or the jurisdiction of the International Court of Justice, must be made always subject to the provisions of Article 103 of the Charter which reads as follows:

"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

108. In the light of the foregoing, the Court is unable to accept either that there is any requirement of prior exhaustion of regional negotiating processes as a precondition to seising the Court; or that the existence of the Contadora process constitutes in this case an obstacle to the examination by the Court of the Nicaraguan Application and judicial determinations in due course of the submissions of the Parties in the case. The Court is therefore unable to declare the Application inadmissible, as requested by the United States, on any of the grounds it has advanced as requiring such a finding.

* * *

109. The Court thus has found that Nicaragua, as authorized by the second paragraph of Article 36 of the Statute of the Permanent Court of International Justice, made, on 24 September 1929, following its signature of the Protocol to which the Statute was adjoined, an unconditional Declaration recognizing the compulsory jurisdiction of the Permanent Court, in particular without conditions as to ratification and without limit of time, though it has not been established that the instrument of ratification of that Protocol ever reached the Secretariat of the League. Nevertheless, the Court has not been convinced by the arguments addressed to it that the absence of such formality excluded the operation of Article 36, paragraph 5, of the Statute of the present Court, and prevented the transfer to the present Court of the Declaration as a result of the consent thereto given by Nicaragua which, having been represented at the San Francisco Conference, signed and ratified the Charter and thereby accepted the Statute in which Article 36, paragraph 5, appears. It has also found that the constant acquiescence of Nicaragua in affirmations, to be found in United Nations and other publications, of its position as bound by the optional clause constitutes a valid manifestation of its intent to recognize the compulsory jurisdiction of the Court.

110. Consequently, the Court finds that the Nicaraguan Declaration of 24 September 1929 is valid, and that Nicaragua accordingly was, for the purposes of Article 36, paragraph 2, of the Statute of the Court, a "State accepting the same obligation" as the United States of America at the date of filing of the Application, so as to be able to rely on the United States Declaration of 26 August 1946. The Court also finds that despite the United States notification of 6 April 1984, the present Application is not excluded from the scope of the acceptance by the United States of America of the compulsory jurisdiction of the Court. Accordingly the Court finds that the two Declarations do afford a basis for the jurisdiction of the Court.

111. Furthermore, it is quite clear for the Court that, on the basis alone of the Treaty of Friendship, Commerce and Navigation of 1956, Nicaragua and the United States of America are bound to accept the compulsory jurisdiction of this Court over claims presented by the Application of Nicaragua in so far as they imply violations of provisions of this treaty.

* * *
112. In its above-mentioned Order of 10 May 1984, the Court indicated provisional measures “pending its final decision in the proceedings instituted on 9 April 1984 by the Republic of Nicaragua against the United States of America”. It follows that the Order of 10 May 1984, and the provisional measures indicated therein, remain operative until the delivery of the final judgment in the present case.

* * *

113. For these reasons,

THE COURT,

(1) (a) finds, by eleven votes to five, that it has jurisdiction to entertain the Application filed by the Republic of Nicaragua on 9 April 1984, on the basis of Article 36, paragraphs 2 and 5, of the Statute of the Court;

IN FAVOUR: President Elias; Vice-President Sette-Camara; Judges Lachs, Morozov, Nagendra Singh, Ruda, El-Khani, de Lacharrière, Mbaye, Bedjaoui; Judge ad hoc Colliard;

AGAINST: Judges Mosler, Oda, Ago, Schwebel and Sir Robert Jennings.

(b) finds, by fourteen votes to two, that it has jurisdiction to entertain the Application filed by the Republic of Nicaragua on 9 April 1984, in so far as that Application relates to a dispute concerning the interpretation or application of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua signed at Managua on 21 January 1956, on the basis of Article XXIV of that Treaty;

IN FAVOUR: President Elias; Vice-President Sette-Camara; Judges Lachs, Morozov, Nagendra Singh, Mosler, Oda, Ago, El-Khani, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui; Judge ad hoc Colliard;

AGAINST: Judges Ruda and Schwebel.

(c) finds, by fifteen votes to one, that it has jurisdiction to entertain the case;

IN FAVOUR: President Elias; Vice-President Sette-Camara; Judges Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Khani, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui; Judge ad hoc Colliard;

AGAINST: Judge Schwebel.

(2) finds unanimously, that the said Application is admissible.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-sixth day of November, one thousand nine hundred and eighty-four, in three copies, one of which will be placed in the archives of the Court and the others will be transmitted to the Government of Nicaragua and to the Government of the United States of America, respectively.

(Signed) Taslim O. Elias,
President.

(Signed) Santiago Torres Bernárdez,
Registrar.


Judge Schwebel appends a dissenting opinion to the Judgment of the Court.

(Initialled) T.O.E.
(Initialled) S.T.B.
International Court of Justice

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)
Merits, Judgment

I.C.J. Reports 1986
CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA
(NICARAGUA v. UNITED STATES OF AMERICA)

MERITS

JUDGMENT OF 27 JUNE 1986

1986


INTERNATIONAL COURT OF JUSTICE

YEAR 1986

27 June 1986

CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA

(NICARAGUA v. UNITED STATES OF AMERICA)

MERITS

Failure of Respondent to appear — Statute of the Court, Article 53 — Equality of the parties.

Jurisdiction of the Court — Effect of application of multilateral treaty reservation to United States declaration of acceptance of jurisdiction under Statute, Article 36, paragraph 2 — Third State “affected” by decision of the Court on dispute arising under a multilateral treaty — Character of objection to jurisdiction not exclusively preliminary — Rules of Court, Article 79.

Justiciability of the dispute — “Legal dispute” (Statute, Article 36, paragraph 2).


Acts imputable to respondent State — Mining of ports — Attacks on oil installations and other objectives — Overflights — Support of armed bands opposed to Government of applicant State — Encouragement of conduct contrary to principles of humanitarian law — Economic pressure — Circumstances precluding international responsibility — Possible justification of imputed acts — Conduct of Applicant during relevant period.


MILITARY AND PARAMILITARY ACTIVITIES (JUDGMENT)

Principle prohibiting recourse to the threat or use of force in international relations — Inherent right of self-defence — Conditions for exercise — Individual and collective self-defence — Response to armed attack — Declaration of having been the object of armed attack and request for measures in the exercise of collective self-defence.

Principle of non-intervention — Content of the principle — Opinio juris — State practice — Question of collective counter-measures in response to conduct not amounting to armed attack.

State sovereignty — Territory — Airspace — Internal and territorial waters — Right of access of foreign vessels.


Respect for human rights — Right of States to choose political system, ideology and alliances.

1936 Treaty of Friendship, Commerce and Navigation — Jurisdiction of the Court — Obligation under customary international law not to commit acts calculated to defeat object and purpose of a treaty — Review of relevant treaty provisions.

Claim for reparation.

Peaceful settlement of disputes.

JUDGMENT

Present: President NAGENDRA SINGH; Vice-President de Lacharriére; Judges LACHS, RUDA, ELIAS, ODA, AGO, SETTE-CAMARA, SCHWEBEL, Sir Robert JENNINGS, MBAYE, BEDJAOUI, NI, EVENSEN; Judge ad hoc COLLIARD; Registrar TорRES BERNАRDEZ.

In the case concerning military and paramilitary activities in and against Nicaragua,

between

the Republic of Nicaragua,

represented by

H.E. Mr. Carlos Argüello Gómez, Ambassador,
as Agent and Counsel,

Mr. Ian Brownlie, Q.C., F.B.A., Chichele Professor of Public International Law in the University of Oxford; Fellow of All Souls College, Oxford,

Hon. Abram Chayes, Felix Frankfurter Professor of Law, Harvard Law School; Fellow, American Academy of Arts and Sciences,

Mr. Alain Pellet, Professor at the University of Paris-Nord and the Institut d'études politiques de Paris,
Mr. Paul S. Reichler, Reichler and Appelbaum, Washington, D.C.; Member of the Bar of the United States Supreme Court; Member of the Bar of the District of Columbia, as Counsel and Advocates,

Mr. Augusto Zamora Rodriguez, Legal Adviser to the Foreign Ministry of the Republic of Nicaragua,

Miss Judith C. Appelbaum, Reichler and Appelbaum, Washington, D.C.; Member of the Bar of the District of Columbia and the State of California,

Mr. David Wippman, Reichler and Appelbaum, Washington, D.C., as Counsel,

and

the United States of America,

THE COURT,

composed as above,

delivers the following Judgment:

1. On 9 April 1984 the Ambassador of the Republic of Nicaragua to the Netherlands filed in the Registry of the Court an application instituting proceedings against the United States of America in respect of a dispute concerning responsibility for military and paramilitary activities in and against Nicaragua. In order to found the jurisdiction of the Court the Application relied on declarations made by the Parties accepting the compulsory jurisdiction of the Court under Article 36 of the Statute.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was at once communicated to the Government of the United States of America. In accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. At the same time as the Application was filed, the Republic of Nicaragua also filed a request for the indication of provisional measures under Article 41 of the Statute. By an Order dated 10 May 1984, the Court rejected a request made by the United States for removal of the case from the list, indicated, pending its final decision in the proceedings, certain provisional measures, and decided that, until the Court delivers its final judgment in the case, it would keep the matters covered by the Order continuously under review.

4. By the said Order of 10 May 1984, the Court further decided that the written proceedings in the case should first be addressed to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application. By an Order dated 14 May 1984, the President of the Court fixed 30 June 1984 as time-limit for the filing of a Memorial by the Republic of Nicaragua and 17 August 1984 as time-limit for the filing of a Counter-Memorial by the United States of America on the questions of jurisdiction and admissibility and these pleadings were duly filed within the time-limits fixed.

5. In its Memorial on jurisdiction and admissibility, the Republic of Nicaragua contended that, in addition to the basis of jurisdiction relied on in the Application, a Treaty of Friendship, Commerce and Navigation signed by the Parties in 1956 provides an independent basis for jurisdiction under Article 36, paragraph 1, of the Statute of the Court.

6. Since the Court did not include upon the bench a judge of Nicaraguan nationality, Nicaragua, by a letter dated 3 August 1984, exercised its right under Article 31, paragraph 2, of the Statute of the Court to choose a judge ad hoc to sit in the case. The person so designated was Professor Claude-Albert Colliard.

7. On 15 August 1984, two days before the closure of the written proceedings on the questions of jurisdiction and admissibility, the Republic of El Salvador filed a Declaration of Intervention in the case under Article 63 of the Statute. Having been supplied with the written observations of the Parties on the Declaration, pursuant to Article 83 of the Rules of Court, the Court, by an Order dated 4 October 1984, decided not to hold a hearing on the Declaration of Intervention, and decided that that Declaration was inadmissible inasmuch as it related to the phase of the proceedings then current.

8. On 8-10 October and 15-18 October 1984 the Court held public hearings at which it heard the argument of the Parties on the questions of the jurisdiction of the Court to entertain the dispute and the admissibility of the Application.

9. By a Judgment dated 26 November 1984, the Court found that it had jurisdiction to entertain the Application on the basis of Article 36, paragraphs 2 and 5, of the Statute of the Court; that it had jurisdiction to entertain the Application in so far as it relates to a dispute concerning the interpretation or application of the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua of 21 January 1956, on the basis of Article XXIV of that Treaty; that it had jurisdiction to entertain the case; and that the Application was admissible.

10. By a letter dated 18 January 1985 the Agent of the United States referred to the Court's Judgment of 26 November 1984 and informed the Court as follows:

"the United States is constrained to conclude that the judgment of the Court was clearly and manifestly erroneous as to both fact and law. The United States remains firmly of the view, for the reasons given in its written and oral pleadings in the case, that the Court is without jurisdiction over the dispute between the United States and Nicaragua concerning the question of military and paramilitary activities in and against Nicaragua, and that the Nicaraguan application of 9 April 1984 is inadmissible. Accordingly, it is my duty to inform you that the United States intends not to participate in any further proceedings in connection with this case, and reserves its rights in respect of any decision by the Court regarding Nicaragua's claims."

11. By an Order dated 22 January 1985 the President of the Court, after referring to the letter from the United States Agent, fixed 30 April 1985 as time-limit for a Memorial of Nicaragua and 31 May 1985 as time-limit for a Counter-Memorial of the United States of America on the merits of the dispute. The Memorial of Nicaragua was filed within the time-limit so fixed; no pleading was filed by the United States of America, nor did it make any request for extension of the time-limit. In its Memorial, communicated to the United States pursuant to Article 43 of the Statute of the Court, Nicaragua invoked Article 53 of the Statute and called upon the Court to decide the case despite the failure of the Respondent to appear and defend.
12. On 10 September 1985, immediately prior to the opening of the oral proceedings, the Agent of Nicaragua submitted to the Court a number of documents referred to as "Supplemental Annexes" to the Memorial of Nicaragua. In application of Article 56 of the Rules of Court, these documents were treated as "new documents" and copies were transmitted to the United States of America, which did not lodge any objection to their production.

13. On 12-13 and 16-20 September 1985 the Court held public hearings at which it was addressed by the following representatives of Nicaragua: H.E. Mr. Carlos Argüello Gómez, Hon. Abram Chayes, Mr. Paul S. Reichler, Mr. Ian Brownlie, and Mr. Alain Pellet. The United States was not represented at the hearing. The following witnesses were called by Nicaragua and gave evidence: Commander Luis Carrión, Vice-Minister of the Interior of Nicaragua (examined by Mr. Brownlie); Dr. David MacMichael, a former officer of the United States Central Intelligence Agency (CIA) (examined by Mr. Chayes); Professor Michael John Glennon (examined by Mr. Reichler); Father Jean Loison (examined by Mr. Pellet); Mr. William Huper, Minister of Finance of Nicaragua (examined by Mr. Argüello Gómez). Questions were put by Members of the Court to the witnesses, as well as to the Agent and counsel of Nicaragua, and replies were given either orally at the hearing or subsequently in writing. On 14 October 1985 the Court requested Nicaragua to make available certain further information and documents, and one Member of the Court put a question to Nicaragua. The verbatim records of the hearings and the information and documents supplied in response to these requests were transmitted by the Registrar to the United States of America.

14. Pursuant to Article 53, paragraph 2, of the Rules of Court, the pleadings and annexed documents were made accessible to the public by the Court as from the date of opening of the oral proceedings.

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

in the Application:

"Nicaragua, reserving the right to supplement or to amend this Application and subject to the presentation to the Court of the relevant evidence and legal arguments, requests the Court to adjudge and declare as follows:

(a) That the United States, in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua, has violated and is violating its express charter and treaty obligations to Nicaragua, and in particular, its charter and treaty obligations under:
   – Article 2 (4) of the United Nations Charter;
   – Articles 18 and 20 of the Charter of the Organization of American States;
   – Article 8 of the Convention on Rights and Duties of States;
   – Article I, Third, of the Convention concerning the Duties and Rights of States in the Event of Civil Strife.

(b) That the United States, in breach of its obligation under general and customary international law, has violated and is violating the sovereignty of Nicaragua by:

   – armed attacks against Nicaragua by air, land and sea;
   – incursions into Nicaraguan territorial waters;
   – aerial trespass into Nicaraguan airspace;
   – efforts by direct and indirect means to coerce and intimidate the Government of Nicaragua.

(c) That the United States, in breach of its obligation under general and customary international law, has used and is using force and the threat of force against Nicaragua.

(d) That the United States, in breach of its obligation under general and customary international law, has intervened and is intervening in the internal affairs of Nicaragua.

(e) That the United States, in breach of its obligation under general and customary international law, has infringed and is infringing the freedom of the high seas and interrupting peaceful maritime commerce.

(f) That the United States, in breach of its obligation under general and customary international law, has killed, wounded and kidnapped and is killing, wounding and kidnapping citizens of Nicaragua.

(g) That, in view of its breaches of the foregoing legal obligations, the United States is under a particular duty to cease and desist immediately: from all use of force — whether direct or indirect, overt or covert — against Nicaragua, and from all threats of force against Nicaragua;

   from all violations of the sovereignty, territorial integrity or political independence of Nicaragua, including all intervention, direct or indirect, in the internal affairs of Nicaragua;

   from all support of any kind — including the provision of training, arms, ammunition, finances, supplies, assistance, direction or any other form of support — to any nation, group, organization, movement or individual engaged or planning to engage in military or paramilitary actions in or against Nicaragua;

   from all efforts to restrict, block or endanger access to or from Nicaraguan ports;

   from all killings, woundings and kidnappings of Nicaraguan citizens.

(h) That the United States has an obligation to pay Nicaragua, in its own right and as parens patriae for the citizens of Nicaragua, reparations for damages to person, property and the Nicaraguan economy caused by the foregoing violations of international law in a sum to be determined by the Court. Nicaragua reserves the right to introduce to the Court a precise evaluation of the damages caused by the United States";"

in the Memorial on the merits:

"The Republic of Nicaragua respectfully requests the Court to grant the following relief:

First: the Court is requested to adjudge and declare that the United
States has violated the obligations of international law indicated in this Memorial, and that in particular respects the United States is in continuing violation of those obligations.

Second: the Court is requested to state in clear terms the obligation which the United States bears to bring to an end the aforesaid breaches of international law.

Third: the Court is requested to adjudge and declare that, in consequence of the violations of international law indicated in this Memorial, compensation is due to Nicaragua, both on its own behalf and in respect of wrongs inflicted upon its nationals; and the Court is requested further to receive evidence and to determine, in a subsequent phase of the present proceedings, the quantum of damages to be assessed as the compensation due to the Republic of Nicaragua.

Fourth: without prejudice to the foregoing request, the Court is requested to award to the Republic of Nicaragua the sum of 370,200,000 United States dollars, which sum constitutes the minimum valuation of the direct damages, with the exception of damages for killing nationals of Nicaragua, resulting from the violations of international law indicated in the substance of this Memorial.

With reference to the fourth request, the Republic of Nicaragua reserves the right to present evidence and argument, with the purpose of elaborating the minimum (and in that sense provisional) valuation of direct damages and, further, with the purpose of claiming compensation for the killing of nationals of Nicaragua and consequential loss in accordance with the principles of international law in respect of the violations of international law generally, in a subsequent phase of the present proceedings in case the Court accedes to the third request of the Republic of Nicaragua."

16. At the conclusion of the last statement made on behalf of Nicaragua at the hearing, the final submissions of Nicaragua were presented, which submissions were identical to those contained in the Memorial on the merits and set out above.

17. No pleadings on the merits having been filed by the United States of America, which was also not represented at the oral proceedings of September 1985, no submissions on the merits were presented on its behalf.

* * * * *

18. The dispute before the Court between Nicaragua and the United States concerns events in Nicaragua subsequent to the fall of the Government of President Anastasio Somoza Debayle in Nicaragua in July 1979, and activities of the Government of the United States in relation to Nicaragua since that time. Following the departure of President Somoza, a Junta of National Reconstruction and an 18-member government was installed by the body which had led the armed opposition to President Somoza, the Frente Sandinista de Liberación Nacional (FSLN). That body had initially an extensive share in the new government, described as a “democratic coalition”, and as a result of later resignations and reshuffles, became almost its sole component. Certain opponents of the new Government, primarily supporters of the former Somoza Government and in particular ex-members of the National Guard, formed themselves into irregular military forces, and commenced a policy of armed opposition, though initially on a limited scale.

19. The attitude of the United States Government to the “democratic coalition government” was at first favourable; and a programme of economic aid to Nicaragua was adopted. However by 1981 this attitude had changed. United States aid to Nicaragua was suspended in January 1981 and terminated in April 1981. According to the United States, the reason for this change of attitude was reports of involvement of the Government of Nicaragua in logistical support, including provision of arms, for guerrillas in El Salvador. There was however no interruption in diplomatic relations, which have continued to be maintained up to the present time. In September 1981, according to testimony called by Nicaragua, it was decided to plan and undertake activities directed against Nicaragua.

20. The armed opposition to the new Government in Nicaragua, which originally comprised various movements, subsequently became organized into two main groups: the Fuerza Democrática Nicaragüense (FDN) and the Alianza Revolucionaria Democrática (ARD). The first of these grew from 1981 onwards into a trained fighting force, operating along the borders with Honduras; the second, formed in 1982, operated along the borders with Costa Rica. The precise extent to which, and manner in which, the United States Government contributed to bringing about these developments will be studied more closely later in the present Judgment. However, after an initial period in which the “covert” operations of United States personnel and persons in their pay were kept from becoming public knowledge, it was made clear, not only in the United States press, but also in Congress and in official statements by the President and high United States officials, that the United States Government had been giving support to the contras, a term employed to describe those fighting against the present Nicaraguan Government. In 1983 budgetary legislation enacted by the United States Congress made specific provision for funds to be used by United States intelligence agencies for supporting “directly or indirectly, military or paramilitary operations in Nicaragua”. According to Nicaragua, the contras have caused it considerable material damage and widespread loss of life, and have also committed such acts as killing of prisoners, indiscriminate killing of civilians, torture, rape and kidnapping. It is contended by Nicaragua that the United States Government is effectively in control of the contras, that it devised their strategy and directed their tactics, and that the purpose of that Government was, from the beginning, to overthrow the Government of Nicaragua.

21. Nicaragua claims furthermore that certain military or paramilitary operations against it were carried out, not by the contras, who at the time claimed responsibility, but by persons in the pay of the United States
Government, and under the direct command of United States personnel, who also participated to some extent in the operations. These operations will also be more closely examined below in order to determine their legal significance and the responsibility for them; they include the mining of certain Nicaraguan ports in early 1984, and attacks on ports, oil installations, a naval base, etc. Nicaragua has also complained of overflights of its territory by United States aircraft, not only for purposes of intelligence-gathering and supply to the contras in the field, but also in order to intimidate the population.

22. In the economic field, Nicaragua claims that the United States has withdrawn its own aid to Nicaragua, drastically reduced the quota for imports of sugar from Nicaragua to the United States, and imposed a trade embargo; it has also used its influence in the Inter-American Development Bank and the International Bank for Reconstruction and Development to block the provision of loans to Nicaragua.

23. As a matter of law, Nicaragua claims, inter alia, that the United States has acted in violation of Article 2, paragraph 4, of the United Nations Charter, and of a customary international law obligation to refrain from the threat or use of force; that its actions amount to intervention in the internal affairs of Nicaragua, in breach of the Charter of the Organization of American States and of rules of customary international law forbidding intervention; and that the United States has acted in violation of the sovereignty of Nicaragua, and in violation of a number of other obligations established in general customary international law and in the inter-American system. The actions of the United States are also claimed by Nicaragua to be such as to defeat the object and purpose of a Treaty of Friendship, Commerce and Navigation concluded between the Parties in 1956, and to be in breach of provisions of that Treaty.

24. As already noted, the United States has not filed any pleading on the merits of the case, and was not represented at the hearings devoted thereto. It did however make clear in its Counter-Memorial on the questions of jurisdiction and admissibility that “by providing, upon request, proportionate and appropriate assistance to third States not before the Court” it claims to be acting in reliance on the inherent right of self-defense “guaranteed . . . by Article 51 of the Charter” of the United Nations, that is to say the right of collective self-defence.

25. Various elements of the present dispute have been brought before the United Nations Security Council by Nicaragua, in April 1984 (as the Court had occasion to note in its Order of 10 May 1984, and in its Judgment on jurisdiction and admissibility of 26 November 1984, I.C.J. Reports 1984, p. 432, para. 91), and on a number of other occasions. The subject-matter of the dispute also forms part of wider issues affecting Central America at present being dealt with on a regional basis in the context of what is known as the “Contadora Process” (I.C.J. Reports 1984, pp. 183-185, paras. 34-36; pp. 438-441, paras. 102-108).

26. The position taken up by the Government of the United States of America in the present proceedings, since the delivery of the Court’s Judgment of 26 November 1984, as defined in the letter from the United States Agent dated 18 January 1985, brings into operation Article 53 of the Statute of the Court, which provides that “Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim”. Nicaragua, has, in its Memorial and oral argument, invoked Article 53 and asked for a decision in favour of its claim. A special feature of the present case is that the United States only ceased to take part in the proceedings after a Judgment had been given adverse to its contentions on jurisdiction and admissibility. Furthermore, it stated when doing so “that the judgment of the Court was clearly and manifestly erroneous as to both fact and law”, that it “remains firmly of the view . . . that the Court is without jurisdiction to entertain the dispute” and that the United States “reserves its rights in respect of any decision by the Court regarding Nicaragua’s claims”.

27. When a State named as party to proceedings before the Court decides not to appear in the proceedings, or not to defend its case, the Court usually expresses regret, because such a decision obviously has a negative impact on the sound administration of justice (cf. Fisheries Jurisdiction, I.C.J. Reports 1973, p. 7, para. 12; p. 54, para. 13; I.C.J. Reports 1974, p. 9, para. 17; p. 181, para. 18; Nuclear Tests, I.C.J. Reports 1974, p. 257, para. 15; p. 461, para. 15; Aegean Sea Continental Shelf, I.C.J. Reports 1978, p. 7, para. 15; United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, p. 18, para. 33). In the present case, the Court regrets even more deeply the decision of the respondent State not to participate in the present phase of the proceedings, because this decision was made after the United States had participated fully in the proceedings on the request for provisional measures, and the proceedings on jurisdiction and admissibility. Having taken part in the proceedings to argue that the Court lacked jurisdiction, the United States thereby acknowledged that the Court had the power to make a finding on its own jurisdiction to rule upon the merits. It is not possible to argue that the Court had jurisdiction only to declare that it lacked jurisdiction. In the normal course of events, for a party to appear before a court entails acceptance of the possibility of the court’s finding against that party. Furthermore the Court is bound to emphasize that the non-participation of a party in the proceedings at any stage of the case cannot, in any circumstances, affect the validity of its judgment. Nor does such validity depend upon the acceptance of that judgment by one party. The fact that a State purports to “reserve its rights”
in respect of a future decision of the Court, after the Court has determined that it has jurisdiction, is clearly of no effect on the validity of that decision. Under Article 36, paragraph 6, of its Statute, the Court has jurisdiction to determine any dispute as to its own jurisdiction, and its judgment on that matter, as on the merits, is final and binding on the parties under Articles 59 and 60 of the Statute (cf. Corfu Channel, Judgment of 15 December 1949, I.C.J. Reports 1949, p. 248).

28. When Article 53 of the Statute applies, the Court is bound to “satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim” of the party appearing is well founded in fact and law. In the present case, the Court has had the benefit of both Parties pleading before it at the earlier stages of the procedure, those concerning the request for the indication of provisional measures and to the questions of jurisdiction and admissibility. By its Judgment of 26 November 1984, the Court found, inter alia, that it had jurisdiction to entertain the case; it must however take steps to “satisfy itself” that the claims of the Applicant are “well founded in fact and law”. The question of the application of Article 53 has been dealt with by the Court in a number of previous cases, referred to above, and the Court does not therefore find it necessary to recapitulate the content of these decisions. The reasoning adopted to dispose of the basic problems arising was essentially the same, although the words used may have differed slightly from case to case. Certain points of principle may however be restated here. A State which decides not to appear must accept the consequences of its decision, the first of which is that the case will continue without its participation; the State which has chosen not to appear remains a party to the case, and is bound by the eventual judgment in accordance with Article 59 of the Statute. There is however no question of a judgment automatically in favour of the party appearing, since the Court is required, as mentioned above, to “satisfy itself” that that party’s claim is well founded in fact and law.

29. The use of the term “satisfy itself” in the English text of the Statute (and in the French text the term “s’assurer”) implies that the Court must attain the same degree of certainty as in any other case that the claim of the party appearing is sound in law, and, so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence. For the purpose of deciding whether the claim is well founded in law, the principle jura novit curia signifies that the Court is not solely dependent on the argument of the parties before it with respect to the applicable law (cf. “Lotus”, P.C.I.J., Series A, No. 10, p. 31), so that the absence of one party has less impact. As the Court observed in the Fisheries Jurisdiction cases:

"The Court . . . , as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court." (I.C.J. Reports 1974, p. 9, para. 17; p. 181, para. 18.)

Nevertheless the views of the parties to a case as to the law applicable to their dispute are very material, particularly, as will be explained below (paragraphs 184 and 185), when those views are concordant. In the present case, the burden laid upon the Court is therefore somewhat lightened by the fact that the United States participated in the earlier phases of the case, when it submitted certain arguments on the law which have a bearing also on the merits.

30. As to the facts of the case, in principle the Court is not bound to confine its consideration to the material formally submitted to it by the parties (cf. Brazilian Loans, P.C.I.J., Series A, No. 20/21, p. 124; Nuclear Tests, I.C.J. Reports 1974, pp. 263-264, paras. 31, 32). Nevertheless, the Court cannot by its own enquiries entirely make up for the absence of one of the Parties; that absence, in a case of this kind involving extensive questions of fact, must necessarily limit the extent to which the Court is informed of the facts. It would furthermore be an over-simplification to conclude that the only detrimental consequence of the absence of a party is the lack of opportunity to submit argument and evidence in support of its own case. Proceedings before the Court call for vigilance by all. The absent party also forfeits the opportunity to counter the factual allegations of its opponent. It is of course for the party appearing to prove the allegations it makes, yet as the Court has held:

"While Article 53 thus obliges the Court to consider the submissions of the Party which appears, it does not compel the Court to examine their accuracy in all their details; for this might in certain unopposed cases prove impossible in practice." (Corfu Channel, I.C.J. Reports 1949, p. 248.)

31. While these are the guiding principles, the experience of previous cases in which one party has decided not to appear shows that something more is involved. Though formally absent from the proceedings, the party in question frequently submits to the Court letters and documents, in ways and by means not contemplated by the Rules. The Court has thus to strike a balance. On the one hand, it is valuable for the Court to know the views of both parties in whatever form those views may have been expressed. Further, as the Court noted in 1974, where one party is not appearing “it is especially incumbent upon the Court to satisfy itself that it is in possession of all the available facts” (Nuclear Tests, I.C.J. Reports 1974, p. 263, para. 31; p. 468, para. 32). On the other hand, the Court has to emphasize
that the equality of the parties to the dispute must remain the basic principle for the Court. The intention of Article 53 was that in a case of non-appearance neither party should be placed at a disadvantage; therefore the party which declines to appear cannot be permitted to profit from its absence, since this would amount to placing the party appearing at a disadvantage. The provisions of the Statute and Rules of Court concerning the presentation of pleadings and evidence are designed to secure a proper administration of justice, and a fair and equal opportunity for each party to comment on its opponent's contentions. The treatment to be given by the Court to communications or material emanating from the absent party must be determined by the weight to be given to these different considerations, and is not susceptible of rigid definition in the form of a precise general rule. The vigilance which the Court can exercise when aided by the presence of both parties to the proceedings has a counterpart in the special care it has to devote to the proper administration of justice in a case in which only one party is present.

* * *

32. Before proceeding further, the Court considers it appropriate to deal with a preliminary question, relating to what may be referred to as the justiciable or the dispute submitted to it by Nicaragua. In its Counter-Memorial on jurisdiction and admissibility the United States advanced a number of arguments why the claim should be treated as inadmissible: inter alia, again according to the United States, that a claim of unlawful use of armed force is a matter committed by the United Nations Charter and by practice to the exclusive competence of other organs, in particular the Security Council; and that an "ongoing armed conflict" involving the use of armed force contrary to the Charter is one with which a court cannot deal effectively without overstepping proper judicial bounds. These arguments were examined by the Court in its Judgment of 26 November 1984, and rejected. No further arguments of this nature have been submitted to the Court by the United States, which has not participated in the subsequent proceedings. However the examination of the merits which the Court has now carried out shows the existence of circumstances as a result of which, it might be argued, the dispute, or that part of it which relates to the questions of use of force and collective self-defence, would be non-justiciable.

33. In the first place, it has been suggested that the present dispute should be declared non-justiciable, because it does not fall into the category of "legal disputes" within the meaning of Article 36, paragraph 2, of the Statute. It is true that the jurisdiction of the Court under that provision is limited to "legal disputes" concerning any of the matters enumerated in the text. The question whether a given dispute between two States is or is not a "legal dispute" for the purposes of this provision may itself be a matter in dispute between those two States; and if so, that dispute is to be settled by the decision of the Court in accordance with paragraph 6 of Article 36. In the present case, however, this particular point does not appear to be in dispute between the Parties. The United States, during the proceedings devoted to questions of jurisdiction and admissibility, advanced a number of grounds why the Court should find that it had no jurisdiction, or that the claim was not admissible. It relied inter alia on proviso (c) to its own declaration of acceptance of jurisdiction under Article 36, paragraph 2, without ever advancing the more radical argument that the whole declaration was inapplicable because the dispute brought before the Court by Nicaragua was not a "legal dispute" within the meaning of that paragraph. As a matter of admissibility, the United States objected to the application of Article 36, paragraph 2, not because the dispute was not a "legal dispute", but because of the express allocation of such matters as the subject of Nicaragua's claims to the political organs under the United Nations Charter, an argument rejected by the Court in its Judgment of 26 November 1984 (I.C.J. Reports 1984, pp. 431-436). Similarly, while the United States contended that the nature of the judicial function precludes its application to the substance of Nicaragua's allegations in this case — an argument which the Court was again unable to uphold (ibid., pp. 436-438) — it was carefully to emphasize that this did not mean that it was arguing that international law was not relevant or controlling in a dispute of this kind. In short, the Court can see no indication whatsoever that, even in the view of the United States, the present dispute falls outside the category of "legal disputes" to which Article 36, paragraph 2, of the Statute applies. It must therefore proceed to examine the specific claims of Nicaragua in the light of the international law applicable.

34. There can be no doubt that the issues of the use of force and collective self-defence raised in the present proceedings are issues which are regulated both by customary international law and by treaties, in particular the United Nations Charter. Yet it is also suggested that, for another reason, the questions of this kind which arise in the present case are not justiciable, that they fall outside the limits of the kind of questions a court can deal with. It is suggested that the plea of collective self-defence which has been advanced by the United States as a justification for its actions with regard to Nicaragua requires the Court to determine whether the United States was legally justified in adjudging itself under a necessity, because its own security was in jeopardy, to use force in response to foreign intervention in El Salvador. Such a determination, it is said, involves a pronouncement on political and military matters, not a question of a kind that a court can usefully attempt to answer.

35. As will be further explained below, in the circumstances of the dispute now before the Court, what is in issue is the purported exercise by the United States of a right of collective self-defence in response to an armed attack on another State. The possible unlawfulness of a response to the imminent threat of an armed attack which has not yet taken place has not
been raised. The Court has therefore to determine first whether such attack has occurred, and if so whether the measures allegedly taken in self-defence were a legally appropriate reaction as a matter of collective self-defence. To resolve the first of these questions, the Court does not have to determine whether the United States, or the State which may have been under attack, was faced with a necessity of reacting. Nor does its examination, if it determines that an armed attack did occur, of issues relating to the collective character of the self-defence and the kind of reaction, necessarily involve it in any evaluation of military considerations. Accordingly the Court can at this stage confine itself to a finding that, in the circumstances of the present case, the issues raised of collective self-defence are issues which it has competence, and is equipped, to determine.

* * *

36. By its Judgment of 26 November 1984, the Court found that it had jurisdiction to entertain the present case, first on the basis of the United States declaration of acceptance of jurisdiction, under the optional clause of Article 36, paragraph 2, of the Statute, deposited on 26 August 1946 and secondly on the basis of Article XXIV of a Treaty of Friendship, Commerce and Navigation between the Parties, signed at Managua on 21 January 1956. The Court notes that since the institution of the present proceedings, both bases of jurisdiction have been terminated. On 1 May 1985 the United States gave written notice to the Government of Nicaragua to terminate the Treaty, in accordance with Article XXV, paragraph 3, thereof; that notice expired, and thus terminated the treaty relationship, on 1 May 1986. On 7 October 1985 the United States deposited with the Secretary-General of the United Nations a notice terminating the declaration under the optional clause, in accordance with the terms of that declaration, and that notice expired on 7 April 1986. These circumstances do not however affect the jurisdiction of the Court under Article 36, paragraph 2, of the Statute, or its jurisdiction under Article XXIV, paragraph 2, of the Treaty to determine "any dispute between the Parties as to the interpretation or application" of the Treaty. As the Court pointed out in the Nortebonh case:

"When an Application is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court . . . the filing of the Application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application. Once this condition has been satisfied, the Court must deal with the claim; it has jurisdiction to deal with all the aspects, whether they relate to jurisdiction, to admissibility or to the merits. An extrinsic fact such as the subsequent lapse of the Declaration [or, as in the present case also, the Treaty containing a compromissory clause], by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established." (I.C.J. Reports 1953, p. 123.)

* * *

37. In the Judgment of 26 November 1984 the Court however also declared that one objection advanced by the United States, that concerning the exclusion from the United States acceptance of jurisdiction under the optional clause of "disputes arising under a multilateral treaty", raised "a question concerning matters of substance relating to the merits of the case", and concluded:

"That being so, and since the procedural technique formerly available of joinder of preliminary objections to the merits has been done away with since the 1972 revision of the Rules of Court, the Court has no choice but to avail itself of Article 79, paragraph 7, of the present Rules of Court, and declare that the objection based on the multilateral treaty reservation of the United States Declaration of Acceptance does not possess, in the circumstances of the case, an exclusively preliminary character, and that consequently it does not constitute an obstacle for the Court to entertain the proceedings instituted by Nicaragua under the Application of 9 April 1984." (I.C.J. Reports 1984, pp. 425-426, para. 76.)

38. The present case is the first in which the Court has had occasion to exercise the power first provided for in the 1972 Rules of Court to declare that a preliminary objection "does not possess, in the circumstances of the case, an exclusively preliminary character". It may therefore be appropriate to take this opportunity to comment briefly on the rationale of this provision of the Rules, in the light of the problems to which the handling of preliminary objections has given rise. In exercising its rule-making power under Article 30 of the Statute, and generally in approaching the complex issues which may be raised by the determination of appropriate procedures for the settlement of disputes, the Court has kept in view an approach defined by the Permanent Court of International Justice. That Court found that it was at liberty to adopt

"the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law" (Mavrommatis Palestine Concessions, P.C.I.J., Series A, No. 2, p. 16).

39. Under the Rules of Court dating back to 1936 (which on this point reflected still earlier practice), the Court had the power to join an objection to the merits "whenever the interests of the good administration of justice require it" (Panevežys-Saldutiskis Railway, P.C.I.J., Series A/B, No. 75,
p. 56), and in particular where the Court, if it were to decide on the objection, “would run the risk of adjudicating on questions which appertain to the merits of the case or of prejudging their solution” (ibid.). If this power was exercised, there was always a risk, namely that the Court would ultimately decide the case on the preliminary objection, after requiring the parties fully to plead the merits, and this did in fact occur (Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970, p. 3). The result was regarded in some quarters as an unnecessary prolongation of an expensive and time-consuming procedure.

40. Taking into account the wide range of issues which might be presented as preliminary objections, the question which the Court faced was whether to revise the Rules so as to exclude for the future the possibility of joinder to the merits, so that every objection would have to be resolved at the preliminary stage, or to seek a solution which would be more flexible. The solution of considering all preliminary objections immediately and rejecting all possibility of a joinder to the merits had many advocates and presented many advantages. In the Panevezys-Saldutiskis Railway case, the Permanent Court defined a preliminary objection as one

“submitted for the purpose of excluding an examination by the Court of the merits of the case, and being one upon which the Court can give a decision without in any way adjudicating upon the merits” (P.C.I.J., Series A/B, No. 76, p. 22).

If this view is accepted then of course every preliminary objection should be dealt with immediately without touching the merits, or involving parties in argument of the merits of the case. To find out, for instance, whether there is a dispute between the parties or whether the Court has jurisdiction, does not normally require an analysis of the merits of the case. However that does not solve all questions of preliminary objections, which may, as experience has shown, be to some extent bound up with the merits. The final solution adopted in 1972, and maintained in the 1978 Rules concerning preliminary objections is the following: the Court is to give its decision

“by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Court rejects the objection, or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings.” (Art. 79, para. 7.)

41. While the variety of issues raised by preliminary objections cannot possibly be foreseen, practice has shown that there are certain kinds of preliminary objections which can be disposed of by the Court at an early stage without examination of the merits. Above all, it is clear that a question of jurisdiction is one which requires decision at the preliminary stage of the proceedings. The new rule enumerates the objections contemplated as follows:

“Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits . . .” (Art. 79, para. 1.)

It thus presents one clear advantage: that it qualifies certain objections as preliminary, making it quite clear that when they are exclusively of that character they will have to be decided upon immediately, but if they are not, especially when the character of the objections is not exclusively preliminary because they contain both preliminary aspects and other aspects relating to the merits, they will have to be dealt with at the stage of the merits. This approach also tends to discourage the unnecessary prolongation of proceedings at the jurisdictional stage.

* * *

42. The Court must thus now rule upon the consequences of the United States multilateral treaty reservation for the decision which it has to give. It will be recalled that the United States acceptance of jurisdiction deposited on 26 August 1946 contains a proviso excluding from its application:

“disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction”.

The 1984 Judgment included pronouncements on certain aspects of that reservation, but the Court then took the view that it was neither necessary nor possible, at the jurisdictional stage of the proceedings, for it to take a position on all the problems posed by the reservation.

43. It regarded this as not necessary because, in its Application, Nicaragua had not confined its claims to breaches of multilateral treaties but had also invoked a number of principles of “general and customary international law”, as well as the bilateral Treaty of Friendship, Commerce and Navigation of 1956. These principles remained binding as such, although they were also enshrined in treaty law provisions. Consequently, since the case had not been referred to the Court solely on the basis of multilateral treaties, it was not necessary for the Court, in order to consider the merits of Nicaragua’s claim, to decide the scope of the reservation in question: “the claim . . . would not in any event be barred by the multilateral treaty reservation” (I.C.J. Reports 1984, p. 425, para. 73). Moreover, it was not found possible for the reservation to be definitively dealt with at the jurisdictional stage of the proceedings. To make a judgment on the scope of the reservation would have meant giving a definitive interpretation of the term “affected” in that reservation. In its 1984 Judgment, the Court held
that the term “affected” applied not to multilateral treaties, but to the parties to such treaties. The Court added that if those parties wished to protect their interests “in so far as these are not already protected by Article 59 of the Statute”, they “would have the choice of either instituting proceedings or intervening” during the merits phase. But at all events, according to the Court, “the determination of the States ‘affected’ could not be left to the parts but must be made by the Court” (I.C.J. Reports 1984, p. 425, para. 75). This process could however not be carried out at the stage of the proceedings in which the Court then found itself; “it is only when the general lines of the judgment to be given become clear”, the Court said, “that the States ‘affected’ could be identified” (ibid). The Court thus concluded that this was “a question concerning matters of substance relating to the merits of the case” (ibid., para. 76). Since “the question of what States may be ‘affected’ by the decision on the merits is not in itself a jurisdictional problem”, the Court found that it “has no choice but to avail itself of Article 79, paragraph 7, of the present Rules of Court, and declare that the objection based on the multilateral treaty reservation... does not possess, in the circumstances of the case, an exclusively preliminary character” (ibid., para. 76).

Now that the Court has considered the substance of the dispute, it becomes both possible and necessary for it to rule upon the points related to the United States reservation which were not settled in 1984. It is necessary because the Court’s jurisdiction, as it has frequently recalled, is based on the consent of States, expressed in a variety of ways including declarations made under Article 36, paragraph 2, of the Statute. It is the declaration made by the United States under that Article which defines the categories of dispute for which the United States consents to the Court’s jurisdiction. If therefore that declaration, because of a reservation contained in it, excludes from the disputes for which it accepts the Court’s jurisdiction certain disputes arising under multilateral treaties, the Court must take that fact into account. The final decision on this point, which it was not possible to take at the jurisdictional stage, can and must be taken by the Court now when coming to its decision on the merits. If this were not so, the Court would not have decided whether or not the objection was well-founded, either at the jurisdictional stage, because it did not possess an exclusively preliminary character, or at the merits stage, because it did to some degree have such a character. It is now possible to resolve the question of the application of the reservation because, in the light of the Court’s full examination of the facts of the case and the law, the implications of the argument of collective self-defence raised by the United States have become clear.

The United States has not in the present phase submitted to the Court any arguments whatever, either on the merits proper or on the question – not exclusively preliminary – of the multilateral treaty reservation. The Court cannot therefore consider that the United States has waived the reservation or no longer ascribes to it the scope which the United States attributed to it when last stating its position on this matter before the Court. This conclusion is the more decisive inasmuch as a respondent’s non-participation requires the Court, as stated for example in the Fisheries Jurisdiction cases, to exercise “particular circumspection and... special care” (I.C.J. Reports 1974, p. 10, para. 17, and p. 181, para. 18).

46. It has also been suggested that the United States may have waived the multilateral treaty reservation by its conduct of its case at the jurisdictional stage, or more generally by asserting collective self-defence in accordance with the United Nations Charter as justification for its activities vis-à-vis Nicaragua. There is no doubt that the United States, during its participation in the proceedings, insisted that the law applicable to the dispute was to be found in multilateral treaties, particularly the United Nations Charter and the Charter of the Organization of American States; indeed, it went so far as to contend that such treaties supervene and subsume customary law on the subject. It is however one thing for a State to advance a contention that the law applicable to a given dispute derives from a specified source; it is quite another for that State to consent to the Court’s having jurisdiction to entertain that dispute, and thus to apply that law to the dispute. The whole purpose of the United States argument as to the applicability of the United Nations and Organization of American...
clai to be exercising a right of collective self-defense, which it regards as a qualification of its unilateral action towards Nicaragua. The Court, in its third decision, confirmed this assertion, which it submitted on 15 August 1984, and that it had asked for the right to exercise the right of collective self-defense. Consequently, in order to rule upon Nicaragua’s complaint before the Court, it would have to determine whether any collective self-defense by Nicaragua, not only in respect of the right of the United States to exercise its rights under a multilateral treaty, to which it is a party, is claimed.

The Court referred to the Organization of American States Charter, which is the only multilateral treaty relevant to the case, in order to rule upon Nicaragua’s complaint before the Court, it would have to determine whether any collective self-defense by Nicaragua, not only in respect of the right of the United States to exercise its rights under a multilateral treaty, to which it is a party, is claimed.

The United States has brought the case to the Court under the provisions of Article 33 of the United Nations Charter, and in accordance with Article 21 of the Organization of American States Charter. The Court, therefore, is bound to rule on the merits of the case, even if the United States has not brought the case to the Court under the provisions of Article 33 of the United Nations Charter, and in accordance with Article 21 of the Organization of American States Charter. The Court, therefore, is bound to rule on the merits of the case, even if the United States has not brought the case to the Court under the provisions of Article 33 of the United Nations Charter, and in accordance with Article 21 of the Organization of American States Charter.

The Court will first refer to the United States’ use of force alleged to be contrary to Article 21 of the Organization of American States Charter. The United States’ use of force alleged to be contrary to Article 21 of the Organization of American States Charter.

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exercise of the right of collective self-defence, it could not be argued that they could nevertheless constitute a violation of Article 21 of the Organization of American States Charter. It therefore follows that the situation of El Salvador with regard to the assertion by the United States of the right of collective self-defence is the same under the Organization of American States Charter as it is under the United Nations Charter.

51. In its Judgment of 26 November 1984, the Court recalled that Nicaragua’s Application, according to that State, does not cast doubt on El Salvador’s right to receive aid, military or otherwise, from the United States (I.C.J. Reports 1984, p. 430, para. 86). However, this refers to the direct aid provided to the Government of El Salvador on its territory in order to help it combat the insurrection with which it is faced, not to any indirect aid which might be contributed to this combat by certain United States activities in and against Nicaragua. The Court has to consider the consequences of a rejection of the United States’ justification of its actions as the exercise of the right of collective self-defence for the sake of El Salvador, in accordance with the United Nations Charter. A judgment to that effect would declare contrary to treaty-law the indirect aid which the United States Government considers itself entitled to give the Government of El Salvador in the form of activities in and against Nicaragua. The Court would of course refrain from any finding on whether El Salvador could lawfully exercise the right of individual self-defence; but El Salvador would still be affected by the Court’s decision on the lawfulness of resort by the United States to collective self-defence. If the Court found that no armed attack had occurred, then not only would action by the United States in purported exercise of the right of collective self-defence prove to be unjustified, but also would any action which El Salvador might take or might have taken on the asserted ground of individual self-defence.

52. It could be argued that the Court, if it found that the situation does not permit the exercise by El Salvador of its right of self-defence, would not be “affecting” that right itself but the application of it by El Salvador in the circumstances of the present case. However, it should be recalled that the condition of the application of the multilateral treaty reservation is not that the “right” of a State be affected, but that the State itself be “affected” – a broader criterion. Furthermore whether the relations between Nicaragua and El Salvador can be qualified as relations between an attacker State and a victim State which is exercising its right of self-defence, would appear to be a question in dispute between those two States. But El Salvador has not submitted this dispute to the Court; it therefore has a right to have the Court refrain from ruling upon a dispute which it has not submitted to it. Thus, the decision of the Court in this case would affect this right of El Salvador and consequently this State itself.

53. Nor is it only in the case of a decision of the Court rejecting the United States claim to be acting in self-defence that El Salvador would be affected” by the decision. The multilateral treaty reservation does not require, as a condition for the exclusion of a dispute from the jurisdiction of the Court, that a State party to the relevant treaty be “adversely” or “prejudicially” affected by the decision, even though this is clearly the case primarily in view. In other situations in which the position of a State not before the Court is under consideration (cf. Monetary Gold Removed from Rome in 1943, I.C.J. Reports 1954, p. 32; Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, I.C.J. Reports 1984, p. 20, para. 31) it is clearly impossible to argue that that State may be differently treated if the Court’s decision will not necessarily be adverse to the interests of the absent State, but could be favourable to those interests. The multilateral treaty reservation bars any decision that would “affect” a third State party to the relevant treaty. Here also, it is not necessary to determine whether the decision will “affect” that State unfavourably or otherwise; the condition of the reservation is met if the State will necessarily be “affected”, in one way or the other.

54. There may of course be circumstances in which the Court, having examined the merits of the case, concludes that no third State could be “affected” by the decision: for example, as pointed out in the 1984 Judgment, if the relevant claim is rejected on the facts (I.C.J. Reports 1984, p. 425, para. 75). If the Court were to conclude in the present case, for example, that the evidence was not sufficient for a finding that the United States had used force against Nicaragua, the question of justification on the grounds of self-defence would not arise, and there would be no possibility of El Salvador being “affected” by the decision. In 1984 the Court could not, on the material available to it, exclude the possibility of such a finding being reached after fuller study of the case, and could not therefore conclude at once that El Salvador would necessarily be “affected” by the eventual decision. It was thus this possibility which prevented the objection based on the reservation from having an exclusively preliminary character.

55. As indicated in paragraph 49 above, there remains the claim of Nicaragua that the United States has intervened in the internal and external affairs of Nicaragua in violation of Article 18 of the Organization of American States Charter. That Article provides:

“No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.”

The potential link, recognized by this text, between intervention and the use of armed force, is actual in the present case, where the same activities attributed to the United States are complained of under both counts, and
the response of the United States is the same to each complaint — that it has acted in self-defence. The Court has to consider what would be the impact, for the States identified by the United States as likely to be “affected”, of a decision whereby the Court would decline to rule on the alleged violation of Article 21 of the Organization of American States Charter, concerning the use of force, but passed judgment on the alleged violation of Article 18. The Court will not here enter into the question whether self-defence may justify an intervention involving armed force, so that it has to be treated as not constituting a breach either of the principle of non-use of force or of that of non-intervention. At the same time, it concludes that in the particular circumstances of this case, it is impossible to say that a ruling on the alleged breach by the United States of Article 18 of the Organization of American States Charter would not “affect” El Salvador.

56. The Court therefore finds that El Salvador, a party to the United Nations Charter and to the Charter of the Organization of American States, is a State which would be “affected” by the decision which the Court would have to take on the claims by Nicaragua that the United States has violated Article 2, paragraph 4, of the United Nations Charter and Articles 18, 20 and 21 of the Organization of American States Charter. Accordingly, the Court, which under Article 53 of the Statute has to be “satisfied” that it has jurisdiction to decide each of the claims it is asked to uphold, concludes that the jurisdiction conferred upon it by the United States declaration of acceptance of jurisdiction under Article 36, paragraph 2, of the Statute does not permit the Court to entertain these claims. It should however be recalled that, as will be explained further below, the effect of the reservation in question is confined to barring the applicability of the United Nations Charter and Organization of American States Charter as multilateral treaty law, and has no further impact on the sources of international law which Article 38 of the Statute requires the Court to apply.

* * *

57. One of the Court’s chief difficulties in the present case has been the determination of the facts relevant to the dispute. First of all, there is marked discard between the Parties not only on the interpretation of the facts, but even on the existence or nature of at least some of them. Secondly, the respondent State has not appeared during the present merits phase of the proceedings, thus depriving the Court of the benefit of its complete and fully argued statement regarding the facts. The Court’s task was therefore necessarily more difficult, and it has had to pay particular heed, as said above, to the proper application of Article 53 of its Statute. Thirdly, there is the secrecy in which some of the conduct attributed to one or other of the Parties has been carried on. This makes it more difficult for the Court not only to decide on the imputability of the facts, but also to establish what are the facts. Sometimes there is no question, in the sense that it does not appear to be disputed, that an act was done, but there are conflicting reports, or a lack of evidence, as to who did it. The problem is then not the legal process of imputing the act to a particular State for the purpose of establishing responsibility, but the prior process of tracing material proof of the identity of the perpetrator. The occurrence of the act itself may however have been shrouded in secrecy. In the latter case, the Court has had to endeavour first to establish what actually happened, before entering on the next stage of considering whether the act (if proven) was imputable to the State to which it has been attributed.

58. A further aspect of this case is that the conflict to which it relates has continued and is continuing. It has therefore been necessary for the Court to decide, for the purpose of its definition of the factual situation, what period of time, beginning from the moment of the dispute, should be taken into consideration. The Court holds that general principles as to the judicial process require that the facts on which its Judgment is based should be those occurring up to the close of the oral proceedings on the merits of the case. While the Court is of course very well aware, from reports in the international press, of the developments in Central America since that date, it cannot, as explained below (paragraphs 62 and 63), treat such reports as evidence, nor has it had the benefit of the comments or argument of either of the Parties on such reports. As the Court recalled in the Nuclear Tests cases, where facts, apparently of such a nature as materially to affect its decision, came to its attention after the close of the hearings:

“...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.” (I.C.J. Reports 1974, p. 264, para. 33; p. 468, para. 34.)

Neither Party has requested such action by the Court; and since the reports to which reference has been made do not suggest any profound modification of the situation of which the Court is seized, but rather its intensification in certain respects, the Court has seen no need to reopen the hearings.

* * *

59. The Court is bound by the relevant provisions of its Statute and its Rules relating to the system of evidence, provisions devised to guarantee the sound administration of justice, while respecting the equality of the parties. The presentation of evidence is governed by specific rules relating to, for instance, the observance of time-limits, the communication of
evidence to the other party, the submission of observations on it by that party, and the various forms of challenge by each party of the other’s evidence. The absence of one of the parties restricts this procedure to some extent. The Court is careful, even where both parties appear, to give each of them the same opportunities and chances to produce their evidence; when the situation is complicated by the non-appearance of one of them, then a fortiori the Court regards it as essential to guarantee as perfect equality as possible between the parties. Article 53 of the Statute therefore obliges the Court to employ whatever means and resources may enable it to satisfy itself whether the submissions of the applicant State are well-founded in fact and law, and simultaneously to safeguard the essential principles of the sound administration of justice.

60. The Court should now indicate how these requirements have to be met in this case so that it can properly fulfil its task under that Article of its Statute. In so doing, it is not unaware that its role is not a passive one; and that, within the limits of its Statute and Rules, it has freedom in estimating the value of the various elements of evidence, though it is clear that general principles of judicial procedure necessarily govern the determination of what can be regarded as proved.

61. In this context, the Court has the power, under Article 50 of its Statute, to entrust "any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion", and such a body could be a group of judges selected from among those sitting in the case. In the present case, however, the Court felt it was unlikely that an enquiry of this kind would be practical or desirable, particularly since such a body, if it was properly to perform its task, might have found it necessary to go not only to the applicant State, but also to several other neighbouring countries, and even to the respondent State, which had refused to appear before the Court.

62. At all events, in the present case the Court has before it documentary material of various kinds from various sources. A large number of documents has been supplied in the form of reports in press articles, and some also in the form of extracts from books. Whether these were produced by the applicant State, or by the absent Party before it ceased to appear in the proceedings, the Court has been careful to treat them with great caution; even if they seem to meet high standards of objectivity, the Court regards them not as evidence capable of proving facts, but as material which can nevertheless contribute, in some circumstances, to corroborating the existence of a fact, i.e., as illustrative material additional to other sources of evidence.

63. However, although it is perfectly proper that press information should not be treated in itself as evidence for judicial purposes, public knowledge of a fact may nevertheless be established by means of these sources of information, and the Court can attach a certain amount of weight to such public knowledge. In the case of United States Diplomatic and Consular Staff in Tehran, the Court referred to facts which “are, for the most part, matters of public knowledge which have received extensive coverage in the world press and in radio and television broadcasts from Iran and other countries” (I.C.J. Reports 1980, p. 9, para. 12). On the basis of information, including press and broadcast material, which was “wholly consistent and concordant as to the main facts and circumstances of the case”, the Court was able to declare that it was satisfied that the allegations of fact were well-founded (ibid., p. 10, para. 13). The Court has however to show particular caution in this area. Widespread reports of a fact may prove on closer examination to derive from a single source, and such reports, however numerous, will in such case have no greater value as evidence than the original source. It is with this important reservation that the newspaper reports supplied to the Court should be examined in order to assess the facts of the case, and in particular to ascertain whether such facts were matters of public knowledge.

64. The material before the Court also includes statements by representatives of States, sometimes at the highest political level. Some of these statements were made before official organs of the State or of an international or regional organization, and appear in the official records of those bodies. Others, made during press conferences or interviews, were reported by the local or international press. The Court takes the view that statements of this kind, emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them. They may then be construed as a 'form of admission'.

65. However, it is natural also that the Court should treat such statements with caution, whether the official statement was made by an authority of the Respondent or of the Applicant. Neither Article 53 of the Statute, nor any other ground, could justify a selective approach, which would have undermined the consistency of the Court’s methods and its elementary duty to ensure equality between the Parties. The Court must take account of the manner in which the statements were made public; evidently, it cannot treat them as having the same value irrespective of whether the text is to be found in an official national or international publication, or in a book or newspaper. It must also take note whether the text of the official statement in question appeared in the language used by the author or on the basis of a translation (cf. I.C.J. Reports 1980, p. 10, para. 13). It may also be relevant whether or not such a statement was brought to the Court’s knowledge by official communications filed in conformity with the relevant requirements of the Statute and Rules of Court. Furthermore, the Court has inevitably had sometimes to interpret the statements, to ascertain precisely to what degree they constituted acknowledgments of a fact.

66. At the hearings in this case, the applicant State called five witnesses to give oral evidence, and the evidence of a further witness was offered in
72. The declarations to which the Court considers it may refer are not limited to those made in the pleadings and the oral argument addressed to it in the successive stages of the case, nor are they limited to statements made by the Parties. Clearly the Court is entitled to refer, not only to the Nicaraguan pleadings and oral argument, but to the pleadings and oral argument submitted to it by the United States before it withdrew from participation in the proceedings, and to the Declaration of Intervention of El Salvador in the proceedings. It is equally clear that the Court may take account of public declarations to which either Party has specifically drawn attention, and the text, or a report, of which has been filed as documentary evidence. But the Court considers that, in its quest for the truth, it may also take note of statements of representatives of the Parties (or of other States) in international organizations, as well as the resolutions adopted or discussed by such organizations, in so far as factually relevant, whether or not such material has been drawn to its attention by a Party.

73. In addition, the Court is aware of the existence and the contents of a publication of the United States State Department entitled "Revolution Beyond Our Borders", Sandinista Intervention in Central America intended to justify the policy of the United States towards Nicaragua. This publication was issued in September 1983, and on 6 November 1985 was circulated as an official document of the United Nations General Assembly and the Security Council, at the request of the United States (A/40/858 ; S/17612) ; Nicaragua had circulated in reply a letter to the Secretary-General, annexing inter alia an extract from its Memorial on the Merits and an extract from the verbatim records of the hearings in the case (A/40/907 ; S/17639). The United States publication was not submitted to the Court in any formal manner contemplated by the Statute and Rules of Court, though on 13 September 1985 the United States Information Office in The Hague sent copies to an official of the Registry to be made available to anyone at the Court interested in the subject. The representatives of Nicaragua before the Court during the hearings were aware of the existence of this publication, since it was referred to in a question put to the Agent of Nicaragua by a Member of the Court. They did not attempt to refute before the Court what was said in that publication, pointing out that materials of this kind “do not constitute evidence in this case”, and going on to suggest that it “cannot properly be considered by the Court”. The Court however considers that, in view of the special circumstances of this case, it may, within limits, make use of information in such a publication.

* * *

74. In connection with the question of proof of facts, the Court notes that Nicaragua has relied on an alleged implied admission by the United States. It has drawn attention to the invocation of collective self-defence by the United States, and contended that “the use of the justification of collective self-defence constitutes a major admission of direct and substantial United States involvement in the military and paramilitary operations” directed against Nicaragua. The Court would observe that the normal purpose of an invocation of self-defence is to justify conduct which would otherwise be wrongful. If advanced as a justification in itself, not coupled with a denial of the conduct alleged, it may well imply both an admission of that conduct, and of the wrongfulness of that conduct in the absence of the justification of self-defence. This reasoning would do away with any difficulty in establishing the facts, which would have been the subject of an implicit overall admission by the United States, simply through its attempt to justify them by the right of self-defence. However, in the present case the United States has not listed the facts or described the measures which it claims to have taken in self-defence ; nor has it taken the stand that it is responsible for all the activities of which Nicaragua accuses it but such activities were justified by the right of self-defence. Since it has not done this, the United States cannot be taken to have admitted all the activities, or any of them ; the recourse to the right of self-defence thus does not make possible a firm and complete definition of admitted facts. The Court thus cannot consider reliance on self-defence to be an implicit general admission on the part of the United States ; but it is certainly a recognition as to the imputability of some of the activities complained of.

* * * * *

75. Before examining the complaint of Nicaragua against the United States that the United States is responsible for the military capacity, if not the very existence, of the contra forces, the Court will first deal with events which, in the submission of Nicaragua, involve the responsibility of the United States in a more direct manner. These are the mining of Nicaraguan ports or waters in early 1984 ; and certain attacks on, in particular, Nicaraguan port and oil installations in late 1983 and early 1984. It is the contention of Nicaragua that these were not acts committed by members of the contras with the assistance and support of United States agencies. Those directly concerned in the acts were, it is claimed, not Nicaraguan nationals or other members of the FDN or ARDE, but either United States military personnel or persons of the nationality of unidentified Latin American countries, paid by, and acting on the direct instructions of, United States military or intelligence personnel. (These persons were apparently referred to in the vocabulary of the CIA as “UCLAs” – “Unilaterally Controlled Latino Assets”, and this acronym will be used, purely for convenience, in what follows.) Furthermore, Nicaragua contends that such United States personnel, while they may have refrained from themselves entering Nicaraguan territory or recognized territorial waters, directed the operations and gave very close logistic, intelligence and practical support. A further complaint by Nicaragua which does not
relate to contra activity is that of overflights of Nicaraguan territory and territorial waters by United States military aircraft. These complaints will now be examined.

* * *

76. On 25 February 1984, two Nicaraguan fishing vessels struck mines in the Nicaraguan port of El Bluff, on the Atlantic coast. On 1 March 1984 the Dutch dredger Geopon, and on 7 March 1984 the Panamanian vessel Los Caraibes were damaged by mines at Corinto. On 20 March 1984 the Soviet tanker Lugansk was damaged by a mine in Puerto Sandino. Further vessels were damaged or destroyed by mines in Corinto on 28, 29 and 30 March. The period for which the mines effectively closed or restricted access to the ports was some two months. Nicaragua claims that a total of 12 vessels or fishing boats were destroyed or damaged by mines, that 14 people were wounded and two people killed. The exact position of the mines — whether they were in Nicaraguan internal waters or in its territorial sea — has not been made clear to the Court: some reports indicate that those at Corinto were not in the docks but in the access channel, or in the bay where ships wait for a berth. Nor is there any direct evidence of the size and nature of the mines; the witness Commander Carrón explained that the Nicaraguan authorities were never able to capture an unexploded mine. According to press reports, the mines were laid on the sea-bed and triggered either by contact, acoustically, magnetically or by water pressure: they were said to be small, causing a noisy explosion, but unlikely to sink a ship. Other reports mention mines of varying size, some up to 300 pounds of explosives. Press reports quote United States administration officials as saying that mines were constructed by the CIA with the help of a United States Navy Laboratory.

77. According to a report in Lloyds List and Shipping Gazette, responsibility for mining was claimed on 2 March 1984 by the ARDE. On the other hand, according to an affidavit by Mr. Edgar Chamorro, a former political leader of the FDN, he was instructed by a CIA official to issue a press release over the clandestine radio on 5 January 1984, claiming that the FDN had mined several Nicaraguan harbours. He also stated that the FDN in fact played no role in the mining of the harbours, but did not state who was responsible. According to a press report, the contra announced on 8 January 1984, that they were mining all Nicaraguan ports, and warning all ships to stay away from them; but according to the same report, nobody paid much attention to this announcement. It does not appear that the United States Government itself issued any

warning or notification to other States of the existence and location of the mines.

78. It was announced in the United States Senate on 10 April 1984 that the Director of the CIA had informed the Senate Select Committee on Intelligence that President Reagan had approved a CIA plan for the mining of Nicaraguan ports; press reports state that the plan was approved in December 1983, but according to a member of that Commit-

tee, such approval was given in February 1984. On 10 April 1984, the United States Senate voted that

"it is the sense of the Congress that no funds . . . shall be obligated or

expended for the purpose of planning, directing, executing or sup-

porting the mining of the ports or territorial waters of Nicaragua".

During a televised interview on 28 May 1984, of which the official tran-
script has been produced by Nicaragua, President Reagan, when ques-
tioned about the mining of ports, said "Those were homemade mines . . .
that couldn't sink a ship. They were planted in those harbors . . . by the
Nicaraguan rebels." According to press reports quoting sources in the
United States administration, the laying of mines was effected from speed
boats, not by members of the ARDE or FDN, but by the "UCLAs". The
mother ships used for the operation were operated, it is said, by United
States nationals: they are reported to have remained outside the 12-mile
limit of Nicaraguan territorial waters recognized by the United States.

Other less sophisticated mines may, it appears, have been laid in ports and
in Lake Nicaragua by contras operating separately; a Nicaraguan military
official was quoted in the press as stating that "most" of the mining activity
was directed by the United States.

79. According to Nicaragua, vessels of Dutch, Panamanian, Soviet,
Liberian and Japanese registry, and one (Homin) of unidentified regis-
try, were damaged by mines, though the damage to the Homin has also
been attributed by Nicaragua rather to gunfire from minelaying vessels.
Other sources mention damage to a British or a Cuban vessel. No direct
evidence is available to the Court of any diplomatic protests by a State
whose vessel had been damaged: according to press reports, the Soviet
Government accused the United States of being responsible for the min-
ing, and the British Government indicated to the United States that it
deeply deplored the mining, as a matter of principle. Nicaragua has also
submitted evidence to show that the mining of the ports caused a rise in
marine insurance rates for cargo to and from Nicaragua, and that some
shipping companies stopped sending vessels to Nicaraguan ports.
80. On this basis, the Court finds it established that, on a date in late 1983 or early 1984, the President of the United States authorized a United States government agency to lay mines in Nicaraguan ports; that in early 1984 mines were laid in or close to the ports of El Bluff, Corinto and Puerto Sandino, either in Nicaraguan internal waters or in its territorial sea or both, by persons in the pay and acting on the instructions of that agency, under the supervision and with the logistic support of United States agents; that neither before the laying of the mines, nor subsequently, did the United States Government issue any public and official warning to international shipping of the existence and location of the mines; and that personal and material injury was caused by the explosion of the mines, which also created risks causing a rise in marine insurance rates.

* * *

81. The operations which Nicaragua attributes to the direct action of United States personnel or “UCLAs”, in addition to the mining of ports, are apparently the following:

(i) 8 September 1983: an attack was made on Sandino international airport in Managua by a Cessna aircraft, which was shot down;
(ii) 13 September 1983: an underwater oil pipeline and part of the oil terminal at Puerto Sandino were blown up;
(iii) 2 October 1983: an attack was made on oil storage facilities at Benjamin Zeledon on the Atlantic coast, causing the loss of a large quantity of fuel;
(iv) 10 October 1983: an attack was made by air and sea on the port of Corinto, involving the destruction of five oil storage tanks, the loss of millions of gallons of fuel, and the evacuation of large numbers of the local population;
(v) 14 October 1983: the underwater oil pipeline at Puerto Sandino was again blown up;
(vi) 4/5 January 1984: an attack was made by speedboats and helicopters using rockets against the Potosi Naval Base;
(vii) 24/25 February 1984: an incident at El Bluff listed under this date appears to be the mine explosion already mentioned in paragraph 76;
(viii) 7 March 1984: an attack was made on oil and storage facility at San Juan del Sur by speedboats and helicopters;
(ix) 28/30 March 1984: clashes occurred at Puerto Sandino between speedboats, in the course of minelaying operations, and Nicaraguan patrol boats; intervention by a helicopter in support of the speedboats;
(x) 9 April 1984: a helicopter allegedly launched from a mother ship in international waters provided fire support for an ARDE attack on San Juan del Norte.

82. At the time these incidents occurred, they were considered to be acts of the contras, with no greater degree of United States support than the many other military and paramilitary activities of the contras. The declaration of Commander Carrion lists the incidents numbered (i), (ii), (iv) and (vi) above in the catalogue of activities of “mercenaries”, without distinguishing these items from the rest; it does not mention items (iii), (v) and (vii) to (x). According to a report in the New York Times (13 October 1983), the Nicaraguan Government, after the attack on Corinto (item (iv) above) protested to the United States Ambassador in Managua at the aid given by the United States to the contras, and addressed a diplomatic note in the same sense to the United States Secretary of State. The Nicaraguan Memorial does not mention such a protest, and the Court has not been supplied with the text of any such note.

83. On 19 October 1983, thus nine days after the attack on Corinto, a question was put to President Reagan at a press conference. Nicaragua has supplied the Court with the official transcript which, so far as relevant, reads as follows:

“Question: Mr. President, regarding the recent rebel attacks on a Nicaraguan oil depot, is it proper for the CIA to be involved in planning such attacks and supplying equipment for air raids? And do the American people have a right to be informed about any CIA role?

The President: I think covert actions have been a part of government and a part of government’s responsibilities for as long as there has been a government. I’m not going to comment on what, if any, connection such activities might have had with what has been going on, or with some of the specific operations down there.

But I do believe in the right of a country when it believes that its interests are best served to practice covert activity and then, while your people may have a right to know, you can’t let your people know without letting the wrong people know, those that are in opposition to what you’re doing.”

Nicaragua presents this as one of a series of admissions “that the United States was habitually and systematically giving aid to mercenaries carrying out military operations against the Government of Nicaragua.” In the view of the Court, the President’s refusal to comment on the connection between covert activities and “what has been going on, or with some of the specific operations down there” can, in its context, be treated as an admission that the United States had something to do with the Corinto attack, but not necessarily that United States personnel were directly involved.

84. The evidence available to the Court to show that the attacks listed above occurred, and that they were the work of United States personnel or “UCLAs”, other than press reports, is as follows. In his declaration,
Commander Carrión lists items (i), (ii), (iv) and (vi), and in his oral evidence before the Court he mentioned items (ii) and (iv). Items (vi) to (x) were listed in what was said to be a classified CIA internal memorandum or report, excerpts from which were published in the Wall Street Journal on 6 March 1985; according to the newspaper, “intelligence and congressional officials” had confirmed the authenticity of the document. So far as the Court is aware, no denial of the report was made by the United States administration. The affidavit of the former FDN leader Edgar Chamorro states that items (ii), (iv) and (vi) were the work of UCLAs despatched from a CIA “mother ship”, though the FDN was told by the CIA to claim responsibility. It is not however clear what the source of Mr. Chamorro’s information was; since there is no suggestion that he participated in the operation (he states that the FDN “had nothing whatsoever to do” with it), his evidence is probably strictly hearsay, and at the date of his affidavit, the same allegations had been published in the press. Although he did not leave the FDN until the end of 1984, he makes no mention of the attacks listed above of January to April 1984.

85. The Court considers that it should eliminate from further consideration under this heading the following items:

- the attack of 8 September 1983 on Managua airport (item (i)): this was claimed by the ARDE; a press report is to the effect that the ARDE purchased the aircraft from the CIA, but there is no evidence of CIA planning, or of the involvement of any United States personnel or UCLAs;
- the attack on Benjamin Zeledon on 2 October 1983 (item (iii)): there is no evidence of the involvement of United States personnel or UCLAs;
- the incident of 24-25 February 1984 (item vii), already dealt with under the heading of the mining of ports.

86. On the other hand the Court finds the remaining incidents listed in paragraph 81 to be established. The general pattern followed by these attacks appears to the Court, on the basis of that evidence and of press reports quoting United States administration sources, to have been as follows. A “mother ship” was supplied (apparently leased) by the CIA; whether it was of United States registry does not appear. Speedboats, guns and ammunition were supplied by the United States administration, and the actual attacks were carried out by “UCLAs”. Helicopters piloted by Nicaraguans and others piloted by United States nationals were also involved on some occasions. According to one report the pilots were United States civilians under contract to the CIA. Although it is not proved that any United States military personnel took a direct part in the operations, agents of the United States participated in the planning, direction, support and execution of the operations. The execution was the task rather of the “UCLAs”, while United States nationals participated in the planning, direction and support. The imputability to the United States of these attacks appears therefore to the Court to be established.

87. Nicaragua complains of infringement of its airspace by United States military aircraft. Apart from a minor incident on 11 January 1984 involving a helicopter, as to which, according to a press report, it was conceded by the United States that it was possible that the aircraft violated Nicaraguan airspace, this claim refers to overflights by aircraft at high altitude for intelligence reconnaissance purposes, or aircraft for supply purposes to the contras in the field, and aircraft producing “sonic booms”. The Nicaraguan Memorial also mentions low-level reconnaissance flights by aircraft piloted by United States personnel in 1983, but the press report cited affords no evidence that these flights, along the Honduran border, involved any invasion of airspace. In addition Nicaragua has made a particular complaint of the activities of a United States SR-71 plane between 7 and 11 November 1984, which is said to have flown low over several Nicaraguan cities “producing loud sonic booms and shattering glass windows, to exert psychological pressure on the Nicaraguan Government and population”.

88. The evidence available of these overflights is as follows. During the proceedings on jurisdiction and admissibility, the United States Government deposited with the Court a “Background Paper” published in July 1984, incorporating eight aerial photographs of ports, camps, an airfield, etc., in Nicaragua, said to have been taken between November 1981 and June 1984. According to a press report, Nicaragua made a diplomatic protest to the United States in March 1982 regarding overflights, but the text of such protest has not been produced. In the course of a Security Council debate on 25 March 1982, the United States representative said that

“It is true that once we became aware of Nicaragua’s intentions and actions, the United States Government undertook overflights to safeguard our own security and that of other States which are threatened by the Sandinista Government”,

and continued

“These overflights, conducted by unarmed, high-flying planes, for the express and sole purpose of verifying reports of Nicaraguan intervention, are no threat to regional peace and stability; quite the contrary.” (S/PV.2335, p. 48, emphasis added.)
The use of the present tense may be taken to imply that the overflights were continuing at the time of the debate. Press reports of 12 November 1984 confirm the occurrence of sonic booms at that period, and report the statement of Nicaraguan Defence Ministry officials that the plane responsible was a United States SR-71.

89. The claim that sonic booms were caused by United States aircraft in November 1984 rests on assertions by Nicaraguan Defence Ministry officials, reported in the United States press; the Court is not however aware of any specific denial of these flights by the United States Government. On 9 November 1984 the representative of Nicaragua in the Security Council asserted that United States SR-71 aircraft violated Nicaraguan airspace on 7 and 9 November 1984; he did not specifically mention sonic booms in this respect (though he did refer to an earlier flight by a similar aircraft; on 31 October 1984, as having been “accompanied by loud explosions” (S/PV. 2562, pp. 8-10)). The United States representative in the Security Council did not comment on the specific incidents complained of by Nicaragua but simply said that “the allegation which is being advanced against the United States” was “without foundation” (ibid., p. 28).

90. As to low-level reconnaissance flights by United States aircraft, or flights to supply the contras in the field, Nicaragua does not appear to have offered any more specific evidence of these; and it has supplied evidence that United States agencies made a number of planes available to the contras themselves for use for supply and low-level reconnaissance purposes. According to Commander Carrión, these planes were supplied after late 1982, and prior to the contras receiving the aircraft, they had to return at frequent intervals to their base camps for supplies, from which it may be inferred that there were at that time no systematic overflights by United States planes for supply purposes.

91. The Court concludes that, as regards the high-altitude overflights for reconnaissance purposes, the statement admitting them made in the Security Council is limited to the period up to March 1982. However, not only is it entitled to take into account that the interest of the United States in “verifying reports of Nicaraguan intervention” – the justification offered in the Security Council for these flights – has not ceased or diminished since 1982, but the photographs attached to the 1984 Background Paper are evidence of at least sporadic overflights subsequently. It sees no reason therefore to doubt the assertion of Nicaragua that such flights have continued. The Court finds that the incidents of overflights causing “sonic booms” in November 1984 are to some extent a matter of public knowledge. As to overflights of aircraft for supply purposes, it appears from Nicaragua’s evidence that these were carried out generally, if not exclusively, by the contras themselves, though using aircraft supplied to them by the United States. Whatever other responsibility the United States may have incurred in this latter respect, the only violations of Nicaraguan airspace which the Court finds imputable to the United States on the basis of the evidence before it are first of all, the high-altitude reconnaissance flights, and secondly the low-altitude flights of 7 to 11 November 1984, complained of as causing “sonic booms”.

* * *

92. One other aspect of activity directly carried out by the United States in relation to Nicaragua has to be mentioned here, since Nicaragua has attached a certain significance to it. Nicaragua claims that the United States has on a number of occasions carried out military manoeuvres jointly with Honduras on Honduran territory near the Honduras/Nicaragua frontier; it alleges that much of the military equipment flown in to Honduras for the joint manoeuvres was turned over to the contras when the manoeuvres ended, and that the manoeuvres themselves formed part of a general and sustained policy of force intended to intimidate the Government of Nicaragua into accepting the political demands of the United States Government. The manoeuvres in question are stated to have been carried out in autumn 1982; February 1983 (“Ahuas Tara I”); August 1983 (“Ahuas Tara II”), during which American warships were, it is said, sent to patrol the waters off both Nicaragua’s coasts; November 1984, when there were troop movements in Honduras and deployment of warships off the Atlantic coast of Nicaragua; February 1985 (“Ahuas Tara III”); March 1985 (“Universal Trek ’85”); June 1985, paratrooper exercises. As evidence of these manoeuvres having taken place, Nicaragua has offered newspaper reports; since there was no secrecy about the holding of the manoeuvres, the Court considers that it may treat the matter as one of public knowledge, and as such, sufficiently established.

* * *

93. The Court must now examine in more detail the genesis, development and activities of the contra force, and the role of the United States in relation to it, in order to determine the legal significance of the conduct of the United States in this respect. According to Nicaragua, the United States “conceived, created and organized a mercenary army, the contra force”. However, there is evidence to show that some armed opposition to the Government of Nicaragua existed in 1979-1980, even before any interference or support by the United States. Nicaragua dates the beginning of the activity of the United States to “shortly after” 9 March 1981, when, it was said, the President of the United States made a formal presidential finding authorizing the CIA to undertake “covert activities” directed against Nicaragua. According to the testimony of Commander
Carrión, who stated that the “organized military and paramilitary activities” began in December 1981, there were Nicaraguan “anti-government forces” prior to that date, consisting of

“just a few small bands very poorly armed, scattered along the northern border of Nicaragua and . . . composed mainly of ex-members of the Somoza’s National Guard. They did not have any military effectiveness and what they mainly did was rustling cattle and killing some civilians near the borderlines.”

These bands had existed in one form or another since the fall of the Somoza government: the affidavit of Mr. Edgar Chamorro refers to “the ex-National Guardsmen who had fled to Honduras when the Somoza government fell and had been conducting sporadic raids on Nicaraguan border positions ever since”. According to the Nicaraguan Memorial, the CIA initially conducted military and paramilitary activities against Nicaragua soon after the presidential finding of 9 March 1981, “through the existing armed bands”; these activities consisted of “raids on civilian settlements, local militia outposts and army patrols”. The weapons used were those of the former National Guard. In the absence of evidence, the Court is unable to assess the military effectiveness of these bands at that time; but their existence is in effect admitted by the Nicaraguan Government.

94. According to the affidavit of Mr. Chamorro, there was also a political opposition to the Nicaraguan Government, established outside Nicaragua, from the end of 1979 onward, and in August 1981 this grouping merged with an armed opposition force called the 15th of September Legion, which had itself incorporated the previously disparate armed opposition bands, through mergers arranged by the CIA. It was thus that the FDN is said to have come into being. The other major armed opposition group, the ARDE, was formed in 1982 by Alfonso Robelo Callegas, a former member of the original 1979 Junta and Edén Pastora Gómez, a Sandinista military commander, leader of the FRS (Sandino Revolutionary Front) and later Vice-Minister in the Sandinista government. Nicaragua has not alleged that the United States was involved in the formation of this body. Even on the face of the evidence offered by the Applicant, therefore, the Court is unable to find that the United States created an armed opposition in Nicaragua. However, according to press articles citing official sources close to the United States Congress, the size of the contra force increased dramatically once United States financial and other assistance became available: from an initial body of 500 men (plus, according to some reports, 1,000 Miskito Indians) in December 1981, the force grew to 1,000 in February 1982, 1,500 in August 1982, 4,000 in December 1982, 5,500 in February 1983, 8,000 in June 1983 and 12,000 in November 1983. When (as explained below) United States aid other than “humanitarian assistance” was cut off in September 1984, the size of the force was reported to be over 10,000 men.

95. The financing by the United States of the aid to the contras was initially undisclosed, but subsequently became the subject of specific legislative provisions and ultimately the stake in a conflict between the legislative and executive organs of the United States. Initial activities in 1981 seem to have been financed out of the funds available to the CIA for “covert” action; according to subsequent press reports quoted by Nicaragua, $19.5 million was allocated to these activities. Subsequently, again according to press sources, a further $19 million was approved in late 1981 for the purpose of the CIA plan for military and paramilitary operations authorized by National Security Decision Directive 17. The budgetary arrangements for funding subsequent operations up to the end of 1983 have not been made clear, though a press report refers to the United States Congress as having approved “about $20 million” for the fiscal year to 30 September 1983, and from a Report of the Permanent Select Committee on Intelligence of the House of Representatives (hereinafter called the “Intelligence Committee”) it appears that the covert programme was funded by the Intelligence Authorization Act relating to that fiscal year, and by the Defense Appropriations Act, which had been amended by the House of Representatives so as to prohibit “assistance for the purpose of overthrowing the Government of Nicaragua”. In May 1983, this Committee approved a proposal to amend the Act in question so as to prohibit United States support for military or paramilitary operations in Nicaragua. The proposal was designed to have substituted for these operations the provision of open security assistance to any friendly Central American country so as to prevent the transfer of military equipment from or through Cuba or Nicaragua. This proposal was adopted by the House of Representatives, but the Senate did not concur; the executive in the meantime presented a request for $45 million for the operations in Nicaragua for the fiscal year to 30 September 1984. Again conflicting decisions emerged from the Senate and House of Representatives, but ultimately a compromise was reached. In November 1983, legislation was adopted, coming into force on 8 December 1983, containing the following provision:

“During fiscal year 1984, not more than $24,000,000 of the funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose of
which would have the effect of supporting, directly or indirectly, 
military or paramilitary operations in Nicaragua by any nation, 
group, organization, movement, or individual.” (Intelligence Autho-
rization Act 1984, Section 108.)

96. In March 1984, the United States Congress was asked for a 
supplemental appropriation of $21 million “to continue certain activities 
of the Central Intelligence Agency which the President has determined are 
important to the national security of the United States”, i.e., for further 
support for the contras. The Senate approved the supplemental appropria-
tion, but the House of Representatives did not. In the Senate, two amend-
ments which were proposed but not accepted were: to prohibit the funds 
appropriated from being provided to any individual or group known to 
have as one of its intentions the violent overthrow of any Central American 
government; and to prohibit the funds being used for acts of terrorism in 
or against Nicaragua. In June 1984, the Senate took up consideration of the 
executive’s request for $28 million for the activities in Nicaragua for the 
fiscal year 1985. When the Senate and the House of Representatives again 
reached conflicting decisions, a compromise provision was included in the 
Continuing Appropriations Act 1985 (Section 8066). While in principle 
prohibiting the use of funds during the fiscal year to 30 September 
1985

“For the purpose or which would have the effect of supporting, 
directly or indirectly, military or paramilitary operations in Nicaragua by 
any nation, group, organization, movement or individual”,

the Act provided $14 million for that purpose if the President submitted a 
report to Congress after 28 February 1985 justifying such an appropria-
tion, and both Chambers of Congress voted affirmatively to approve it. 
Such a report was submitted on 10 April 1985; it defined United States 
objectives toward Nicaragua in the following terms:

“United States policy toward Nicaragua since the Sandinistas’ 
ascend to power has consistently sought to achieve changes in Nicaragua 
government policy and behavior. We have not sought to 
overthrow the Nicaraguan government nor to force on Nicaragua a 
specific system of government.”

The changes sought were stated to be:

- termination of all forms of Nicaraguan support for insurgencies or 
  subversion in neighboring countries;

At the same time the President of the United States, in a press conference, 
referred to an offer of a cease-fire in Nicaragua made by the opponents 
of the Nicaraguan Government on 1 March 1984, and pledged that the 
$14 million appropriation, if approved, would not be used for arms or 
munitions, but for “food, clothing and medicine and other support for 
survival” during the period “while the cease-fire offer is on the table”. On 
23 and 24 April 1985, the Senate voted for, and the House of Represen-
tatives against, the $14 million appropriation.

97. In June 1985, the United States Congress was asked to approve the 
appropriation of $38 million to fund military or paramilitary activities 
against Nicaragua during the fiscal years 1985 and 1986 (ending 30 Sep-
ember 1986). This appropriation was approved by the Senate on 7 June 
1985. The House of Representatives, however, adopted a proposal for an 
appropriation of $27 million, but solely for humanitarian assistance to the 
contras, and administration of the funds was to be taken out of the hands of 
the CIA and the Department of Defense. The relevant legislation, as 
ultimately agreed by the Senate and House of Representatives after sub-
mission to a Conference Committee, provided

“$27,000,000 for humanitarian assistance to the Nicaraguan demo-
ocratic resistance. Such assistance shall be provided in such depart-
ment or agency of the United States as the President shall designate, 
except the Central Intelligence Agency or the Department of De-
fense...”

As used in this subsection, the term ‘humanitarian assistance’ 
means the provision of food, clothing, medicine, and other humani-
tarian assistance, and it does not include the provision of weapons, 
weapons systems, ammunition, or other equipment, vehicles, or mate-
rial which can be used to inflict serious bodily harm or death.”

The Joint Explanatory Statement of the Conference Committee noted that 
while the legislation adopted
“does proscribe these two agencies [CIA and DOD] from administering the funds and from providing any military training or advice to the democratic resistance... none of the prohibitions on the provision of military or paramilitary assistance to the democratic resistance prevents the sharing of intelligence information with the democratic resistance”.

In the House of Representatives, it was stated that an assurance had been given by the National Security Council and the White House that

“neither the [CIA] reserve for contingencies nor any other funds available [would] be used for any material assistance other than that authorized... for humanitarian assistance for the Nicaraguan democratic resistance, unless authorized by a future act of Congress”.

Finance for supporting the military and paramilitary activities of the contras was thus available from the budget of the United States Government from some time in 1981 until 30 September 1984; and finance limited to “humanitarian assistance” has been available since that date from the same source and remains authorized until 30 September 1986.

98. It further appears, particularly since the restriction just mentioned was imposed, that financial and other assistance has been supplied from private sources in the United States, with the knowledge of the Government. So far as this was earmarked for “humanitarian assistance”, it was actively encouraged by the United States President. According to press reports, the State Department made it known in September 1984 that the administration had decided “not to discourage” private American citizens and foreign governments from supporting the contras. The Court notes that this statement was prompted by an incident which indicated that some private assistance of a military nature was being provided.

99. The Court finds at all events that from 1981 until 30 September 1984 the United States Government was providing funds for military and paramilitary activities by the contras in Nicaragua, and thereafter for “humanitarian assistance”. The most direct evidence of the specific purposes to which it was intended that these funds should be put was given by the oral testimony of a witness called by Nicaragua: Mr. David MacMichael, formerly in the employment of the CIA as a Senior Estimates Officer with the Analytic Group of the National Intelligence Council. He informed the Court that in 1981 he participated in that capacity in discussion of a plan relating to Nicaragua, excerpts from which were subsequently published in the Washington Post, and he confirmed that, with the exception of a detail (here omitted), these excerpts gave an accurate account of the plan, the purposes of which they described as follows:

100. Evidence of how the funds appropriated were spent, during the period up to autumn 1984, has been provided in the affidavit of the former FDN leader, Mr. Chamorro; in that affidavit he gives considerable detail as to the assistance given to the FDN. The Court does not however possess any comparable direct evidence as to support for the ARDE, though press reports suggest that such support may have been given at some stages. Mr. Chamorro states that in 1981 former National Guardsmen in exile were offered regular salaries from the CIA, and that from then on arms (FAL and AK-47 assault rifles and mortars), ammunition, equipment and food were supplied by the CIA. When he worked full time for the FDN, he himself received a salary, as did the other FDN directors. There was also a budget from CIA funds for communications, assistance to Nicaraguan refugees or family members of FDN combatants, and a military and logistics budget; however, the latter was not large since all arms, munitions and military equipment, including uniforms, boots and radio equipment, were acquired and delivered by the CIA.

101. According to Mr. Chamorro, training was at the outset provided by Argentine military officers, paid by the CIA, gradually replaced by CIA personnel. The training given was in

“guerrilla warfare, sabotage, demolitions, and in the use of a variety of weapons, including assault rifles, machine guns, mortars, grenade launchers, and explosives, such as Claymore mines... also... in field communications, and the CIA taught us how to use certain sophisticated codes that the Nicaraguan Government forces would not be able to decipher”.

The CIA also supplied the FDN with intelligence, particularly as to Nicaraguan troop movements, derived from radio and telephonic interception, code-breaking, and surveillance by aircraft and satellites. Mr Chamorro also refers to aircraft being supplied by the CIA; from press reports it appears that those were comparatively small aircraft suitable for reconnaissance and a certain amount of supply-dropping, not for offensive
operations. Helicopters with Nicaraguan crews are reported to have taken part in certain operations of the “UCLAs” (see paragraph 86 above), but there is nothing to show whether these belonged to the contras or were lent by United States agencies.

102. It appears to be recognized by Nicaragua that, with the exception of some of the operations listed in paragraph 81 above, operations on Nicaraguan territory were carried out by the contras alone, all United States trainers or advisers remaining on the other side of the frontier, or in international waters. It is however claimed by Nicaragua that the United States Government has devised the strategy and directed the tactics of the contra force, and provided direct combat support for its military operations.

103. In support of the claim that the United States devised the strategy and directed the tactics of the contras, counsel for Nicaragua referred to the successive stages of the United States legislative authorization for funding the contras (outlined in paragraphs 95 to 97 above), and observed that every offensive by the contras was preceded by a new infusion of funds from the United States. From this, it is argued, the conclusion follows that the timing of each of these offensives was determined by the United States. In the sense that an offensive could not be launched until the funds were available, that may well be so; but, in the Court’s view, it does not follow that each provision of funds by the United States was made in order to set in motion a particular offensive, and that that offensive was planned by the United States.

104. The evidence in support of the assertion that the United States devised the strategy and directed the tactics of the contras appears to the Court to be as follows. There is considerable material in press reports of statements by FDN officials indicating participation of CIA advisers in planning and the discussion of strategy or tactics, confirmed by the affidavit of Mr. Chamorro. Mr. Chamorro attributes virtually a power of command to the CIA operatives: he refers to them as having “ordered” or “instructed” the FDN to take various actions. The specific instances of influence of United States agents on strategy or tactics which he gives are as follows: the CIA, he says, was at the end of 1982 “urging” the FDN to launch an offensive designed to take and hold Nicaraguan territory. After the failure of that offensive, the CIA told the FDN to move its men back into Nicaragua and keep fighting. The CIA in 1983 gave a tactical directive not to destroy farms and crops, and in 1984 gave a directive to the opposite effect. In 1983, the CIA again indicated that they wanted the FDN to launch an offensive to seize and hold Nicaraguan territory. In this respect, attention should also be drawn to the statement of Mr. Chamorro (paragraph 101 above) that the CIA supplied the FDN with intelligence, particularly as to Nicaraguan troop movements, and small aircraft suitable for reconnaissance and a certain amount of supply-dropping. Emphasis has been placed, by Mr. Chamorro, by Commander Carrión, and by counsel for Nicaragua, on the impact on contra tactics of the availability of intelligence assistance and, still more importantly, supply aircraft.

105. It has been contended by Nicaragua that in 1983 a “new strategy” for contra operations in and against Nicaragua was adopted at the highest level of the United States Government. From the evidence offered in support of this, it appears to the Court however that there was, around this time, a change in contra strategy, and a new policy by the United States administration of more overt support for the contras, culminating in the express legislative authorization in the Department of Defense Appropriations Act, 1984, section 775, and the Intelligence Authorization Act for Fiscal Year 1984, section 108. The new contra strategy was said to be to attack “economic targets like electrical plants and storage facilities” and fighting in the cities.

106. In the light of the evidence and material available to it, the Court is not satisfied that all the operations launched by the contra force, at every stage of the conflict, reflected strategy and tactics wholly devised by the United States. However, it is in the Court’s view established that the support of the United States authorities for the activities of the contras took various forms over the years, such as logistic support, the supply of information on the location and movements of the Sandinista troops, the use of sophisticated methods of communication, the deployment of field broadcasting networks, radar coverage, etc. The Court finds it clear that a number of military and paramilitary operations by this force were decided and planned, if not actually by United States advisers, then at least in close collaboration with them, and on the basis of the intelligence and logistic support which the United States was able to offer, particularly the supply aircraft provided to the contras by the United States.

107. To sum up, despite the secrecy which surrounded it, at least initially, the financial support given by the Government of the United States to the military and paramilitary activities of the contras in Nicaragua is a fully established fact. The legislative and executive bodies of the respondent State have moreover, subsequent to the controversy which has been sparked off in the United States, openly admitted the nature, volume and frequency of this support. Indeed, they clearly take responsibility for it, this government aid having now become the major element of United States foreign policy in the region. As to the ways in which such financial support has been translated into practical assistance, the Court has been able to reach a general finding.

108. Despite the large quantity of documentary evidence and testimony which it has examined, the Court has not been able to satisfy itself that the respondent State “created” the contra force in Nicaragua. It seems certain
that members of the former Somoza National Guard, together with civilian opponents to the Sandinista régime, withdrew from Nicaragua soon after that régime was installed in Managua, and sought to continue their struggle against it, even if in a disorganized way and with limited and ineffectual resources, before the Respondent took advantage of the existence of these opponents and incorporated this fact into its policies vis-à-vis the régime of the Applicant. Nor does the evidence warrant a finding that the United States gave “direct and critical combat support”, at least if that form of words is taken to mean that this support was tantamount to direct intervention by the United States combat forces, or that all contra operations reflected strategy and tactics wholly devised by the United States. On the other hand, the Court holds it established that the United States authorities largely financed, trained, equipped, armed and organized the FDN.

109. What the Court has to determine at this point is whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government. Here it is relevant to note that in May 1983 the assessment of the Intelligence Committee in the Report referred to in paragraph 95 above, was that the contras “constituted[d] an independent force” and that the “only element of control that could be exercised by the United States” was “cessation of aid”. Paradoxically this assessment serves to underline, a contrario, the potential for control inherent in the degree of the contras’ dependence on aid. Yet despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf.

110. So far as the potential control constituted by the possibility of cessation of United States military aid is concerned, it may be noted that after 1 October 1984 such aid was no longer authorized, though the sharing of intelligence, and the provision of “humanitarian assistance” as defined in the above-cited legislation (paragraph 97) may continue. Yet, according to Nicaragua’s own case, and according to press reports, contra activity has continued. In sum, the evidence available to the Court indicates that the various forms of assistance provided to the contras by the United States have been crucial to the pursuit of their activities, but is insufficient to demonstrate their complete dependence on United States aid. On the other hand, it indicates that in the initial years of United States assistance the contra force was so dependent. However, whether the United States Government at any stage devised the strategy and directed the tactics of the contras depends on the extent to which the United States made use of the potential for control inherent in that dependence. The Court already indicated that it has insufficient evidence to reach a finding on this point. It is a fortiori unable to determine that the contra force may be equated for legal purposes with the forces of the United States. This conclusion, however, does not of course suffice to resolve the entire question of the responsibility incurred by the United States through its assistance to the contras.

111. In the view of the Court it is established that the contra force has, at least at one period, been so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the United States. This finding is fundamental in the present case. Nevertheless, adequate direct proof that all or the great majority of contra activities during that period received this support has not been, and indeed probably could not be, advanced in every respect. It will suffice the Court to stress that a degree of control by the United States Government, as described above, is inherent in the position in which the contra force finds itself in relation to that Government.

112. To show the existence of this control, the Applicant argued before the Court that the political leaders of the contra force had been selected, installed and paid by the United States; it also argued that the purpose herein was both to guarantee United States control over this force, and to excite sympathy for the Government’s policy within Congress and among the public in the United States. According to the affidavit of Mr. Chamorro, who was directly concerned, when the FDN was formed “the name of the organization, the members of the political junta, and the members of the general staff were all chosen or approved by the CIA”; later the CIA asked that a particular person be made head of the political directorate of the FDN, and this was done. However, the question of the selection, installation and payment of the leaders of the contra force is merely one aspect among others of the degree of dependency of that force. This partial dependency on the United States authorities, the exact extent of which the Court cannot establish, may certainly be inferred inter alia from the fact that the leaders were selected by the United States. But it may also be inferred from other factors, some of which have been examined by the Court, such as the organization, training and equipping of the force, the planning of operations, the choosing of targets and the operational support provided.

113. The question of the degree of control of the contras by the United States Government is relevant to the claim of Nicaragua attributing responsibility to the United States for activities of the contras whereby the United States has, it is alleged, violated an obligation of international law not to kill, wound or kidnap citizens of Nicaragua. The activities in question are said to represent a tactic which includes “the spreading of terror and danger to non-combatants as an end in itself with no attempt to
observe humanitarian standards and no reference to the concept of military necessity”. In support of this, Nicaragua has catalogued numerous incidents, attributed to “CIA-trained mercenaries” or “mercenary forces”, of kidnapping, assassination, torture, rape, killing of prisoners, and killing of civilians not dictated by military necessity. The declaration of Commander Carrión annexed to the Memorial lists the first such incident in December 1981, and continues up to the end of 1984. Two of the witnesses called by Nicaragua (Father Loison and Mr. Glennon) gave oral evidence as to events of this kind. By way of examples of evidence to provide “direct proof of the tactics adopted by the contras under United States guidance and control”, the Memorial of Nicaragua offers a statement, reported in the press, by the ex-FDN leader Mr. Edgar Chamorro, repeated in the latter’s affidavit, of assassinations in Nicaraguan villages; the alleged existence of a classified Defence Intelligence Agency report of July 1982, reported in the New York Times on 21 October 1984, disclosing that the contras were carrying out assassinations; and the preparation by the CIA in 1983 of a manual of psychological warfare. At the hearings, reliance was also placed on the affidavit of Mr. Chamorro.

114. In this respect, the Court notes that according to Nicaragua, the contras are no more than bands of mercenaries which have been recruited, organized, paid and commanded by the Government of the United States. This would mean that they have no real autonomy in relation to that Government. Consequently, any offences which they have committed would be imputable to the Government of the United States, like those of any other forces placed under the latter’s command. In the view of Nicaragua, “stricto sensu, the military and paramilitary attacks launched by the United States against Nicaragua do not constitute a case of civil strife. They are essentially the acts of the United States.” If such a finding of the imputability of the acts of the contras to the United States were to be made, no question would arise of mere complicity in those acts, or of incitement of the contras to commit them.

115. The Court has taken the view (paragraph 110 above) that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.

116. The Court does not consider that the assistance given by the United States to the contras warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that State. It takes the view that the contras remain responsible for their acts, and that the United States is not responsible for the acts of the contras, but for its own conduct vis-à-vis Nicaragua, including conduct related to the acts of the contras. What the Court has to investigate is not the complaints relating to alleged violations of humanitarian law by the contras, regarded by Nicaragua as imputable to the United States, but rather unlawful acts for which the United States may be responsible directly in connection with the activities of the contras. The unlawfulness or otherwise of such acts of the United States is a question different from the violations of humanitarian law of which the contras may or may not have been guilty. It is for this reason that the Court does not have to determine whether the violations of humanitarian law attributed to the contras were in fact committed by them. At the same time, the question whether the United States Government was, or must have been, aware of the relevant time that allegations of breaches of human rights law were being made against the contras is relevant to an assessment of the unlawfulness of the action of the United States. In this respect, the material facts are primarily those connected with the issue in 1983 of a manual of psychological operations.

117. Nicaragua has in fact produced in evidence before the Court two publications which it claims were prepared by the CIA and supplied to the contras in 1983. The first of these, in Spanish, is entitled “Operaciones sicológicas en guerra de guerrillas” (Psychological Operations in Guerrilla Warfare), by “Tayacán”; the certified copy supplied to the Court carries no publisher’s name or date. In its Preface, the publication is described as “a manual for the training of guerrillas in psychological operations, and its application to the concrete case of the Christian and democratic crusade being waged in Nicaragua by the Freedom Commandos”.

The second is entitled the Freedom Fighter’s Manual, with the subtitle “Practical guide to liberating Nicaragua from oppression and misery by paralyzing the military-industrial complex of the traitorous marxist state without having to use special tools and with minimal risk for the combatant”. The text is printed in English and Spanish, and illustrated with simple drawings: it consists of guidance for elementary sabotage techniques. The only indications available to the Court of its authorship are reports in the New York Times, quoting a United States Congressman and
Mr. Edgar Chamorro as attributing the book to the CIA. Since the evidence linking the Freedom Fighter's Manual to the CIA is no more than newspaper reports the Court will not treat its publication as an act imputable to the United States Government for the purposes of the present case.

118. The Court will therefore concentrate its attention on the other manual, that on "Psychological Operations". That this latter manual was prepared by the CIA appears to be clearly established: a report published in January 1985 by the Intelligence Committee contains a specific statement to that effect. It appears from this report that the manual was printed in several editions; only one has been produced and it is of that text that the Court will take account. The manual is devoted to techniques for winning the minds of the population, defined as including the guerrilla troops, the enemy troops and the civilian population. In general, such parts of the manual as are devoted to military rather than political and ideological matters are not in conflict with general humanitarian law; but there are marked exceptions. A section on "Implicit and Explicit Terror", while emphasizing that "the guerrillas should be careful not to become an explicit terror, because this would result in a loss of popular support", and stressing the need for good conduct toward the population, also includes directions to destroy military or police installations, cut lines of communication, kidnap officials of the Sandinista government, etc. Reference is made to the possibility that "it should be necessary...to fire on a citizen who is trying to leave the town", to be justified by the risk of his informing the enemy. Furthermore, a section on "Selective Use of Violence for Propagandistic Effects" begins with the words:

"It is possible to neutralize carefully selected and planned targets, such as court judges, mesta judges, police and State Security officials, CDS chiefs, etc. For psychological purposes it is necessary to take extreme precautions, and it is absolutely necessary to gather together the population affected, so that they will be present, take part in the act, and formulate accusations against the oppressor."

In a later section on "Control of mass concentrations and meetings", the following guidance is given (inter alia):

"If possible, professional criminals will be hired to carry out specific selective 'jobs'.

Specific tasks will be assigned to others, in order to create a 'martyr' for the cause, taking the demonstrators to a confrontation with the authorities, in order to bring about uprisings or shootings, which will cause the death of one or more persons. This would become the martyrs, a situation that should be made use of immediately against the regime, in order to create greater conflicts."

119. According to the affidavit of Mr. Chamorro, about 2,000 copies of the manual were distributed to members of the FDN, but in those copies Mr. Chamorro had arranged for the pages containing the last two passages quoted above to be torn out and replaced by expurgated pages. According to some press reports, another edition of 3,000 copies was printed (though according to one report Mr. Chamorro said that he knew of no other edition), of which however only some 100 are said to have reached Nicaragua, attached to balloons. He was quoted in a press report as saying that the manual was used to train "dozens of guerrilla leaders" for some six months from December 1983 to May 1984. In another report he is quoted as saying that "people did not read it" and that most of the copies were used in a special course on psychological warfare for middle-level commanders. In his affidavit, Mr. Chamorro reports that the attitude of some unit commanders, in contrast to that recommended in the manual, was that "the best way to win the loyalty of the civilian population was to intimidate it" — by murders, mutilations, etc. - "and make it fearful of us."

120. A question examined by the Intelligence Committee was whether the preparation of the manual was a contravention of United States legislation and executive orders; inter alia, it examined whether the advice on "neutralizing" local officials contravened Executive Order 12333. This Executive Order, re-enacting earlier directives, was issued by President Reagan in December 1981; it provides that

"2.11. No person employed by or acting on behalf of the United States Government shall engage in or conspire to engage in, assassination.

2.12. No agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this Order." (US Code, Congressional and Administrative News, 97th Congress, First Session, 1981, p. B.114.)

The manual was written, according to press reports, by "a low-level contract employee" of the CIA; the Report of the Intelligence Committee concluded:

"The Committee believes that the manual has caused embarrassment to the United States and should never have been released in any of its various forms. Specific actions it describes are repugnant to American values.

The original purpose of the manual was to provide training to moderate FDN behavior in the field. Yet, the Committee believes that the manual was written, edited, distributed and used without adequate supervision. No one but its author paid much attention
to the manual. Most CIA officials learned about it from news accounts.

The Committee was told that CIA officers should have reviewed the manual and did not. The Committee was told that all CIA officers should have known about the Executive Order’s ban on assassination . . . but some did not. The entire publication and distribution of the manual was marked within the Agency by confusion about who had authority and responsibility for the manual. The incident of the manual illustrates once again to a majority of the Committee that the CIA did not have adequate command and control of the entire Nicaraguan covert action . . .

CIA officials up the chain of command either never read the manual or were never made aware of it. Negligence, not intent to violate the law, marked the manual’s history.

The Committee concluded that there was no intentional violation of Executive Order 12333.”

When the existence of the manual became known at the level of the United States Congress, according to one press report, “the CIA urged rebels to ignore all its recommendations and begin trying to recall copies of the document”.

121. When the Intelligence Committee investigated the publication of the psychological operations manual, the question of the behaviour of the contras in Nicaragua became of considerable public interest in the United States, and the subject of numerous press reports. Attention was thus drawn to allegations of terrorist behaviour or atrocities said to have been committed against civilians, which were later the subject of reports by various investigating teams, copies of which have been supplied to the Court by Nicaragua. According to the press, CIA officials presented to the Intelligence Committee in 1984 evidence of such activity, and stated that this was the reason why the manual was prepared, it being intended to “moderate the rebels’ behaviour”. This report is confirmed by the finding of the Intelligence Committee that “The original purpose of the manual was to provide training to moderate FDN behaviour in the field”. At the time the manual was prepared, those responsible were aware of, at the least, allegations of behaviour by the contras inconsistent with humanitarian law.

122. The Court concludes that in 1983 an agency of the United States Government supplied to the FDN a manual on psychological guerrilla warfare which, while expressly discouraging indiscriminate violence against civilians, considered the possible necessity of shooting civilians who were attempting to leave a town; and advised the “neutralization” for propaganda purposes of local judges, officials or notables after the sem-

blance of trial in the presence of the population. The text supplied to the contras also advised the use of professional criminals to perform unspecified “jobs”, and the use of provocation at mass demonstrations to produce violence on the part of the authorities so as to make “martyrs”.

* * *

123. Nicaragua has complained to the Court of certain measures of an economic nature taken against it by the Government of the United States, beginning with the cessation of economic aid in April 1981, which it regards as an indirect form of intervention in its internal affairs. According to information published by the United States Government, it provided more than $100 million in economic aid to Nicaragua between July 1979 and January 1981; however, concern in the United States Congress about certain activities attributed to the Nicaraguan Government led to a requirement that, before disbursing assistance to Nicaragua, the President certify that Nicaragua was not “aiding, abetting or supporting acts of violence or terrorism in other countries” (Special Central American Assistance Act, 1979, Sec. 536 (g)). Such a certification was given in September 1980 (45 Federal Register 62779), to the effect that

“on the basis of an evaluation of the available evidence, that the Government of Nicaragua ‘has not co-operated with or harbors any international terrorist organization or is aiding, abetting or supporting acts of violence or terrorism in other countries’.”

An official White House press release of the same date stated that

“The certification is based upon a careful consideration and evaluation of all the relevant evidence provided by the intelligence community and by our Embassies in the field . . . Our intelligence agencies as well as our Embassies in Nicaragua and neighboring countries were fully consulted, and the diverse information and opinions from all sources were carefully weighed.”

On 1 April 1981 however a determination was made to the effect that the United States could no longer certify that Nicaragua was not engaged in support for “terrorism” abroad, and economic assistance, which had been suspended in January 1981, was thereby terminated. According to the Nicaraguan Minister of Finance, this also affected loans previously contracted, and its economic impact was more than $36 million per annum. Nicaragua also claims that, at the multilateral level, the United States has
acted in the Bank for International Reconstruction and Development and the Inter-American Development Bank to oppose or block loans to Nicaragua.

124. On 23 September 1983, the President of the United States made a proclamation modifying the system of quotas for United States imports of sugar, the effect of which was to reduce the quota attributed to Nicaragua by 90 per cent. The Nicaraguan Finance Minister assessed the economic impact of the measure at between $15 and $18 million, due to the preferential system of prices that sugar has in the market of the United States.

125. On 1 May 1985, the President of the United States made an Executive Order, which contained a finding that "the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States" and declared a "national emergency". According to the President’s message to Congress, this emergency situation had been created by "the Nicaraguan Government’s aggressive activities in Central America". The Executive Order declared a total trade embargo on Nicaragua, prohibiting all imports from and exports to that country, barring Nicaraguan vessels from United States ports and excluding Nicaraguan aircraft from air transportation to and from the United States.

* * *

126. The Court has before it, in the Counter-Memorial on jurisdiction and admissibility filed by the United States, the assertion that the United States, pursuant to the inherent right of individual and collective self-defence, and in accordance with the Inter-American Treaty of Reciprocal Assistance, has responded to requests from El Salvador, Honduras and Costa Rica, for assistance in their self-defence against aggression by Nicaragua. The Court has therefore to ascertain, so far as possible, the facts on which this claim is or may be based, in order to determine whether collective self-defence constitutes a justification of the activities of the United States here complained of. Furthermore, it has been suggested that, as a result of certain assurances given by the Nicaraguan "Junta of the Government of National Reconstruction" in 1979, the Government of Nicaragua is bound by international obligations as regards matters which would otherwise be matters of purely domestic policy, that it is in breach of those obligations, and that such breach might justify the action of the United States. The Court will therefore examine the facts underlying this suggestion also.

127. Nicaragua claims that the references made by the United States to the justification of collective self-defence are merely "pretexts" for the activities of the United States. It has alleged that the true motive for the conduct of the United States is unrelated to the support which it accuses

Nicaragua of giving to the armed opposition in El Salvador, and that the real objectives of United States policy are to impose its will upon Nicaragua and force it to comply with United States demands. In the Court’s view, however, if Nicaragua has been giving support to the armed opposition in El Salvador, and if this constitutes an armed attack on El Salvador and the other appropriate conditions are met, collective self-defence could be legally invoked by the United States, even though there may be the possibility of an additional motive, one perhaps even more decisive for the United States, drawn from the political orientation of the present Nicaraguan Government. The existence of an additional motive, other than that officially proclaimed by the United States, could not deprive the latter of its right to resort to collective self-defence. The conclusion to be drawn is that special caution is called for in considering the allegations of the United States concerning conduct by Nicaragua which may provide a sufficient basis for self-defence.

128. In its Counter-Memorial on jurisdiction and admissibility, the United States claims that Nicaragua has "promoted and supported guerrilla violence in neighboring countries", particularly in El Salvador; and has openly conducted cross-border military attacks on its neighbours, Honduras and Costa Rica. In support of this, it annexed to the Counter-Memorial an affidavit by Secretary of State George P. Shultz. In his affidavit, Mr. Shultz declares, inter alia, that:

"The United States has abundant evidence that the Government of Nicaragua has actively supported armed groups engaged in military and paramilitary activities in and against El Salvador, providing such groups with sites in Nicaragua for communications facilities, command and control headquarters, training and logistics support. The Government of Nicaragua is directly engaged with these armed groups in planning ongoing military and paramilitary activities conducted in and against El Salvador. The Government of Nicaragua also participates directly in the procurement, and transshipment through Nicaraguan territory, of large quantities of ammunition, supplies and weapons for the armed groups conducting military and paramilitary activities in and against El Salvador.

In addition to this support for armed groups operating in and against El Salvador, the Government of Nicaragua has engaged in similar support, albeit on a smaller scale, for armed groups engaged, or which have sought to engage, in military or paramilitary activities in and against the Republic of Costa Rica, the Republic of Honduras, and the Republic of Guatemala. The regular military forces of Nicaragua have engaged in several direct attacks on Honduran and Costa Rican territory, causing casualties among the armed forces and civilian populations of those States."

In connection with this declaration, the Court would recall the observa-
tions it has already made (paragraphs 69 and 70) as to the evidential value of declarations by ministers of the government of a State engaged in litigation concerning an armed conflict.

129. In addition, the United States has quoted Presidents Magaña and Duarte of El Salvador, press reports, and United States Government publications. With reference to the claim as to cross-border military attacks, the United States has quoted a statement of the Permanent Representative of Honduras to the Security Council, and diplomatic protests by the Governments of Honduras and Costa Rica to the Government of Nicaragua. In the subsequent United States Government publication "Revolution Beyond Our Borders", referred to in paragraph 73 above, these claims are brought up to date with further descriptive detail. Quoting "Honduran government records", this publication asserts that there were 35 border incursions by the Sandinista People's Army in 1981 and 68 in 1982.

130. In its pleading at the jurisdictional stage, the United States asserted the justification of collective self-defence in relation to alleged attacks on El Salvador, Honduras and Costa Rica. It is clear from the material laid before the Court by Nicaragua that, outside the context of the present judicial proceedings, the United States administration has laid the greatest stress on the question of arms supply and other forms of support to opponents of the Government in El Salvador. In 1983, on the proposal of the Intelligence Committee, the covert programme of assistance to the contras "was to be directed only at the interdiction of arms to El Salvador". Nicaragua's other neighbours have not been lost sight of, but the emphasis has continued to be on El Salvador: the United States Continuing Appropriations Act 1985, Section 8066 (b) (1) (A), provides for aid for the military or paramilitary activities in Nicaragua to be resumed if the President reports inter alia that

"the Government of Nicaragua is providing material or monetary support to anti-government forces engaged in military or paramilitary operations in El Salvador or other Central American countries".

131. In the proceedings on the merits, Nicaragua has addressed itself primarily to refuting the claim that it has been supplying arms and other assistance to the opponents of the Government of El Salvador: it has not specifically referred to the allegations of attacks on Honduras or Costa Rica. In this it is responding to what is, as noted above, the principal justification announced by the United States for its conduct. In ascertaining whether the conditions for the exercise by the United States of the right of collective self-defence are satisfied, the Court will accordingly first consider the activities of Nicaragua in relation to El Salvador, as established by the evidence and material available to the Court. It will then consider whether Nicaragua's conduct in relation to Honduras or Costa Rica may justify the exercise of that right; in that respect it will examine only the allegations of direct cross-border attacks, since the affidavit of Mr. Shultz claims only that there was support by the provision of arms and supplies for military and paramilitary activities "on a smaller scale" in those countries than in El Salvador.

132. In its Declaration of Intervention dated 15 August 1984, the Government of El Salvador stated that: "The reality is that we are the victims of aggression and armed attack from Nicaragua and have been since at least 1980." (Para. IV.) The statements of fact in that Declaration are backed by a declaration by the Acting Minister for Foreign Affairs of El Salvador, similar in form to the declarations by Nicaraguan Ministers annexed to its pleadings. The Declaration of Intervention asserts that "terrorists" seeking the overthrow of the Government of El Salvador were "directed, armed, supplied and trained by Nicaragua" (para. III); that Nicaragua provided "houses, hideouts and communication facilities" (para. VI), and training centres managed by Cuban and Nicaraguan military personnel (para. VII). On the question of arms supply, the Declaration states that

"Although the quantities of arms and supplies, and the routes used, vary, there has been a continuing flow of arms, ammunition, medicines, and clothing from Nicaragua to our country." (Para. VIII.)

133. In its observations, dated 10 September 1984, on the Declaration of Intervention of El Salvador, Nicaragua stated as follows:

"The Declaration includes a series of paragraphs alleging activities by Nicaragua that El Salvador terms an 'armed attack'. The Court should know that this is the first time El Salvador has asserted it is under armed attack from Nicaragua. None of these allegations, which are properly addressed to the merits phase of the case, is supported by proof or evidence of any kind. Nicaragua denies each and every one of them, and stands behind the affidavit of its Foreign Minister, Father Miguel d'Escoto Brockett, in which the Foreign Minister affirms that the Government of Nicaragua has not supplied arms or other materials of war to groups fighting against the Government of El Salvador or provided financial support, training or training facilities to such groups or their members."

134. Reference has also to be made to the testimony of one of the witnesses called by Nicaragua, Mr. David MacMichael (paragraph 99 above) said in evidence that he was in the full time employment of the CIA from March 1981 to April 1983, working for the most part on Inter-
American affairs. During his examination by counsel for Nicaragua, he stated as follows:

"[Question:] In your opinion, if the Government of Nicaragua was sending arms to rebels in El Salvador, could it do so without detection by United States intelligence-gathering capabilities?

[Answer:] In any significant manner over this long period of time I do not believe they could have done so.

Q.: And there was in fact no such detection during the period that you served in the Central Intelligence Agency?

A.: No.

Q.: In your opinion, if arms in significant quantities were being sent from Nicaraguan territory to the rebels in El Salvador — with or without the Government's knowledge or consent — could these shipments have been accomplished without detection by United States intelligence capabilities?

A.: If you say in significant quantities over any reasonable period of time, no I do not believe so.

Q.: And there was in fact no such detection during your period of service with the Agency?

A.: No.

Q.: Mr. MacMichael, up to this point we have been talking about the period when you were employed by the CIA — 6 March 1981 to 3 April 1983. Now let me ask you without limit of time: did you see any evidence of arms going to the Salvadorian rebels from Nicaragua at any time?

A.: Yes, I did.

Q.: When was that?

A.: Late 1980 to very early 1981."

Mr. MacMichael indicated the sources of the evidence he was referring to, and his examination continued:

"[Question:] Does the evidence establish that the Government of Nicaragua was involved during this period?

[Answer:] No, it does not establish it, but I could not rule it out.

135. After counsel for Nicaragua had completed his examination of the witness, Mr. MacMichael was questioned from the bench, and in this context he stated (inter alia) as follows:

"[Question:] Thus if the Government of Nicaragua had shipped arms to El Salvador before March 1981, for example in 1980 and early 1981, in order to arm the big January offensive of the insurgents in El Salvador, you would not be in a position to know that; is that correct?

[Answer:] I think I have testified, your honour, that I reviewed the immediate past intelligence material at that time, that dealt with that period, and I have stated today that there was credible evidence and that on the basis of my reading of it I could not rule out a finding that the Nicaraguan Government had been involved during that period.

Q.: Would you rule it 'in'?

A.: I prefer to stay with my answer that I could not rule it out, but to answer you as directly as I can my inclination would be more towards ruling 'in' than ruling 'out'.

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Q.: I understand you to be saying, Mr. MacMichael, that you believe that it could be taken as a fact that at least in late 1980/early 1981 the Nicaraguan Government was involved in the supply of arms to the Salvadorian insurgency. Is that the conclusion I can draw from your remarks?

A.: I hate to have it appear that you are drawing this from me like a nail out of a block of wood but, yes, that is my opinion."

In short, the Court notes that the evidence of a witness called by Nicaragua in order to negate the allegation of the United States that the Government of Nicaragua had been engaged in the supply of arms to the armed opposition in El Salvador only partly contradicted that allegation.

136. Some confirmation of the situation in 1981 is afforded by an internal Nicaraguan Government report, made available by the Government of Nicaragua in response to a request by the Court, of a meeting held in Managua on 12 August 1981 between Commander Ortega, Co-ordinator of the Junta of the Government of Nicaragua and Mr. Enders, Assistant Secretary of State for Inter-American Affairs of the United States. According to this report, the question of the flow of "arms, munitions and other forms of military aid" to El Salvador, was raised by Mr. Enders as one of the "major problems" (problemas principales). At one point he is reported to have said:

"On your part, you could take the necessary steps to ensure that the flow of arms to El Salvador is again halted as in March of this year. We do not seek to involve ourselves in deciding how and with whom this object should be achieved, but we may well monitor the results."
Later in the course of the discussion, the following exchange is recorded:

"[Ortega:] As for the flow of arms to El Salvador, what must be stated is that as far as we have been informed by you, efforts have been made to stop it; however, I want to make clear that there is a great desire here to collaborate with the Salvadorian people, also among members of our armed forces, although our Junta and the National Directorate have a decision that activities of this kind should not be permitted. We would ask you to give us reports about that flow to help us control it.

[Enders:] You have succeeded in doing so in the past and I believe you can do so now. We are not in a position to supply you with intelligence reports. We would compromise our sources, and our nations have not yet reached the necessary level to exchange intelligence reports."

137. As regards the question, raised in this discussion, of the picture given by United States intelligence sources, further evidence is afforded by the 1983 Report of the Intelligence Committee (paragraphs 95, 109 above). In that Report, dated 13 May 1983, it was stated that

"The Committee has regularly reviewed voluminous intelligence material on Nicaraguan and Cuban support for leftist insurgencies since the 1979 Sandinista victory in Nicaragua."

The Committee continued:

"At the time of the filing of this report, the Committee believes that the intelligence available to it continues to support the following judgments with certainty:

A major portion of the arms and other material sent by Cuba and other communist countries to the Salvadorian insurgents transits Nicaragua with the permission and assistance of the Sandinistas.

The Salvadorian insurgents rely on the use of sites in Nicaragua, some of which are located in Managua itself, for communications, command-and-control, and for the logistics to conduct their financial, material and propaganda activities.

The Sandinista leadership sanctions and directly facilitates all of the above functions.

Nicaragua provides a range of other support activities, including secure transit of insurgents to and from Cuba, and assistance to the insurgents in planning their activities in El Salvador.

In addition, Nicaragua and Cuba have provided – and appear to continue providing – training to the Salvadorian insurgents.”

The Court is not aware of the contents of any analogous report of a body with access to United States intelligence material covering a more recent period. It notes however that the Resolution adopted by the United States Congress on 29 July 1985 recorded the expectation of Congress from the Government of Nicaragua of:

"the end to Sandinista support for insurgencies in other countries in the region, including the cessation of military supplies to the rebel forces fighting the democratically elected government in El Salvador."

138. In its Declaration of Intervention, El Salvador alleges that “Nicaraguan officials have publicly admitted their direct involvement in waging war on us” (para. IX). It asserts that the Foreign Minister of Nicaragua admitted such support at a meeting of the Foreign Ministers of the Contra Group in July 1983. Setting this against the declaration by the Nicaraguan Foreign Minister annexed to the Nicaraguan Memorial, denying any involvement of the Nicaraguan Government in the provision of arms or other supplies to the opposition in El Salvador, and in view of the fact that the Court has not been informed of the exact words of the alleged admission, or with any corroborative testimony from others present at the meeting, the Court cannot regard as conclusive the assertion in the Declaration of Intervention. Similarly, the public statement attributed by the Declaration of Intervention (para. XIII) to Commander Ortega, referring to “the fact of continuing support to the Salvadorian guerrillas” cannot, even assuming it to be accurately quoted, be relied on as proof that that support (which, in the form of political support, is openly admitted by the Nicaraguan Government) takes any specific material form, such as the supply of arms.

139. The Court has taken note of four draft treaties prepared by Nicaragua in 1983, and submitted as an official proposal within the framework of the Contadora process, the text of which was supplied to the Court with the Nicaraguan Application. These treaties, intended to be “subscribed to by all nations that desire to contribute to the peaceful solution of the present armed conflict in the Republic of El Salvador” (p. 58), contained the following provisions:

"Article One

The High Contracting Parties promise not to offer and, should such be the case, to suspend military assistance and training and the supply and trafficking of arms, munitions and military equipment that may be made directly to the contending forces or indirectly through third States.

Article Two

The High Contracting Parties promise to adopt in their respective territories whatever measures may be necessary to impede all supply and trafficking of arms, munitions and military equipment and military assistance to and training of the contending forces in the Republic of El Salvador.” (P. 60.)
In the Introduction to its proposal the Nicaraguan Government stated that it was ready to enter into an agreement of this kind immediately, even if only with the United States. “in order that the Government of that country cease justifying its interventionist policy in El Salvador on the basis of supposed actions by Nicaragua” (p. 58).

140. When filing its Counter-Memorial on the questions of jurisdiction and admissibility, the United States deposited a number of documents in the Registry of the Court, two of which are relevant to the questions here under examination. The first is a publication of the United States Department of State dated 23 February 1981, entitled *Communist Interference in El Salvador*, reproducing a number of documents (in Spanish with English translation) stated to have been among documents in “two particularly important document caches... recovered from the Communist Party of El Salvador (PCS) in November 1980 and the People’s Revolutionary Army (ERP) in January 1981”. A summary of the documents is also to be found in an attachment to the 1983 Report of the Intelligence Committee, filed by Nicaragua. The second is a “Background Paper” published by the United States Department of State and Department of Defense in July 1984, entitled *Nicaragua’s Military Build-Up and Support for Central American Subversion*.

141. The full significance of the documents reproduced in the first of these publications, which are “written using cryptic language and abbreviations”, is not readily apparent, without further assistance from United States experts, who might have been called as witnesses had the United States appeared in the proceedings. For example, there are frequent references to “Lagos” which, according to the United States, is a code-name for Nicaragua; but without such assistance the Court cannot judge whether this interpretation is correct. There is also however some specific reference in an undated document to aid to the armed opposition “which all would pass through Nicaragua” – no code-name being here employed – which the Court must take into account for what it is worth.

142. The second document, the Background Paper, is stated to be based on “Sandinista documents, press reports, and interviews with captured guerrillas and defectors” as well as information from “intelligence sources”; specific intelligence reports are not cited “because of the potential consequences of revealing sources and methods”. The only material evidence included is a number of aerial photographs (already referred to in paragraph 88 above), and a map said to have been captured in a guerrilla camp in El Salvador, showing arms transport routes; this map does not appear of itself to indicate that arms enter El Salvador from Nicaraguan territory.

143. The Court’s attention has also been drawn to various press reports of statements by diplomats, by leaders of the armed opposition in El Salvador, or defectors from it, supporting the view that Nicaragua was involved in the arms supply. As the Court has already explained, it regards press reports not as evidence capable of proving facts, but considers that they can nevertheless contribute, in some circumstances, to corroborating the existence of a particular fact (paragraph 62 above). The press reports here referred to will therefore be taken into account only to that extent.

144. In an interview published in English in the *New York Times Magazine* on 28 April 1985, and in Spanish in *ABC*, Madrid, on 12 May 1985 given by Daniel Ortega Saavedra, President of the Junta of Nicaragua, he is reported to have said:

> “We’ve said that we’re willing to send home the Cubans, the Russians, the rest of the advisers. We’re willing to stop the movement of military aid, or any other kind of aid, through Nicaragua to El Salvador, and we’re willing to accept international verification. In return, we’re asking for one thing: that they don’t attack us, that the United States stop arming and financing... the gangs that kill our people, burn our crops and force us to divert enormous human and economic resources into war when we desperately need them for development.” (“Hemos dicho que estamos dispuestos a sacar a los cubanos, soviéticos y demás asesores; a suspender todo tránsito por nuestro territorio de ayuda militar a otro a los salvadoreños, bajo verificación internacional. Hemos dicho que lo único que pedimos es que nos agredan y que Estados Unidos no arme y financie... a las bandas que entran a matarnos, a quemar las cosechas, y que nos obligan a distraer enormes recursos humanos y económicos que nos hacen una falta angustiosa para el desarrollo.”)

The Court has to consider whether this press report can be treated as evidence of an admission by the Nicaraguan Head of State that the Nicaraguan Government is in a position to stop the movement of military or other aid through Nicaraguan territory to El Salvador; and whether it can be deduced from this (in conjunction with other material) that the Nicaraguan Government is responsible for the supply or transit of such aid.

145. Clearly the remarks attributed to President Ortega raise questions as to his meaning, namely as to what exactly the Nicaraguan Government was offering to stop. According to Nicaragua’s own evidence, President Ortega had offered during the meeting of 12 August 1981 to stop the arms flow if the United States would supply the necessary information to enable the Nicaraguan Government to track it down; it may in fact be the interview of 12 August 1981 that President Ortega was referring to when he spoke of what had been said to the United States Government. At all events, against the background of the firm denial by the Nicaraguan Government of complicity in an arms flow to El Salvador, the Court cannot regard remarks of this kind as an admission that that Government
was in fact doing what it had already officially denied and continued subsequently to deny publicly.

146. Reference was made during the hearings to the testimony of defectors from Nicaragua or from the armed opposition in El Salvador; the Court has no such direct testimony before it. The only material available in this respect is press reports, some of which were annexed to the United States Counter-Memorial on the questions of jurisdiction and admissibility. With appropriate reservations, the Court has to consider what the weight is of such material, which includes allegations of arms supply and of the training of Salvadoreans at a base near Managua. While the Court is not prepared totally to discount this material, it cannot find that it is of any great weight in itself. Still less can statements attributed in the press to unidentified diplomats stationed in Managua be regarded as evidence that the Nicaraguan Government was continuing to supply aid to the opposition in El Salvador.

147. The evidence or material offered by Nicaragua in connection with the allegation of arms supply has to be assessed bearing in mind the fact that, in responding to that allegation, Nicaragua has to prove a negative. Annexed to the Memorial was a declaration dated 21 April 1984 of Miguel d’Escoto Brockmann, the Foreign Minister of Nicaragua. In this respect the Court has, as in the case of the affidavit of the United States Secretary of State, to recall the observations it has already made (paragraphs 69 and 70) as to the evidential value of such declarations. In the declaration, the Foreign Minister states that the allegations made by the United States, that the Nicaraguan Government “is sending arms, ammunition, communications equipment and medical supplies to rebels conducting a civil war against the Government of El Salvador, are false”. He continues:

“In truth, my government is not engaged, and has not been engaged, in the provision of arms or other supplies to either of the factions engaged in the civil war in El Salvador ... Since my government came to power on July 19, 1979, its policy and practice has been to prevent our national territory from being used as a conduit for arms or other military supplies intended for other governments or rebel groups. In fact, on numerous occasions the security forces of my government have intercepted clandestine arms shipments, apparently destined for El Salvador, and confiscated them.”

The Foreign Minister explains the geographical difficulty of patrolling Nicaragua’s frontiers:

148. Before turning to the evidence offered by Nicaragua at the hearings, the Court would note that the action of the United States Government itself, on the basis of its own intelligence reports, does not suggest that arms supply to El Salvador from the territory of Nicaragua was continuous from July 1979, when the new regime took power in Managua, and the early months of 1981. The presidential Determination of 12 September 1980, for the purposes of the Special Central American Assistance Act 1979, quoted in paragraph 123 above, officially certified that the Government of Nicaragua was not aiding, abetting or supporting acts of violence or terrorism in other countries, and the press release of the same date emphasized the “careful consideration and evaluation of all the relevant evidence provided by the intelligence community and by our Embassies in the field” for the purposes of the Determination. The 1983 Report of the Intelligence Committee, on the other hand, referring to its regular review of intelligence since “the 1979 Sandinista victory in Nicaragua”, found that the intelligence available to it in May 1983 supported “with certainty” the judgment that arms and material supplied to “the Salvadorian insurgents transits Nicaragua with the permission and assistance of the Sandinistas” (see paragraph 137 above).

149. During the oral proceedings Nicaragua offered the testimony of Mr. MacMichael, already reviewed above (paragraphs 134 and 135) from a different aspect. The witness, who was well placed to judge the situation from United States intelligence, stated that there was no detection by United States intelligence capabilities of arms traffic from Nicaraguan territory to El Salvador during the period of his service (March 1981 to April 1983). He was questioned also as to his opinion, in the light of official
statements and press reports, on the situation after he left the CIA and ceased to have access to intelligence material, but the Court considers it can attach little weight to statements of opinion of this kind (cf. paragraph 68 above).

150. In weighing up the evidence summarized above, the Court has to determine also the significance of the context of, or background to, certain statements or indications. That background includes, first, the ideological similarity between two movements, the Sandinista movement in Nicaragua and the armed opposition to the present government in El Salvador; secondly the consequent political interest of Nicaragua in the weakening or overthrow of the government in power in El Salvador; and finally, the sympathy displayed in Nicaragua, including among members of the army, towards the armed opposition in El Salvador. At the meeting of 12 August 1981 (paragraph 136 above), for example, Commander Ortega told the United States representative, Mr. Enders, that “we are interested in seeing the guerrillas in El Salvador and Guatemala triumph...”, and that “there is a great desire here to collaborate with the Salvadorian people...”. Against this background, various indications which, taken alone, cannot constitute either evidence or even a strong presumption of aid being given by Nicaragua to the armed opposition in El Salvador, do at least require to be examined meticulously on the basis that it is probable that they are significant.

151. It is in this light, for example, that one indirect piece of evidence acquires particular importance. From the record of the meeting of 12 August 1981 in Managua, mentioned in the preceding paragraph, it emerges that the Nicaraguan authorities may have immediately taken steps, at the request of the United States, to bring to a halt or prevent various forms of support to the armed opposition in El Salvador. The United States representative is there reported to have referred to steps taken by the Government of Nicaragua in March 1981 to halt the flow of arms to El Salvador, and his statement to that effect was not contradicted. According to a New York Times report (17 September 1985) Commander Ortega stated that around this time measures were taken to prevent an airstrip in Nicaragua from continuing to be used for these types of activities. This, in the Court’s opinion, is an admission of certain facts, such as the existence of an airstrip designed to handle small aircraft, probably for the transport of weapons, the likely destination being El Salvador, even if the Court has not received concrete proof of such transport. The promptness with which the Nicaraguan authorities closed off this channel is a strong indication that it was in fact being used, or had been used for such a purpose.

152. The Court finds, in short, that support for the armed opposition in El Salvador from Nicaraguan territory was a fact up to the early months of 1981. While the Court does not possess full proof that there was aid, or as to its exact nature, its scale and its continuance until the early months of 1981, it cannot overlook a number of concordant indications, many of which were provided moreover by Nicaragua itself, from which it can reasonably infer the provision of a certain amount of aid from Nicaraguan territory. The Court has already explained (paragraphs 64, 69 and 70) the precise degree to which it intended to take account, as regards factual evidence, of statements by members of the governments of the States concerned, including those of Nicaragua. It will not return to this point.

153. After the early months of 1981, evidence of military aid from or through Nicaragua remains very weak. This is so despite the deployment by the United States in the region of extensive technical resources for tracking, monitoring and intercepting air, sea and land traffic, described in evidence by Mr. MacMichael and its use of a range of intelligence and information sources in a political context where, moreover, the Government had declared and recognized surveillance of Nicaragua as a “high priority”. The Court cannot of course conclude from this that no transborder traffic in arms existed, although it does not seem particularly unreasonable to believe that traffic of this kind, had it been persistent and on a significant scale, must inevitably have been discovered, in view of the magnitude of the resources used for that purpose. The Court merely takes note that the allegations of arms-trafficking are not solidly established; it has not, in any event, been able to satisfy itself that any continuing flow on a significant scale took place after the early months of 1981.

154. In this connection, it was claimed in the Declaration of Intervention by El Salvador that there was a “continuing flow of arms, ammunition, medicines, and clothing from Nicaragua to our country” (para. VIII), and El Salvador also affirmed the existence of “land infiltration routes between Nicaragua and El Salvador”. Had evidence of this become available, it is not apparent why El Salvador, given full knowledge of an arms-flow and the routes used, could not have put an end to the traffic, either by itself or with the assistance of the United States, which has deployed such powerful resources. There is no doubt that the United States and El Salvador are making considerable effort to prevent any infiltration of weapons and any form of support to the armed opposition in El Salvador from the direction of Nicaragua. So far as the Court has been informed, however, they have not succeeded in tracing and intercepting this infiltration and these various forms of support. Consequently, it can only interpret the lack of evidence of the transborder arms-flow in one of the following two ways: either this flow exists, but is neither as frequent nor as considerable as alleged by the respondent State; or it is being carried on without the knowledge, and against the will, of a government which would rather put a stop to it. If the latter conclusion is at all valid with regard to El Salvador and the United States it must therefore be at least equally valid with regard to Nicaragua.

155. Secondly, even supposing it well established that military aid is
reaching the armed opposition in El Salvador from the territory of Nicaragua, it still remains to be proved that this aid is imputable to the authorities of the latter country. Indeed, the applicant State has in no way sought to conceal the possibility of weapons en route to the armed opposition in El Salvador crossing its territory but it denies that this is the result of any deliberate official policy on its part. As the Court observed in 1949:

"it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves prima facie responsibility nor shifts the burden of proof." (Corfu Channel, I.C.J. Reports 1949, p. 18.)

Here it is relevant to bear in mind that there is reportedly a strong will for collaboration and mutual support between important elements of the populations of both El Salvador and Nicaragua, not least among certain members of the armed forces in Nicaragua. The Court sees no reason to dismiss these considerations, especially since El Salvador itself recognizes the existence in Nicaraguan coastal areas of "traditional smugglers" (Declaration, para. VIII, H), because Nicaragua is accused not so much of delivering weapons itself as of allowing them to transit through its territory; and finally because evidence has been provided, in the report of the meeting of 12 August 1981 referred to in paragraph 136 above, of a degree of co-operation between the United States and Nicaragua for the purpose of putting a stop to these arms deliveries. The continuation of this co-operation does not seem to have depended solely on the Government of Nicaragua, for the Government of the United States, which in 1981 again raised with it the question of this traffic, this time refused to provide the Nicaraguan authorities, as it had on previous occasions, with the specific information and details that would have enabled them to call a halt to it. Since the Government of the United States has justified its refusal by claiming that any disclosure would jeopardize its sources of information, the Court has no means of assessing the reality or cogency of the undervalued evidence which the United States claimed to possess.

156. In passing, the Court would remark that, if this evidence really existed, the United States could be expected to have taken advantage of it in order to forestall or disrupt the traffic observed; it could presumably for example arrange for the deployment of a strong patrol force in El Salvador and Honduras, along the frontiers of these States with Nicaragua. It is difficult to accept that it should have continued to carry out military and paramilitary activities against Nicaragua if their only purpose was, as alleged, to serve as a riposte to the exercise of the right of collective self-defence. If, on the other hand, this evidence does not exist, that, as the Court has pointed out, implies that the arms traffic is so insignificant and casual that it escapes detection even by the sophisticated techniques employed for the purpose, and that, a fortiori, it could also have been carried on unknown to the Government of Nicaragua, as that Government claims. These two conclusions mutually support each other.

157. This second hypothesis would provide the Court with a further reason for taking Nicaragua's affirmation into consideration, in that, if the flow of arms is in fact reaching El Salvador without either Honduras or El Salvador or the United States succeeding in preventing it, it would clearly be unreasonable to demand of the Government of Nicaragua a higher degree of diligence than is achieved by even the combined efforts of the other three States. In particular, when Nicaragua is blamed for allowing consignments of arms to cross its territory, this is tantamount, where El Salvador is concerned, to an admission of its inability to stem the flow. This is revealing as to the predicament of any government, including that of Nicaragua, faced with this arms traffic: its determination to put a stop to it would be likely to fail. More especially, to the extent that some of this aid is said to be successfully routed through Honduras, this accusation against Nicaragua would also signify that Honduras, which is not suspected of seeking to assist the armed opposition in El Salvador, is providing involuntary proof that it is by no means certain that Nicaragua can combat this clandestine traffic any better than Honduras. As the means at the disposal of the governments in the region are roughly comparable, the geographical obstacles, and the intrinsic character of any clandestine arms traffic, simply show that this traffic may be carried on successfully without any complicity from governmental authorities, and even when they seek to put a stop to it. Finally, if it is true that the exceptionally extensive resources deployed by the United States have been powerless to prevent this traffic from keeping the Salvadorian armed opposition supplied, this suggests even more clearly how powerless Nicaragua must be with the much smaller resources at its disposal for subduing this traffic if it takes place on its territory and the authorities endeavour to put a stop to it.

158. Confining itself to the regional States concerned, the Court accordingly considers that it is scarcely possible for Nicaragua's responsibility for an arms traffic taking place on its territory to be automatically assumed while the opposite assumption is adopted with regard to its neighbours in respect of similar traffic. Having regard to the circumstances characterizing this part of Central America, the Court considers it more realistic, and consistent with the probabilities, to recognize that an activity of that nature, if on a limited scale, may very well be pursued unbeknown to the territorial government.

159. It may be objected that the Nicaraguan authorities are alleged to have declared on various occasions that military assistance to the armed opposition in El Salvador was part of their official policy. The Court has already indicated that it is unable to give weight to alleged statements to that effect of which there is insufficient evidence. In the report of the diplomatic talks held on 12 August 1981 at Managua, Commander Ortega
did not in any sense promise to cease sending arms, but, on the contrary, said on the one hand that Nicaragua had taken immediate steps to put a stop to it once precise information had been given and, on the other hand, expressed inability to take such steps where Nicaragua was not provided with information enabling that traffic to be located. The Court would further observe that the four draft treaties submitted by Nicaragua within the Contadora process in 1983 (quoted in paragraph 139 above) do not constitute an admission by Nicaragua of the supply of assistance to the armed opposition in El Salvador, but simply make provision for the future in the context of the inter-American system, in which a State is prohibited from assisting the armed opposition within another State.

160. On the basis of the foregoing, the Court is satisfied that, between July 1979, the date of the fall of the Somoza régime in Nicaragua, and the early months of 1981, an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition in El Salvador. On the other hand, the evidence is insufficient to satisfy the Court that, since the early months of 1981, assistance has continued to reach the Salvadoran armed opposition from the territory of Nicaragua on any significant scale, or that the Government of Nicaragua was responsible for any flow of arms at either period.

* * *

161. The Court therefore turns to the claim that Nicaragua has been responsible for cross-border military attacks on Honduras and Costa Rica. The United States annexed to its Counter-Memorial on jurisdiction, inter alia, a document entitled "Résumé of Sandinista Aggression in Honduran Territory in 1982" issued by the Press and Information Officer of the Honduran Ministry of Foreign Relations on 23 August 1982. That document listed 35 incidents said to involve violations of Honduran territory, territorial waters or airspace, attacks on or harassment of the Honduran population or Honduran patrols, between 30 January 1982 and 21 August 1982. Also attached to the Counter-Memorial were copies of diplomatic Notes from Honduras to Nicaragua protesting at other incidents stated to have occurred in June/July 1983 and July 1984. The Court has no information as to whether Nicaragua replied to these communications, and if so in what terms.

162. With regard to Costa Rica, the United States has supplied the text of diplomatic Notes of protest from Costa Rica to Nicaragua concerning incidents in September 1983, February 1984 and April 1984, and a Note from Costa Rica to the Foreign Ministers of Colombia, Mexico, Panama and Venezuela, referring to an incident of 29 April 1984, and requesting the sending of a mission of observers. Again, the Court has no information as to the contemporary reaction of Nicaragua to these allegations; from press reports it appears that the matter was later amicably settled.

163. As the Court has already observed (paragraphs 130 to 131 above), both the Parties have addressed themselves primarily to the question of aid by the Government of Nicaragua to the armed opposition in El Salvador, and the question of aggression directed against Honduras and Costa Rica has fallen somewhat into the background. Nevertheless the allegation that such aggression affords a basis for the exercise by the United States of the right of collective self-defence remains on the record; and the Court has to note that Nicaragua has not taken the opportunity during the proceedings of expressly refuting the assertion that it has made cross-border military attacks on the territory of those two States. At the opening of the hearings in 1984 on the questions of jurisdiction and admissibility, the Agent of Nicaragua referred to the "supposed armed attacks of Nicaragua against its neighbours", and proceeded to "reiterate our denial of these accusations which in any case we will amply address in the merits phase of these proceedings". However, the declaration of the Nicaraguan Foreign Minister annexed to the Memorial on the merits filed on 30 April 1985, while repudiating the accusation of support for the armed opposition in El Salvador, did not refer at all to the allegation of border incidents involving Honduras and Costa Rica.

164. The Court, while not as fully informed on the question as it would wish to be, therefore considers as established the fact that certain transborder military incursions into the territory of Honduras and Costa Rica are imputable to the Government of Nicaragua. The Court is also aware of the fact that the FDN operates along the Nicaraguan border with Honduras, and the ARDE operates along the border with Costa Rica.

* * *

165. In view of the assertion by the United States that it has acted in exercise of the right of collective self-defence for the protection of El Salvador, Honduras and Costa Rica, the Court has also to consider the evidence available on the question whether those States, or any of them, made a request for such protection. In its Counter-Memorial on jurisdiction and admissibility, the United States informed the Court that:

"El Salvador, Honduras, and Costa Rica have each sought outside assistance, principally from the United States, in their self-defense against Nicaragua's aggression. Pursuant to the inherent right of individual and collective self-defense, and in accordance with the terms of the Inter-American Treaty of Reciprocal Assistance, the United States has responded to these requests."

No indication has however been given of the dates on which such requests for assistance were made. The affidavit of Mr. Shultz, Secretary of State,
dated 14 August 1984 and annexed to the United States Counter-Memorial on jurisdiction and admissibility, while asserting that the United States is acting in accord with the provisions of the United Nations Charter, and pursuant to the inherent right of self-defence, makes no express mention of any request for assistance by the three States named. El Salvador, in its Declaration of Intervention in the present proceedings of 15 August 1984, stated that, faced with Nicaraguan aggression.

"we have been called upon to defend ourselves, but our own economic and military capability is not sufficient to face any international apparatus that has unlimited resources at its disposal, and we have, therefore, requested support and assistance from abroad. It is our natural, inherent right under Article 51 of the Charter of the United Nations to have recourse to individual and collective acts of self-defence. It was with this in mind that President Duarte, during a recent visit to the United States and in discussions with United States congressmen, reiterated the importance of this assistance for our defence from the United States and the democratic nations of the world." (Para. XII.)

Again, no dates are given, but the Declaration continues "This was also done by the Revolutionary Junta of Government and the Government of President Magaña", i.e., between October 1979 and December 1980, and between April 1982 and June 1984.

166. The Court however notes that according to the report, supplied by the Agent of Nicaragua, of the meeting on 12 August 1981 between President Ortega of Nicaragua and Mr. Enders, the latter is reported to have referred to action which the United States might take

"if the arms race in Central America is built up to such a point that some of your [sc. Nicaragua's] neighbours in Central America seek protection from us under the Inter-American Treaty [of Reciprocal Assistance]."

This remark might be thought to carry the implication that no such request had yet been made. Admittedly, the report of the meeting is a unilateral one, and its accuracy cannot be assumed as against the United States. In conjunction with the lack of direct evidence of a formal request for assistance from any of the three States concerned to the United States, the Court considers that this report is not entirely without significance.

** *

167. Certain events which occurred at the time of the fall of the régime of President Somoza have next to be mentioned, since reliance has been placed on them to support a contention that the present Government of Nicaragua is in violation of certain alleged assurances given by its imme-

diate predecessor, the Government of National Reconstruction, in 1979. From the documents made available to the Court, at its request, by Nicaragua, it appears that what occurred was as follows. On 23 June 1979, the Seventeenth Meeting of Consultation of Ministers of Foreign Affairs of the Organization of American States adopted by majority, over the negative vote of, inter alios, the representative of the Somoza government of Nicaragua, a resolution on the subject of Nicaragua. By that resolution after declaring that "the solution of the serious problem is exclusively within the jurisdiction of the people of Nicaragua", the Meeting of Consultation declared

"That in the view of the Seventeenth Meeting of Consultation of Ministers of Foreign Affairs this solution should be arrived at on the basis of the following:

1. Immediate and definitive replacement of the Somoza régime.
2. Installation in Nicaraguan territory of a democratic government, the composition of which should include the principal representative groups which oppose the Somoza régime and which reflects the free will of the people of Nicaragua.
3. Guarantee of the respect for human rights of all Nicaraguans without exception.
4. The holding of free elections as soon as possible, that will lead to the establishment of a truly democratic government that guarantees peace, freedom, and justice."

On 12 July 1979, the five members of the Nicaraguan "Junta of the Government of National Reconstruction" sent from Costa Rica a telegram to the Secretary-General of the Organization of American States, communicating the "Pan of the Government of National Reconstruction to Secure Peace". The telegram explained that the plan had been developed on the basis of the Resolution of the Seventeenth Meeting of Consultation; in connection with that plan, the Junta members stated that they wished to "ratify" (ratificar) some of the "goals that have inspired their government". These included, first

"our firm intention to establish full observance of human rights in our country in accordance with the United Nations Universal Declaration of the Rights of Man [sic], and the Charter on Human Rights of the Organization of American States";

the Inter-American Commission on Human Rights was invited "to visit our country as soon as we are installed in our national territory". A further goal was

"the plan to call the first free elections our country has known in this century, so that Nicaraguans can elect their representatives to the city councils and to a constituent assembly, and later elect the country's highest authorities".
The Plan to Secure Peace provided for the Government of National Reconstruction, as soon as established, to decree a Fundamental Statute and an Organic Law, and implement the Program of the Government of National Reconstruction. Drafts of these texts were appended to the Plan: they were enacted into law on 20 July 1979 and 21 August 1979.

168. In this connection, the Court notes that, since thus announcing its objectives in 1979, the Nicaraguan Government has in fact ratified a number of international instruments on human rights. At the invitation of the Government of Nicaragua, the Inter-American Commission on Human Rights visited Nicaragua and compiled two reports (OEA/Ser.L/V/11.53 and 62). A state of emergency was declared by the Nicaraguan Government (and notified to the United Nations Secretary-General) in July 1979, and was re-declared or extended on a number of subsequent occasions. On 4 November 1984, presidential and legislative elections were held, in the presence of foreign observers: seven political parties took part in the election, while three parties abstained from taking part on the ground that the conditions were unsatisfactory.

169. The view of the United States as to the legal effect of these events is reflected in, for example, a Report submitted to Congress by President Reagan on 10 April 1985 in connection with finance for the contra. It was there stated that one of the changes which the United States was seeking from the Nicaraguan Government was:

"implementation of Sandinista commitment to the Organization of American States to political pluralism, human rights, free elections, non-alignment, and a mixed economy".

A fuller statement of those views is contained in a formal finding by Congress on 29 July 1985, to the following effect:

"(A) the Government of National Reconstruction of Nicaragua formally accepted the June 23, 1979, resolution as a basis for resolving the Nicaraguan conflict in its 'Plan to Achieve Peace' which was submitted to the Organization of American States on July 12, 1979;

(B) the June 23, 1979, resolution and its acceptance by the Government of National Reconstruction of Nicaragua was the formal basis for the removal of the Somoza régime and the installation of the Government of National Reconstruction;

(C) the Government of National Reconstruction, now known as the Government of Nicaragua and controlled by the Frente Sandinista (the FSLN), has flagrantly violated the provisions of the June 23, 1979, resolution, the rights of the Nicaraguan people, and the security of the nations in the region, in that it

(i) no longer includes the democratic members of the Government of National Reconstruction in the political process;

(ii) is not a government freely elected under conditions of freedom of the press, assembly, and organization, and is not recognized as freely elected by its neighbors, Costa Rica, Honduras, and El Salvador;

(iii) has taken significant steps towards establishing a totalitarian Communist dictatorship, including the formation of FSLN neighborhood watch committees and the enactment of laws that violate human rights and grant undue executive power;

(iv) has committed atrocities against its citizens as documented in reports by the Inter-American Commission on Human Rights of the Organization of American States;

(v) has aligned itself with the Soviet Union and Soviet allies, including the German Democratic Republic, Bulgaria, Libya, and the Palestine Liberation Organization;

(vi) has committed and refuses to cease aggression in the form of armed subversion against its neighbors in violation of the Charter of the United Nations, the Charter of the Organization of American States, the Inter-American Treaty of Reciprocal Assistance, and the 1965 United Nations General Assembly Declaration on Intervention; and

(vii) has built up an army beyond the needs of immediate self-defense, at the expense of the needs of the Nicaraguan people and about which the nations of the region have expressed deepest concern."

170. The resolution goes on to note the belief expressed by Costa Rica, El Salvador and Honduras that

"their peace and freedom is not safe so long as the Government of Nicaragua excludes from power most of Nicaragua's political leadership and is controlled by a small sectarian party, without regard to the will of the majority of Nicaraguans"

and adds that

"the United States, given its role in the installation of the current Government of Nicaragua, has a special responsibility regarding the implementation of the commitments made by that Government in 1979, especially to those who fought against Somoza to bring democracy to Nicaragua with United States support".

Among the findings as to the "Resolution of the Conflict" is the statement that the Congress
"supports the Nicaraguan democratic resistance in its efforts to peacefully resolve the Nicaraguan conflict and to achieve the fulfillment of the Government of Nicaragua's solemn commitments to the Nicaraguan people, the United States, and the Organization of American States".

From the transcripts of speeches and press conferences supplied to the Court by Nicaragua, it is clear that the resolution of Congress expresses a view shared by the President of the United States, who is constitutionally responsible for the foreign policy of the United States.

171. The question whether the alleged violations by the Nicaraguan Government of the 1979 Resolution of the Organization of American States Meeting of Consultation, listed in paragraph 169, are relied on by the United States Government as legal justifications of its conduct towards Nicaragua, or merely as political arguments, will be examined later in the present Judgment. It may however be observed that the resolution clearly links United States support for the contras to the breaches of what the United States regards as the “solemn commitments” of the Government of Nicaragua.

* * * * *

172. The Court has now to turn its attention to the question of the law applicable to the present dispute. In formulating its view on the significance of the United States multilateral treaty reservation, the Court has reached the conclusion that it must refrain from applying the multilateral treaties invoked by Nicaragua in support of its claims, without prejudice either to other treaties or to the other sources of law enumerated in Article 38 of the Statute. The first stage in its determination of the law actually to be applied to this dispute is to ascertain the consequences of the exclusion of the applicability of the multilateral treaties for the definition of the content of the customary international law which remains applicable.

173. According to the United States, these consequences are extremely wide-ranging. The United States has argued that:

"Just as Nicaragua's claims allegedly based on 'customary and general international law' cannot be determined without recourse to the United Nations Charter as the principal source of that law, they also cannot be determined without reference to the 'particular international law' established by multilateral conventions in force among the parties."

The United States contends that the only general and customary international law on which Nicaragua can base its claims is that of the Charter: in particular, the Court could not, it is said, consider the lawfulness of an alleged use of armed force without referring to the "principal source of the relevant international law", namely, Article 2, paragraph 4. of the United Nations Charter. In brief, in a more general sense "the provisions of the United Nations Charter relevant here subsume and supervene related principles of customary and general international law". The United States concludes that "since the multilateral treaty reservation bars adjudication of claims based on those treaties, it bars all of Nicaragua’s claims". Thus the effect of the reservation in question is not, it is said, merely to prevent the Court from deciding upon Nicaragua's claims by applying the multilateral treaties in question; it further prevents it from applying in its decision any rule of customary international law the content of which is also the subject of a provision in those multilateral treaties.

174. In its Judgment of 26 November 1984, the Court has already commented briefly on this line of argument. Contrary to the views advanced by the United States, it affirmed that it

"cannot dismiss the claims of Nicaragua under principles of customary and general international law, simply because such principles have been enshrined in the texts of the conventions relied upon by Nicaragua. The fact that the above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions. Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated." (I.C.J. Reports 1984, p. 424, para. 73.)

Now that the Court has reached the stage of a decision on the merits, it must develop and refine upon these initial remarks. The Court would observe that, according to the United States argument, it should refrain from applying the rules of customary international law because they have been "subsumed" and "supervened" by those of international treaty law, and especially those of the United Nations Charter. Thus the United States apparently takes the view that the existence of principles in the United Nations Charter precludes the possibility that similar rules might exist independently in customary international law, either because existing customary rules had been incorporated into the Charter, or because the Charter influenced the later adoption of customary rules with a corresponding content.

175. The Court does not consider that, in the areas of law relevant to the present dispute, it can be claimed that all the customary rules which may be invoked have a content exactly identical to that of the rules contained in
the treaties which cannot be applied by virtue of the United States reservation. On a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content. But in addition, even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability. Nor can the multilateral treaty reservation be interpreted as meaning that, once applicable to a given dispute, it would exclude the application of any rule of customary international law the content of which was the same as, or analogous to, that of the treaty-law rule which had caused the reservation to become effective.

176. As regards the suggestion that the areas covered by the two sources of law are identical, the Court observes that the United Nations Charter, the convention to which most of the United States argument is directed, by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law: this reference to customary law is contained in the actual text of Article 51, which mentions the “inherent right” (in the French text the “droit naturel”) of individual or collective self-defence, which “nothing in the present Charter shall impair” and which applies in the event of an armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a “natural” or “inherent” right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of the “armed attack” which, if found to exist, authorizes the exercise of the “inherent right” of self-defence, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which “subsumes and supervenes” customary international law. It rather demonstrates that in the field in question, the importance of which for the present dispute need hardly be stressed, customary international law continues to exist alongside treaty law. The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content. This could also be demonstrated for other subjects, in particular for the principle of non-intervention.

177. But as observed above (paragraph 175), even if the customary norm and the treaty norm were to have exactly the same content, this would not be a reason for the Court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of the treaty norm. The existence of identical rules in international treaty law and customary law has been clearly recognized by the Court in the North Sea Continental Shelf cases. To a large extent, those cases turned on the question whether a rule enshrined in a treaty also existed as a customary rule, either because the treaty had merely codified the custom, or caused it to “crystallize”, or because it had influenced its subsequent adoption. The Court found that this identity of content in treaty law and in customary international law did not exist in the case of the rule invoked, which appeared in one article of the treaty, but did not suggest that such identity was debared as a matter of principle: on the contrary, it considered it to be clear that certain other articles of the treaty in question “were . . . regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law” (I.C.J. Reports 1969, p. 39, para. 63). More generally, there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter “supervenes” the former, so that the customary international law has no further existence of its own.

178. There are a number of reasons for considering that, even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence. This is so from the standpoint of their applicability. In a legal dispute affecting two States, one of them may argue that the applicability of a treaty rule to its own conduct depends on the other State’s conduct in respect of the application of other rules, on other subjects, also included in the same treaty. For example, if a State exercises its right to terminate or suspend the operation of a treaty on the ground of the violation by the other party of a “provision essential to the accomplishment of the object or purpose of the treaty” (in the words of Art. 60, para. 3 (b), of the Vienna Convention on the Law of Treaties), it is exempted, vis-à-vis the other State, from a rule of treaty-law because of the breach by that other State of a different rule of treaty-law. But if the two rules in question also exist as rules of customary international law, the failure of the one State to apply the one rule does not justify the other State in declining to apply the other rule. Rules which are identical in treaty law and in customary international law are also distinguishable by reference to the methods of interpretation and application. A State may accept a rule contained in a treaty not simply because it favours the application of the rule itself, but also because the treaty establishes what that State regards as desirable institutions or mechanisms to ensure implementation of the rule. Thus, if that rule parallels a rule of customary international law, two rules of the same content are subject to separate treatment as regards the organs competent to verify their implementation, depending on whether they are
customary rules or treaty rules. The present dispute illustrates this point.

179. It will therefore be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content. Consequently, in ascertaining the content of the customary international law applicable to the present dispute, the Court must satisfy itself that the Parties are bound by the customary rules in question; but the Court is in no way bound to uphold these rules only in so far as they differ from the treaty rules which it is prevented by the United States reservation from applying in the present dispute.

180. The United States however presented a further argument, during the proceedings devoted to the question of jurisdiction and admissibility, in support of its contention that the multilateral treaty reservation debars the Court from considering the Nicaraguan claims based on customary international law. The United States observed that the multilateral treaties in question contain legal standards specifically agreed between the Parties to govern their mutual rights and obligations, and that the conduct of the Parties will continue to be governed by these treaties, irrespective of what the Court may decide on the customary law issue, because of the principle of *pacta sunt servanda*. Accordingly, in the contention of the United States, the Court cannot properly adjudicate the mutual rights and obligations of the two States when reference to their treaty rights and obligations is barred; the Court would be adjudicating those rights and obligations by standards other than those to which the Parties have agreed to conduct themselves in their actual international relations.

181. The question raised by this argument is whether the provisions of the multilateral treaties in question, particularly the United Nations Charter, diverge from the relevant rules of customary international law to such an extent that a judgment of the Court as to the rights and obligations of the parties under customary law, disregarding the content of the multilateral treaties binding on the parties, would be a wholly academic exercise, and not “susceptible of any compliance or execution whatever” (*Northern Cameroons, I.C.J. Reports 1963*, p. 37). The Court does not consider that this is the case. As already noted, on the question of the use of force, the United States itself argues for a complete identity of the relevant rules of customary international law with the provisions of the Charter. The Court has not accepted this extreme contention, having found that on a number of points the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content (paragraph 174 above). However, so far from having constituted a marked departure from a customary international law which still exists unmodified, the Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter, to such an extent that a number of rules contained in the Charter have acquired a status independent of it. The essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations. The differences which may exist between the specific content of each are not, in the Court’s view, such as to cause a judgment confined to the field of customary international law to be ineffective or inappropriate, or a judgment not susceptible of compliance or execution.

182. The Court concludes that it should exercise the jurisdiction conferred upon it by the United States declaration of acceptance under Article 36, paragraph 2, of the Statute, to determine the claims of Nicaragua based upon customary international law notwithstanding the exclusion from its jurisdiction of disputes “arising under” the United Nations and Organization of American States Charters.

* * *

183. In view of this conclusion, the Court has next to consider what are the rules of customary international law applicable to the present dispute. For this purpose, it has to direct its attention to the practice and *opinio juris* of States; as the Court recently observed,

“It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.” (*Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985*, pp. 29-30, para. 27.)

In this respect the Court must not lose sight of the Charter of the United Nations and that of the Organization of American States, notwithstanding the operation of the multilateral treaty reservation. Although the Court has no jurisdiction to determine whether the conduct of the United States constitutes a breach of those conventions, it can and must take them into account in ascertaining the content of the customary international law which the United States is also alleged to have infringed.

184. The Court notes that there is in fact evidence, to be examined below, of a considerable degree of agreement between the Parties as to the content of the customary international law relating to the non-use of force and non-intervention. This concurrence of their views does not however dispense the Court from having itself to ascertain what rules of customary international law are applicable. The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States. Bound as it is by Article 38 of its Statute to apply, *inter alia,*
international custom “as evidence of a general practice accepted as law”, the Court may not disregard the essential role played by general practice. Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.

185. In the present dispute, the Court, while exercising its jurisdiction only in respect of the application of the customary rules of non-use of force and non-intervention, cannot disregard the fact that the Parties are bound by these rules as a matter of treaty law and of customary international law. Furthermore, in the present case, apart from the treaty commitments binding the Parties to the rules in question, there are various instances of their having expressed recognition of the validity thereof as customary international law in other ways. It is therefore in the light of this “subjective element” — the expression used by the Court in its 1969 Judgment in the *North Sea Continental Shelf* cases (I.C.J. Reports 1969, p. 44) — that the Court has to appraise the relevant practice.

186. It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other’s internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.

* * *

187. The Court must therefore determine, first, the substance of the customary rules relating to the use of force in international relations, applicable to the dispute submitted to it. The United States has argued that, on this crucial question of the lawfulness of the use of force in inter-State relations, the rules of general and customary international law, and those of the United Nations Charter, are in fact identical. In its view this identity is so complete that, as explained above (paragraph 173), it constitutes an argument to prevent the Court from applying this customary law, because it is indistinguishable from the multilateral treaty law which it may not apply. In its Counter-Memorial on jurisdiction and admissibility the United States asserts that “Article 2 (4) of the Charter is customary and general international law”. It quotes with approval an observation by the International Law Commission to the effect that “the great majority of international lawyers today unhesitatingly hold that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force” (*ILC* Yearbook, 1966, Vol. II, p. 247).

The United States points out that Nicaragua has endorsed this view, since one of its counsel asserted that “indeed it is generally considered by publicists that Article 2, paragraph 4, of the United Nations Charter is in this respect an embodiment of existing general principles of international law”. And the United States concludes:

“In sum, the provisions of Article 2 (4) with respect to the lawfulness of the use of force are ‘modern customary law’ (*International Law Commission, loc. cit.*) and the ‘embodiment of general principles of international law’ (counsel for Nicaragua, Hearing of 25 April 1984, morning, *loc. cit.*). There is no other ‘customary and general international law’ on which Nicaragua can rest its claims.”

“It is, in short, inconceivable that this Court could consider the lawfulness of an alleged use of armed force without referring to the principal source of the relevant international law — Article 2 (4) of the United Nations Charter.”

As for Nicaragua, the only noteworthy shade of difference in its view lies in Nicaragua’s belief that “in certain cases the rule of customary law will not necessarily be identical in content and mode of application to the conventional rule”.

188. The Court thus finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law. The Parties thus both take the view that the fundamental principle in this area is expressed in the terms employed in Article 2, paragraph 4, of the United Nations Charter. They therefore accept a treaty-law obligation to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. The Court has however to be satisfied that there exists in customary international law an *opinio juris* as to the binding character of such abstention. This *opinio juris* may, though with all due caution, be deduced
from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations”. The effect of consent to the text of such resolutions cannot be understood as merely that of a “reiteration or elucidation” of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. The principle of non-use of force, for example, may thus be regarded as a principle of customary international law, not as such conditioned by provisions relating to collective security, or to the facilities or armed contingents to be provided under Article 43 of the Charter. It would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such rule (or set of rules), to be thenceforth treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter.

189. As regards the United States in particular, the weight of an expression of *opinio juris* can similarly be attached to its support of the resolution of the Sixth International Conference of American States condemning aggression (18 February 1928) and ratification of the Montevideo Convention on Rights and Duties of States (26 December 1933), Article 11 of which imposes the obligation not to recognize territorial acquisitions or special advantages which have been obtained by force. Also significant is United States acceptance of the principle of the prohibition of the use of force which is contained in the declaration on principles governing the mutual relations of States participating in the Conference on Security and Co-operation in Europe (Helsinki, 1 August 1975), whereby the participating States undertake to “refrain in their mutual relations, as well as in their international relations in general,” *(emphasis added)* from the threat or use of force. Acceptance of a text in these terms confirms the existence of an *opinio juris* of the participating States prohibiting the use of force in international relations.

190. A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that “the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*” (paragraph (1) of the commentary of the Commission to Article 50 of its draft Articles on the Law of Treaties, *ILC Yearbook*, 1966-II, p. 247). Nicaragua in its Memorial on the Merits submitted in the present case states that the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations “has come to be recognized as *jus cogens*”. The United States, in its Counter-Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this principle is a “universal norm”, a “universal international law”, a “universally recognized principle of international law”, and a “principle of *jus cogens*”.

191. As regards certain particular aspects of the principle in question, it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms. In determining the legal rule which applies to these latter forms, the Court can again draw on the formulations contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), referred to above). As already observed, the adoption by States of this text affords an indication of their *opinio juris* as to customary international law on the question. Alongside certain descriptions which may refer to aggression, this text includes others which refer only to less grave forms of the use of force. In particular, according to this resolution:

> “Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.

> States have a duty to refrain from acts of reprisal involving the use of force.

> Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of the right to self-determination and freedom and independence.

> Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.”
192. Moreover, in the part of this same resolution devoted to the principle of non-intervention in matters within the national jurisdiction of States, a very similar rule is found:

“Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State.”

In the context of the inter-American system, this approach can be traced back at least to 1928 (Convention on the Rights and Duties of States in the Event of Civil Strife, Art. 1 (1)); it was confirmed by resolution 78 adopted by the General Assembly of the Organization of American States on 21 April 1972. The operative part of this resolution reads as follows:

“The General Assembly Resolves:

1. To reiterate solemnly the need for the member states of the Organization to observe strictly the principles of non-intervention and self-determination of peoples as a means of ensuring peaceful coexistence among them and to refrain from committing any direct or indirect act that might constitute a violation of those principles.

2. To reaffirm the obligation of those states to refrain from applying economic, political, or any other type of measures to coerce another state and obtain from it advantages of any kind.

3. Similarly, to reaffirm the obligation of those states to refrain from organizing, supporting, promoting, financing, instigating, or tolerating subversive, terrorist, or armed activities against another state and from intervening in a civil war in another state or in its internal struggles.”

193. The general rule prohibiting force allows for certain exceptions. In view of the arguments advanced by the United States to justify the acts of which it is accused by Nicaragua, the Court must express a view on the content of the right of self-defence, and more particularly the right of collective self-defence. First, with regard to the existence of this right, it notes that in the language of Article 51 of the United Nations Charter, the inherent right (or “droit naturel”) which any State possesses in the event of an armed attack, covers both collective and individual self-defence. Thus, the Charter itself testifies to the existence of the right of collective self-defence in customary international law. Moreover, just as the wording of certain General Assembly declarations adopted by States demonstrates their recognition of the principle of the prohibition of force as defined a matter of customary international law, some of the wording in those declarations operates similarly in respect of the right of self-defence (both collective and individual). Thus, in the declaration quoted above on the

Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, the reference to the prohibition of force is followed by a paragraph stating that:

“nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful”.

This resolution demonstrates that the States represented in the General Assembly regard the exception to the prohibition of force constituted by the right of individual or collective self-defence as already a matter of customary international law.

194. With regard to the characteristics governing the right of self-defence, since the Parties consider the existence of this right to be established as a matter of customary international law, they have concentrated on the conditions governing its use. In view of the circumstances in which the dispute has arisen, reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised. Accordingly the Court expresses no view on that issue. The Parties also agree in holding that whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence. Since the existence of the right of collective self-defence is established in customary international law, the Court must define the specific conditions which may have to be met for its exercise, in addition to the conditions of necessity and proportionality to which the Parties have referred.

195. In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this. There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to” (inter alia) an actual armed attack conducted by regular forces, “or its substantial involvement therein”. This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the
Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States. It is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.

196. The question remains whether the lawfulness of the use of collective self-defence by the third State for the benefit of the attacked State also depends on a request addressed by that State to the third State. A provision of the Charter of the Organization of American States is here in point: and while the Court has no jurisdiction to consider that instrument as applicable to the dispute, it may examine it to ascertain what light it throws on the content of customary international law. The Court notes that the Organization of American States Charter includes, in Article 3 (f), the principle that: "An act of aggression against one American State is an act of aggression against all the other American States" and a provision in Article 27 that:

"Every act of aggression by a State against the territorial integrity or the inviolability of the territory or against the sovereignty or political independence of an American State shall be considered an act of aggression against the other American States."

197. Furthermore, by Article 3, paragraph 1, of the Inter-American Treaty of Reciprocal Assistance, signed at Rio de Janeiro on 2 September 1947, the High-Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations; and under paragraph 2 of that Article,

"On the request of the State or States directly attacked and until the decision of the Organ of Consultation of the Inter-American System, each one of the Contracting Parties may determine the immediate measures which it may individually take in fulfilment of the obligation contained in the preceding paragraph and in accordance with the principle of continental solidarity."

(The 1947 Rio Treaty was modified by the 1975 Protocol of San José, Costa Rica, but that Protocol is not yet in force.)

198. The Court observes that the Treaty of Rio de Janeiro provides that measures of collective self-defence taken by each State are decided "on the request of the State or States directly attacked". It is significant that this requirement of a request on the part of the attacked State appears in the treaty particularly devoted to these matters of mutual assistance; it is not found in the more general text (the Charter of the Organization of American States), but Article 28 of that Charter provides for the application of the measures and procedures laid down in "the special treaties on the subject".

199. At all events, the Court finds that in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack. The Court concludes that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked.

200. At this point, the Court may consider whether in customary international law there is any requirement corresponding to that found in the treaty law of the United Nations Charter, by which the State claiming to use the right of individual or collective self-defence must report to an international body, empowered to determine the conformity with international law of the measures which the State is seeking to justify on that basis. Thus Article 51 of the United Nations Charter requires that measures taken by States in exercise of this right of self-defence must be "immediately reported" to the Security Council. As the Court has observed above (paragraphs 178 and 188), a principle enshrined in a treaty, if reflected in customary international law, may well be so unencumbered with the conditions and modalities surrounding it in the treaty. Whatever influence the Charter may have had on customary international law in these matters, it is clear that in customary international law it is not a condition of the lawfulness of the use of force in self-defence that a procedure so closely dependent on the content of a treaty commitment and of the institutions established by it, should have been followed. On the other hand, if self-defence is advanced as a justification for measures which would otherwise be in breach both of the principle of customary international law and of that contained in the Charter, it is to be expected that the conditions of the Charter should be respected. Thus for the purpose of enquiry into the customary law position, the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence.
201. To justify certain activities involving the use of force, the United States has relied solely on the exercise of its right of collective self-defence. However, the Court, having regard particularly to the non-participation of the United States in the merits phase, considers that it should enquire whether customary international law, applicable to the present dispute, may contain other rules which may exclude the unlawfulness of such activities. It does not, however, see any need to reopen the question of the conditions governing the exercise of the right of individual self-defence, which have already been examined in connection with collective self-defence. On the other hand, the Court must enquire whether there is any justification for the activities in question, to be found not in the right of collective self-defence against an armed attack, but in the right to take counter-measures in response to conduct of Nicaragua which is not alleged to constitute an armed attack. It will examine this point in connection with an analysis of the principle of non-intervention in customary international law.

* * *

202. The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law. As the Court has observed: "Between independent States, respect for territorial sovereignty is an essential foundation of international relations" (I.C.J. Reports 1949, p. 35), and international law requires political integrity also to be respected. Expressions of an *opinio juris* regarding the existence of the principle of non-intervention in customary international law are numerous and not difficult to find. Of course, statements whereby States avow their recognition of the principles of international law set forth in the United Nations Charter cannot strictly be interpreted as applying to the principle of non-intervention by States in the internal and external affairs of other States, since this principle is not, as such, spelt out in the Charter. But it was never intended that the Charter should embody written confirmation of every essential principle of international law in force. The existence in the *opinio juris* of States of the principle of non-intervention is backed by established and substantial practice. It has moreover been presented as a corollary of the principle of the sovereign equality of States. A particular instance of this is General Assembly resolution 2625 (XXV), the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States. In the *Corfu Channel* case, when a State claimed a right of intervention in order to secure evidence in the territory of another State for submission to an international tribunal (I.C.J. Reports 1949, p. 34), the Court observed that:

"the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself." (I.C.J. Reports 1949, p. 35.)

203. The principle has since been reflected in numerous declarations adopted by international organizations and conferences in which the United States and Nicaragua have participated, e.g., General Assembly resolution 2131 (XX), the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty. It is true that the United States, while it voted in favour of General Assembly resolution 2131 (XX), also declared at the time of its adoption in the First Committee that it considered the declaration in that resolution to be "only a statement of political intention and not a formulation of law" (Official Records of the General Assembly, Twentieth Session, First Committee, A/C.1/SR.1423, p. 436). However, the essentials of resolution 2131 (XX) are repeated in the Declaration approved by resolution 2625 (XXV), which set out principles which the General Assembly declared to be "basic principles" of international law, and on the adoption of which no analogous statement was made by the United States representative.

204. As regards inter-American relations, attention may be drawn to, for example, the United States reservation to the Montevideo Convention on Rights and Duties of States (26 December 1933), declaring the opposition of the United States Government to "interference with the freedom, the sovereignty or other internal affairs, or processes of the Governments of other nations"; or the ratification by the United States of the Additional Protocol relative to Non-Intervention (23 December 1936). Among more recent texts, mention may be made of resolutions AG/RES.78 and AG/RES.128 of the General Assembly of the Organization of American States. In a different context, the United States expressly accepted the principles set forth in the declaration, to which reference has already been made, appearing in the Final Act of the Conference on Security and Co-operation in Europe (Helsinki, 1 August 1975), including an elaborate statement of the principle of non-intervention; while these principles were presented as applying to the mutual relations among the participating States, it can be inferred that the text testifies to the existence, and the acceptance by the United States, of a customary principle which has universal application.

205. Notwithstanding the multiplicity of declarations by States accepting the principle of non-intervention, there remain two questions: first,
what is the exact content of the principle so accepted, and secondly, is the practice sufficiently in conformity with it for this to be a rule of customary international law? As regards the first problem — that of the content of the principle of non-intervention — the Court will define only those aspects of the principle which appear to be relevant to the resolution of the dispute. In this respect it notes that, in view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State. As noted above (paragraph 191), General Assembly resolution 2625 (XXV) equates assistance of this kind with the use of force by the assisting State when the acts committed in another State “involve a threat or use of force”. These forms of action are therefore wrongful in the light of both the principle of non-use of force, and that of non-intervention. In view of the nature of Nicaragua’s complaints against the United States, and those expressed by the United States in regard to Nicaragua’s conduct towards El Salvador, it is primarily acts of intervention of this kind with which the Court is concerned in the present case.

206. However, before reaching a conclusion on the nature of prohibited intervention, the Court must be satisfied that State practice justifies it. There have been in recent years a number of instances of foreign intervention for the benefit of forces opposed to the government of another State. The Court is not here concerned with the process of decolonization; this question is not in issue in the present case. It has to consider whether there might be indications of a practice illustrative of belief in a kind of general right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified. For such a general right to come into existence would involve a fundamental modification of the customary law principle of non-intervention.

207. In considering the instances of the conduct above described, the Court has to emphasize that, as was observed in the North Sea Continental Shelf cases, for a new customary rule to be formed, not only must the acts concerned “amount to a settled practice”, but they must be accompanied by the opinio juris sive necessitatis. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is “evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis.” (I.C.J. Reports 1969, p. 44, para. 77.)

The Court has no jurisdiction to rule upon the conformity with international law of any conduct of States not parties to the present dispute, or of conduct of the Parties unconnected with the dispute; nor has it authority to ascribe to States legal views which they do not themselves advance. The significance for the Court of cases of State conduct prima facie inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law. In fact however the Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition. The United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign State for reasons connected with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy. But these were statements of international policy, and not an assertion of rules of existing international law.

208. In particular, as regards the conduct towards Nicaragua which is the subject of the present case, the United States has not claimed that its intervention, which it justified in this way on the political level, was also justified on the legal level, alleging the exercise of a new right of intervention regarded by the United States as existing in such circumstances. As mentioned above, the United States has, on the legal plane, justified its intervention expressly and solely by reference to the “classic” rules involved, namely, collective self-defence against an armed attack, Nicaragua, for its part, has often expressed its solidarity and sympathy with the opposition in various States, especially in El Salvador. But Nicaragua too has not argued that this was a legal basis for an intervention, let alone an intervention involving the use of force.

209. The Court therefore finds that no such general right of intervention, in support of an opposition within another State, exists in contemporary international law. The Court concludes that acts constituting a breach of the customary principle of non-intervention will also, if they
directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations.

* * *

210. When dealing with the rule of the prohibition of the use of force, the Court considered the exception to it constituted by the exercise of the right of collective self-defence in the event of armed attack. Similarly, it must now consider the following question: if one State acts towards another State in breach of the principle of non-intervention, may a third State lawfully take such action by way of counter-measures against the first State as would otherwise constitute an intervention in its internal affairs? A right to act in this way in the case of intervention would be analogous to the right of collective self-defence in the case of an armed attack, but both the act which gives rise to the reaction, and that reaction itself, would in principle be less grave. Since the Court is here dealing with a dispute in which a wrongful use of force is alleged, it has primarily to consider whether a State has a right to respond to intervention with intervention going so far as to justify a use of force in reaction to measures which do not constitute an armed attack but may nevertheless involve a use of force. The question is itself undeniably relevant from the theoretical viewpoint. However, since the Court is bound to confine its decision to those points of law which are essential to the settlement of the dispute before it, it is not for the Court here to determine what direct reactions are lawfully open to a State which considers itself the victim of another State's acts of intervention, possibly involving the use of force. Hence it has not to determine whether, in the event of Nicaragua's having committed any such acts against El Salvador, the latter was lawfully entitled to take any particular counter-measure. It might however be suggested that, in such a situation, the United States might have been permitted to intervene in Nicaragua in the exercise of some right analogous to the right of collective self-defence, one which might be resorted to in a case of intervention short of armed attack.

211. The Court has recalled above (paragraphs 193 to 195) that for one State to use force against another, on the ground that that State has committed a wrongful act of force against a third State, is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack. Thus the lawfulness of the use of force by a State in response to a wrongful act of which it has not itself been the victim is not admitted when this wrongful act is not an armed attack. In the view of the Court, under international law in force today — whether customary international law or that of the United Nations system — States do not have a right of “collective” armed response to acts which do not constitute an “armed attack”. Furthermore, the Court has to recall that the United States itself is relying on the “inherent right of self-defence” (paragraph 126 above), but apparently does not claim that any such right exists as would, in respect of intervention, operate in the same way as the right of collective self-defence in respect of an armed attack. In the discharge of its duty under Article 53 of the Statute, the Court has nevertheless had to consider whether such a right might exist; but in doing so it may take note of the absence of any such claim by the United States as an indication of opinio juris.

* * *

212. The Court should now mention the principle of respect for State sovereignty, which in international law is of course closely linked with the principles of the prohibition of the use of force and of non-intervention. The basic legal concept of State sovereignty in customary international law, expressed in, inter alia, Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory. As to superjacent air space, the 1944 Chicago Convention on International Civil Aviation (Art. 1) reproduces the established principle of the complete and exclusive sovereignty of a State over the air space above its territory. That convention, in conjunction with the 1958 Geneva Convention on the Territorial Sea, further specifies that the sovereignty of the coastal State extends to the territorial sea and to the air space above it, as does the United Nations Convention on the Law of the Sea adopted on 10 December 1982. The Court has no doubt that these prescriptions of treaty-law merely respond to firmly established and longstanding tenets of customary international law.

213. The duty of every State to respect the territorial sovereignty of others is to be considered for the appraisal to be made of the facts relating to the mining which occurred along Nicaragua's coasts. The legal rules in the light of which these acts of mining should be judged depend upon where they took place. The laying of mines within the ports of another State is governed by the law relating to internal waters, which are subject to the sovereignty of the coastal State. The position is similar as regards mines placed in the territorial sea. It is therefore the sovereignty of the coastal State which is affected in such cases. It is also by virtue of its sovereignty that the coastal State may regulate access to its ports.

214. On the other hand, it is true that in order to enjoy access to ports, foreign vessels possess a customary right of innocent passage in territorial waters for the purposes of entering or leaving internal waters; Article 18, paragraph 1 (b), of the United Nations Convention on the Law of the Sea of 10 December 1982, does no more than codify customary international law on this point. Since freedom of navigation is guaranteed, first in the exclusive economic zones which may exist beyond territorial waters (Art. 58 of the Convention), and secondly, beyond territorial waters and on the high seas (Art. 87), it follows that any State which enjoys a right of access to ports for its ships also enjoys all the freedom necessary for
military activities. I may therefore be said that, if this right of access to
the port is hindered by the laying of mines by another State, what is
infringed is the freedom of communications and of maritime commerce. At
all events, it is certain that interference with navigation in these areas
prejudices both the sovereignty of the coastal State over its internal waters,
and the right of free access enjoyed by foreign ships.

* * *

215. The Court has noted above (paragraph 77 in fine) that the United
States did not issue any warning or notification of the presence of the
mines which had been laid in or near the ports of Nicaragua. Yet even in
time of war, the Convention relative to the laying of automatic submarine
contact mines of 18 October 1907 (the Hague Convention No. VIII) pro-
vides that “every possible precaution must be taken for the security of
peaceful shipping” and belligerents are bound

“to notify the danger zones as soon as military exigencies permit, by a
notice addressed to ship owners, which must also be communicated to
the Governments through the diplomatic channel” (Art. 3).

Neutral Powers which lay mines off their own coasts must issue a similar
notification, in advance (Art. 4). It has already been made clear above that
in peacetime for one State to lay mines in the internal or territorial waters
of another is an unlawful act; but in addition, if a State lays mines in any
waters whatever in which the vessels of another State have rights of access
or passage, and fails to give any warning or notification whatsoever, in
disregard of the security of peaceful shipping, it commits a breach of the
principles of humanitarian law underlying the specific provisions of Con-
vention No. VIII of 1907. Those principles were expressed by the Court in
the Corfu Channel case as follows:

“certain general and well recognized principles, namely: elementary
considerations of humanity, even more exacting in peace than in war”

* * *

216. This last consideration leads the Court on to examination of the
international humanitarian law applicable to the dispute. Clearly, use of
force may in some circumstances raise questions of such law. Nicaragua
has in the present proceedings not expressly invoked the provisions of
international humanitarian law as such, even though, as noted above
(paragraph 113), it has complained of acts committed on its territory which
would appear to be breaches of the provisions of such law. In the sub-
missions in its Application it has expressly charged

“That the United States, in breach of its obligation under general
and customary international law, has killed, wounded and kidnapped
and is killing, wounding and kidnapping citizens of Nicaragua.”
(Application, 26 (f).)

The Court has already indicated (paragraph 115) that the evidence avail-
able is insufficient for the purpose of attributing to the United States
the acts committed by the contras in the course of their military or
paramilitary operations in Nicaragua; accordingly, this submission has to
be rejected. The question however remains of the law applicable to the
acts of the United States in relation to the activities of the contras, in
particular the production and dissemination of the manual on psycholo-
gical operations described in paragraphs 117 to 122 above; as already
explained (paragraph 116), this is a different question from that of the
violations of humanitarian law of which the contras may or may not
have been guilty.

217. The Court observes that Nicaragua, which has invoked a number
of multilateral treaties, has refrained from making reference to the four
Geneva Conventions of 12 August 1949, to which both Nicaragua and the
United States are parties. Thus at the time when the Court was seised of
the dispute, that dispute could be considered not to “arise”, to use the wording
of the United States multilateral treaty reservation, under any of these
Geneva Conventions. The Court did not therefore have to consider
whether that reservation might be a bar to the Court treating the relevant
provisions of these Conventions as applicable. However, if the Court were
on its own initiative to find it appropriate to apply these Conventions, as
such, for the settlement of the dispute, it could be argued that the Court
would be treating it as a dispute “arising” under them; on that basis, it
would have to consider whether any State party to those Conventions
would be “affected” by the decision, for the purposes of the United States
multilateral treaty reservation.

218. The Court however sees no need to take a position on that matter,
since in its view the conduct of the United States may be judged according
to the fundamental general principles of humanitarian law; in its view, the
Geneva Conventions are in some respects development, and in other
respects no more than the expression of such principles. It is significant in
this respect that, according to the terms of the Conventions, the denun-
ciation of one of them

“shall in no way impair the obligations which the Parties to the
conflict shall remain bound to fulfil by virtue of the principles of the
law of nations, as they result from the usages established among
civilized peoples, from the laws of humanity and the dictates of the
public conscience” (Convention I, Art. 63; Convention II, Art. 62; Convention III, Art. 142; Convention IV, Art. 158).

Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called “elementary considerations of humanity” (Corfu Channel, Merits, I.C.J. Reports 1949, p. 22; paragraph 215 above). The Court may therefore find them applicable to the present dispute, and is thus not required to decide what role the United States multinational treaty reservation might otherwise play in regard to the treaties in question.

219. The conflict between the contras’ forces and those of the Government of Nicaragua is an armed conflict which is “not of an international character”. The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts. Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict. The relevant principles are to be looked for in the provisions of Article 3 of each of the four Conventions of 12 August 1949, the text of which, identical in each Convention, expressly refers to conflicts not having an international character.

220. The Court considers that there is an obligation on the United States Government, in the terms of Article I of the Geneva Conventions, to “respect” the Conventions and even “to ensure respect” for them “in all circumstances”, since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions, which reads as follows:

“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for...

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention...”

* * *

221. In its Judgment of 26 November 1984, the Court concluded that, in so far as the claims presented in Nicaragua’s Application revealed the existence of a dispute as to the interpretation or application of the Articles of the 1956 Treaty of Friendship, Commerce and Navigation between the Parties mentioned in paragraph 82 of that Judgment (that is, Arts. XIX, XIV, XVII, XX, 1), it had jurisdiction to deal with them under Article XXIV, paragraph 2, of that Treaty. Having thus established its jurisdiction to entertain the dispute between the Parties in respect of the interpretation and application of the Treaty in question, the Court must determine the meaning of the various provisions which are relevant for its judgment. In this connection, the Court has in particular to ascertain the scope of Article XXI, paragraphs 1 (c) and 1 (d), of the Treaty. According to that clause:

“the present Treaty shall not preclude the application of measures:

.......

(c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment;
(d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests“.

In the Spanish text of the Treaty (equally authentic with the English text) the last phrase is rendered as “sus intereses esenciales y seguridad”.

222. This article cannot be interpreted as removing the present dispute as to the scope of the Treaty from the Court’s jurisdiction. Being itself an article of the Treaty, it is covered by the provision in Article XXIV that any dispute about the “interpretation or application” of the Treaty lies within the Court’s jurisdiction. Article XXI defines the instances in which the Treaty itself provides for exceptions to the generality of its other provisions, but it by no means removes the interpretation and application of that article from the jurisdiction of the Court as contemplated in Article XXIV. That the Court has jurisdiction to determine whether measures taken by one of the Parties fall within such an exception, is also clear a contrario from the fact that the text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests”, in such fields as nuclear fission, arms, etc. The 1956 Treaty, on the contrary, speaks simply of “necessary” measures, not of those considered by a party to be such.

223. The Court will therefore determine the substantial nature of the two categories of measures contemplated by this Article and which are not barred by the Treaty. No comment is required at this stage on subparagraph 1 (c) of Article XXI. As to subparagraph 1 (d), clearly “measures ... necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security” must signify measures which the State in question must take in performance of an international commitment of which any evasion constitutes a breach. A commitment of this kind is accepted by Members of the United Nations in respect of Security Council decisions taken on the basis of Chapter VII of the United Nations Charter (Art. 25), or, for members of the Organization of American States, in respect of decisions taken by the Organ of Consultation of the Inter-American system, under Articles 3 and 20 of the Inter-American Treaty of Reciprocal Assistance (Rio de Janeiro, 1947). The Court does not believe that this provision of the 1956 Treaty can apply to the eventuality of the exercise of the right of individual or collective self-defence.

224. On the other hand, action taken in self-defence, individual or collective, might be considered as part of the wider category of measures qualified in Article XXI as “necessary to protect” the “essential security interests” of a party. In its Counter-Memorial on jurisdiction and admissibility, the United States contended that: “Any possible doubts as to the applicability of the FCN Treaty to Nicaragua’s claims is dispelled by Article XXI of the Treaty ...” After quoting paragraph 1 (d) (set out in paragraph 221 above), the Counter-Memorial continues:

“Article XXI has been described by the Senate Foreign Relations Committee as containing ‘the usual exceptions relating ... to traffic in arms, ammunition and implements of war and to measures for collective or individual self-defense’.”

It is difficult to deny that self-defence against an armed attack corresponds to measures necessary to protect essential security interests. But the concept of essential security interests certainly extends beyond the concept of an armed attack, and has been subject to very broad interpretations in the past. The Court has therefore to assess whether the risk run by these “essential security interests” is reasonable, and secondly, whether the measures presented as being designed to protect these interests are not merely useful but “necessary”.

225. Since Article XXI of the 1956 Treaty contains a power for each of the parties to derogate from the other provisions of the Treaty, the possibility of invoking the clauses of that Article must be considered once it is apparent that certain forms of conduct by the United States would otherwise be in conflict with the relevant provisions of the Treaty. The appraisal of the conduct of the United States in the light of these relevant provisions of the Treaty pertains to the application of the law rather than to its interpretation, and the Court will therefore undertake this in the context of its general evaluation of the facts established in relation to the applicable law.

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226. The Court, having outlined both the facts of the case as proved by the evidence before it, and the general rules of international law which appear to it to be in issue as a result of these facts, and the applicable treaty-law, has now to appraise the facts in relation to the legal rules applicable. In so far as acts of the Respondent may appear to constitute violations of the relevant rules of law, the Court will then have to determine
whether there are present any circumstances excluding unlawfulness, or whether such acts may be justified upon any other ground.

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227. The Court will first appraise the facts in the light of the principle of the non-use of force, examined in paragraphs 187 to 200 above. What is unlawful, in accordance with that principle, is recourse to either the threat or the use of force against the territorial integrity or political independence of any State. For the most part, the complaints by Nicaragua are of the actual use of force against it by the United States. Of the acts which the Court has found imputable to the Government of the United States, the following are relevant in this respect:

- the laying of mines in Nicaraguan internal or territorial waters in early 1984 (paragraph 80 above);
- certain attacks on Nicaraguan ports, oil installations and a naval base (paragraphs 81 and 86 above).

These activities constitute infringements of the principle of the prohibition of the use of force, defined earlier, unless they are justified by circumstances which exclude their unlawfulness, a question now to be examined. The Court has also found (paragraph 92) the existence of military manoeuvres held by the United States near the Nicaraguan borders; and Nicaragua has made some suggestion that this constituted a "threat of force", which is equally forbidden by the principle of non-use of force. The Court is however not satisfied that the manoeuvres complained of, in the circumstances in which they were held, constituted on the part of the United States a breach, as against Nicaragua, of the principle forbidding recourse to the threat or use of force.

228. Nicaragua has also claimed that the United States has violated Article 2, paragraph 4, of the Charter, and has used force against Nicaragua in breach of its obligation under customary international law in as much as it has engaged in

"recruiting, training, arming, equipping, financing, supplying, and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua" (Application, para. 26 (a) and (c)).

So far as the claim concerns breach of the Charter, it is excluded from the Court’s jurisdiction by the multilateral treaty reservation. As to the claim that United States activities in relation to the contras constitute a breach of the customary international law principle of the non-use of force, the Court finds that, subject to the question whether the action of the United States might be justified as an exercise of the right of self-defence, the United States has committed a prima facie violation of that principle by its

assistance to the contras in Nicaragua, by "organizing or encouraging the organization of irregular forces or armed bands . . . for incursion into the territory of another State", and "participating in acts of civil strife . . . in another State", in the terms of General Assembly resolution 2625 (XXV). According to that resolution, participation of this kind is contrary to the principle of the prohibition of the use of force when the acts of civil strife referred to "involve a threat or use of force". In the view of the Court, while the arming and training of the contras can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance given by the United States Government. In particular, the Court considers that the mere supply of funds to the contras, while undoubtedly an act of intervention in the internal affairs of Nicaragua, as will be explained below, does not in itself amount to a use of force.

229. The Court must thus consider whether, as the Respondent claims, the acts in question of the United States are justified by the exercise of its right of collective self-defence against an armed attack. The Court must therefore establish whether the circumstances required for the exercise of this right of self-defence are present and, if so, whether the steps taken by the United States actually correspond to the requirements of international law. For the Court to conclude that the United States was lawfully exercising its right of collective self-defence, it must first find that Nicaragua engaged in an armed attack against El Salvador, Honduras or Costa Rica.

230. As regards El Salvador, the Court has found (paragraph 160 above) that it is satisfied that between July 1979 and the early months of 1981, an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition in that country. The Court was not however satisfied that assistance has reached the Salvadoran armed opposition, on a scale of any significance, since the early months of 1981, or that the Government of Nicaragua was responsible for any flow of arms at either period. Even assuming that the supply of arms to the opposition in El Salvador could be treated as imputable to the Government of Nicaragua, to justify invocation of the right of collective self-defence in customary international law, it would have to be equated with an armed attack by Nicaragua on El Salvador. As stated above, the Court is unable to consider that, in customary international law, the provision of arms to the opposition in another State constitutes an armed attack on that State. Even at a time when the arms flow was at its peak, and again assuming the participation of the Nicaraguan Government, that would not constitute such armed attack.

231. Turning to Honduras and Costa Rica, the Court has also stated (paragraph 164 above) that it should find established that certain trans-
border incursions into the territory of those two States, in 1982, 1983 and 1984, were imputable to the Government of Nicaragua. Very little information is however available to the Court as to the circumstances of these incursions or their possible motivations, which renders it difficult to decide whether they may be treated for legal purposes as amounting, singly or collectively, to an "armed attack" by Nicaragua on either or both States. The Court notes that during the Security Council debate in March/April 1984, the representative of Costa Rica made no accusation of an armed attack, emphasizing merely his country's neutrality and support for the Contadora process (S/PV.2529, pp. 13-23); the representative of Honduras however stated that

"my country is the object of aggression made manifest through a number of incidents by Nicaragua against our territorial integrity and civilian population" (ibid., p. 37).

There are however other considerations which justify the Court in finding that neither these incursions, nor the alleged supply of arms to the opposition in El Salvador, may be relied on as justifying the exercise of the right of collective self-defence.

232. The exercise of the right of collective self-defence presupposes that an armed attack has occurred; and it is evident that it is the victim State, being the most directly aware of that fact, which is likely to draw general attention to its plight. It is also evident that if the victim State wishes another State to come to its help in the exercise of the right of collective self-defence, it will normally make an express request to that effect. Thus in the present instance, the Court is entitled to take account, in judging the asserted justification of the exercise of collective self-defence by the United States, of the actual conduct of El Salvador, Honduras and Costa Rica at the relevant time, as indicative of a belief by the State in question that it was the victim of an armed attack by Nicaragua, and of the making of a request by the victim State to the United States for help in the exercise of collective self-defence.

233. The Court has seen no evidence that the conduct of those States was consistent with such a situation, either at the time when the United States first embarked on the activities which were allegedly justified by self-defence, or indeed for a long period subsequently. So far as El Salvador is concerned, it appears to the Court that while El Salvador did in fact officially declare itself the victim of an armed attack, and did ask for the United States to exercise its right of collective self-defence, this occurred only on a date much later than the commencement of the United States activities which were allegedly justified by this request. The Court notes that on 3 April 1984, the representative of El Salvador before the United Nations Security Council, while complaining of the "open foreign intervention practised by Nicaragua in our internal affairs" (S/PV.2528, p. 58), refrained from stating that El Salvador had been subjected to armed attack, and made no mention of the right of collective self-defence which it had supposedly asked the United States to exercise. Nor was this mentioned when El Salvador addressed a letter to the Court in April 1984, in connection with Nicaragua's complaint against the United States. It was only in its Declaration of Intervention filed on 15 August 1984, that El Salvador referred to requests addressed at various dates to the United States for the latter to exercise its right of collective self-defence (para. XII), asserting on this occasion that it had been the victim of aggression from Nicaragua "since at least 1980". In that Declaration, El Salvador affirmed that initially it had "not wanted to present any accusation or allegation [against Nicaragua] to any of the jurisdictions to which we have a right to apply", since it sought "a solution of understanding and mutual respect" (para. III).

234. As to Honduras and Costa Rica, they also were prompted by the institution of proceedings in this case to address communications to the Court; in neither of these is there mention of armed attack or collective self-defence. As has already been noted (paragraph 231 above), Honduras in the Security Council in 1984 asserted that Nicaragua had engaged in aggression against it, but did not mention that a request had consequently been made to the United States for assistance by way of collective self-defence. On the contrary, the representative of Honduras emphasized that the matter before the Security Council "is a Central American problem, without exception, and it must be solved regionally" (S/PV.2529, p. 38), i.e., through the Contadora process. The representative of Costa Rica also made no reference to collective self-defence. Nor, it may be noted, did the representative of the United States assert during that debate that it had acted in response to requests for assistance in that context.

235. There is also an aspect of the conduct of the United States which the Court is entitled to take into account as indicative of the view of that State on the question of the existence of an armed attack. At no time, up to the present, has the United States Government addressed to the Security Council, in connection with the matters the subject of the present case, the report which is required by Article 51 of the United Nations Charter in respect of measures which a State believes itself bound to take when it exercises the right of individual or collective self-defence. The Court, whose decision has to be made on the basis of customary international law, has already observed that in the context of that law, the reporting obligation enshrined in Article 51 of the Charter of the United Nations does not exist. It does not therefore treat the absence of a report on the part of the United States as the breach of an undertaking forming part of the customary international law applicable to the present dispute. But the Court is justified in observing that this conduct of the United States hardly conforms with the latter's avowed conviction that it was acting in the context of collective self-defence as consecrated by Article 51 of the Charter. This fact is all the more noteworthy because, in the Security
Council, the United States has itself taken the view that failure to observe the requirement to make a report contradicted a State’s claim to be acting on the basis of collective self-defence (S/PV.2187).

236. Similarly, while no strict legal conclusion may be drawn from the date of El Salvador’s announcement that it was the victim of an armed attack, and the date of its official request addressed to the United States concerning the exercise of collective self-defence, those dates have a significance as evidence of El Salvador’s view of the situation. The declaration and the request of El Salvador, made publicly for the first time in August 1984, do not support the contention that in 1981 there was an armed attack capable of serving as a legal foundation for United States activities which began in the second half of that year. The States concerned did not behave as though there were an armed attack at the time when the activities attributed by the United States to Nicaragua, without actually constituting such an attack, were nevertheless the most accentuated; they did so behave only at a time when these facts fell furthest short of what would be required for the Court to take the view that an armed attack existed on the part of Nicaragua against El Salvador.

237. Since the Court has found that the condition sine qua non required for the exercise of the right of collective self-defence by the United States is not fulfilled in this case, the appraisal of the United States activities in relation to the criteria of necessity and proportionality takes on a different significance. As a result of this conclusion of the Court, even if the United States activities in question had been carried on in strict compliance with the canons of necessity and proportionality, they would not thereby become lawful. If however they were not, this may constitute an additional ground of wrongfulness. On the question of necessity, the Court observes that the United States measures taken in December 1981 (or, at the earliest, March of that year – paragraph 93 above) cannot be said to correspond to a “necessity” justifying the United States action against Nicaragua on the basis of assistance given by Nicaragua to the armed opposition in El Salvador. First, these measures were only taken, and began to produce their effects, several months after the major offensive of the armed opposition against the Government of El Salvador had been completely repulsed (January 1981), and the actions of the opposition considerably reduced in consequence. Thus it was possible to eliminate the main danger to the Salvadoran Government without the United States embarking on activities in and against Nicaragua. Accordingly, it cannot be held that these activities were undertaken in the light of necessity. Whether or not the assistance to the contras might meet the criterion of proportionality, the Court cannot regard the United States activities summarized in paragraphs 80, 81 and 86, i.e., those relating to the mining of the Nicaraguan ports and the attacks on ports, oil installations, etc., as satisfying that criterion. Whatever uncertainty may exist as to the exact scale of the aid received by the Salvadoran armed opposition from Nicaragua, it is clear that these latter United States activities in question could not have been proportionate to that aid. Finally on this point, the Court must also observe that the reaction of the United States in the context of what it regarded as self-defence was continued long after the period in which any presumed armed attack by Nicaragua could reasonably be contemplated.

238. Accordingly, the Court concludes that the plea of collective self-defence against an alleged armed attack on El Salvador, Honduras or Costa Rica, advanced by the United States to justify its conduct toward Nicaragua, cannot be upheld; and accordingly that the United States has violated the principle prohibiting recourse to the threat or use of force by the acts listed in paragraph 227 above, and by its assistance to the contras to the extent that this assistance “involve[s] a threat or use of force” (paragraph 228 above).

* * *

239. The Court comes now to the application in this case of the principle of non-intervention in the internal affairs of States. It is argued by Nicaragua that the “military and paramilitary activities aimed at the government and people of Nicaragua” have two purposes:

“(a) The actual overthrow of the existing lawful government of Nicaragua and its replacement by a government acceptable to the United States; and

(b) The substantial damaging of the economy, and the weakening of the political system, in order to coerce the government of Nicaragua into the acceptance of United States policies and political demands.”

Nicaragua also contends that the various acts of an economic nature, summarized in paragraphs 123 to 125 above, constitute a form of “indirect” intervention in Nicaragua’s internal affairs.

240. Nicaragua has laid much emphasis on the intentions it attributes to the Government of the United States in giving aid and support to the contras. It contends that the purpose of the policy of the United States and its actions against Nicaragua in pursuance of this policy was, from the beginning, to overthrow the Government of Nicaragua. In order to demonstrate this, it has drawn attention to numerous statements by high officials of the United States Government, in particular by President Reagan, expressing solidarity and support for the contras, described on occasion as “freedom fighters”, and indicating that support for the contras would continue until the Nicaraguan Government took certain action, desired by the United States Government, amounting in effect to a surrender to the demands of the latter Government. The official Report of the
President of the United States to Congress of 10 April 1985, quoted in paragraph 96 above, states that: “We have not sought to overthrow the Nicaraguan Government nor to force on Nicaragua a specific system of government.” But it indicates also quite openly that “United States policy toward Nicaragua” – which includes the support for the military and paramilitary activities of the contras which it was the purpose of the Report to continue – “has consistently sought to achieve changes in Nicaraguan government policy and behavior”.

241. The Court however does not consider it necessary to seek to establish whether the intention of the United States to secure a change of governmental policies in Nicaragua went so far as to be equated with an endeavour to overthrow the Nicaraguan Government. It appears to the Court to be clearly established first, that the United States intended, by its support of the contras, to coerce the Government of Nicaragua in respect of matters in which each State is permitted, by the principle of State sovereignty, to decide freely (see paragraph 205 above); and secondly that the intention of the contras themselves was to overthrow the present Government of Nicaragua. The 1983 Report of the Intelligence Committee refers to the contras’ “openly acknowledged goal of overthrowing the Sandinistas”. Even if it be accepted, for the sake of argument, that the objective of the United States in assisting the contras was solely to interdict the supply of arms to the armed opposition in El Salvador, it strains belief to suppose that a body formed in armed opposition to the Government of Nicaragua, and calling itself the “Nicaraguan Democratic Force”, intended only to check Nicaraguan interference in El Salvador and did not intend to achieve violent change of government in Nicaragua. The Court considers that in international law, if one State, with a view to the coercion of another State, supports and assists armed bands in that State whose purpose is to overthrow the government of that State, that amounts to an intervention by the one State in the internal affairs of the other, whether or not the political objective of the State giving such support and assistance is equally far-reaching. It is for this reason that the Court has only examined the intentions of the United States Government so far as they bear on the question of self-defence.

242. The Court therefore finds that the support given by the United States, up to the end of September 1984, to the military and paramilitary activities of the contras in Nicaragua, by financial support, training, supply of weapons, intelligence and logistic support, constitutes a clear breach of the principle of non-intervention. The Court has however taken note that, with effect from the beginning of the United States governmental financial year 1985, namely 1 October 1984, the United States Congress has restricted the use of the funds appropriated for assistance to the contras to “humanitarian assistance” (paragraph 97 above). There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law. The characteristics of such aid were indicated in the first and second of the fundamental principles declared by the Twentieth International Conference of the Red Cross, that

“The Red Cross, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours – in its international and national capacity – to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, co-operation and lasting peace amongst all peoples” and that

“It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours only to relieve suffering, giving priority to the most urgent cases of distress.”

243. The United States legislation which limited aid to the contras to humanitarian assistance however also defined what was meant by such assistance, namely:

“the provision of food, clothing, medicine, and other humanitarian assistance, and it does not include the provision of weapons, weapons systems, ammunition, or other equipment, vehicles, or material which can be used to inflict serious bodily harm or death” (paragraph 97 above).

It is also to be noted that, while the United States Congress has directed that the CIA and Department of Defense are not to administer any of the funds voted, it was understood that intelligence information might be “shared” with the contras. Since the Court has no information as to the interpretation in fact given to the Congress decision, or as to whether intelligence information is in fact still being supplied to the contras, it will limit itself to a declaration as to how the law applies in this respect. An essential feature of truly humanitarian aid is that it is given “without discrimination” of any kind. In the view of the Court, if the provision of “humanitarian assistance” is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely “to prevent and alleviate human suffering”, and “to protect life and health and to ensure respect for the human being”; it must also, and above all, be given without discrimination to all in need in Nicaragua, not merely to the contras and their dependents.

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244. As already noted, Nicaragua has also asserted that the United States is responsible for an “indirect” form of intervention in its internal
affairs inasmuch as it has taken, to Nicaragua's disadvantage, certain action of an economic nature. The Court's attention has been drawn in particular to the cessation of economic aid in April 1981; the 90 per cent reduction in the sugar quota for United States imports from Nicaragua in April 1981; and the trade embargo adopted on 1 May 1985. While admitting in principle that some of these actions were not unlawful in themselves, counsel for Nicaragua argued that these measures of economic constraint add up to a systematic violation of the principle of non-intervention.

245. The Court does not here have to concern itself with possible breaches of such international economic instruments as the General Agreement on Tariffs and Trade, referred to in passing by counsel for Nicaragua: any such breaches would appear to fall outside the Court's jurisdiction, particularly in view of the effect of the multilateral treaty reservation, nor has Nicaragua seised the Court of any complaint of such breaches. The question of the compatibility of the actions complained of with the 1956 Treaty of Friendship, Commerce and Navigation will be examined below, in the context of the Court's examination of the provisions of that Treaty. At this point, the Court has merely to say that it is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention.

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246. Having concluded that the activities of the United States in relation to the activities of the contras in Nicaragua constitute prima facie acts of intervention, the Court must next consider whether they may nevertheless be justified on some legal ground. As the Court has stated, the principle of non-intervention derives from customary international law. It would certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request for assistance made by an opposition group in another State — supposing such a request to have actually been made by an opposition to the régime in Nicaragua in this instance. Indeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition. This would permit any State to intervene at any moment in the internal affairs of another State, whether at the request of the government or at the request of its opposition. Such a situation does not in the Court's view correspond to the present state of international law.

247. The Court has already indicated (paragraph 238) its conclusion that the conduct of the United States towards Nicaragua cannot be justified by the right of collective self-defence in response to an alleged armed attack on one or other of Nicaragua's neighbours. So far as regards the allegations of supply of arms by Nicaragua to the armed opposition in El Salvador, the Court has indicated that while the concept of an armed attack includes the despatch by one State of armed bands into the territory of another State, the supply of arms and other support to such bands cannot be equated with armed attack. Nevertheless, such activities may well constitute a breach of the principle of the non-use of force and an intervention in the internal affairs of a State, that is, a form of conduct which is certainly wrongful, but is of lesser gravity than an armed attack. The Court must therefore enquire now whether the activities of the United States towards Nicaragua might be justified as a response to an intervention by that State in the internal affairs of another State in Central America.

248. The United States admits that it is giving its support to the contras in Nicaragua, but justifies this by claiming that that State is adopting similar conduct by itself assisting the armed opposition in El Salvador, and to a lesser extent in Honduras and Costa Rica, and has committed transborder attacks on those two States. The United States raises this justification as one of self-defence: having rejected it on those terms, the Court has nevertheless to consider whether it may be valid as action by way of counter-measures in response to intervention. The Court has however to find that the applicable law does not warrant such a justification.

249. On the legal level the Court cannot regard response to an intervention by Nicaragua as such a justification. While an armed attack would give rise to an entitlement to collective self-defence, a use of force of a lesser degree of gravity cannot, as the Court has already observed (paragraph 211 above), produce any entitlement to take collective counter-measures involving the use of force. The acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.

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250. In the Application, Nicaragua further claims:

"That the United States, in breach of its obligation under general and customary international law, has violated and is violating the sovereignty of Nicaragua by:

- armed attacks against Nicaragua by air, land and sea;
- incursions into Nicaraguan territorial waters;
- aerial trespass into Nicaraguan airspace;
- efforts by direct and indirect means to coerce and intimidate the Government of Nicaragua." (Para. 26 (b))
The Nicaraguan Memorial, however, enumerates under the heading of violations of sovereignty only attacks on Nicaraguan territory, incursions into its territorial sea, and overflights. The claim as to United States “efforts by direct and indirect means to coerce and intimidate the Government of Nicaragua” was presented in the Memorial under the heading of the threat or use of force, which has already been dealt with above (paragraph 227). Accordingly, that aspect of Nicaragua’s claim will not be pursued further.

251. The effects of the principle of respect for territorial sovereignty inevitably overlap with those of the principles of the prohibition of the use of force and of non-intervention. Thus the assistance to the contras, as well as the direct attacks on Nicaraguan ports, oil installations, etc., referred to in paragraphs 81 to 86 above, not only amount to an unlawful use of force, but also constitute infringements of the territorial sovereignty of Nicaragua, and incursions into its territorial and internal waters. Similarly, the mining operations in the Nicaraguan ports not only constitute breaches of the principle of the non-use of force, but also affect Nicaragua’s sovereignty over certain maritime expanses. The Court has in fact found that these operations were carried on in Nicaragua’s territorial or internal waters or both (paragraph 80), and accordingly they constitute a violation of Nicaragua’s sovereignty. The principle of respect for territorial sovereignty is also directly infringed by the unauthorized overflight of a State’s territory by aircraft belonging to or under the control of the government of another State. The Court has found above that such overflights were in fact made (paragraph 91 above).

252. These violations cannot be justified either by collective self-defence, for which, as the Court has recognized, the necessary circumstances are lacking, nor by any right of the United States to take countermeasures involving the use of force in the event of intervention by Nicaragua in El Salvador, since no such right exists under the applicable international law. They cannot be justified by the activities in El Salvador attributed to the Government of Nicaragua. The latter activities, assuming that they did in fact occur, do not bring into effect any right belonging to the United States which would justify the actions in question. Accordingly, such actions constitute violations of Nicaragua’s sovereignty under customary international law.

253. At this point it will be convenient to refer to another aspect of the legal implications of the mining of Nicaragua’s ports. As the Court has indicated in paragraph 214 above, where the vessels of one State enjoy a right of access to ports of another State, if that right of access is hindered by the laying of mines, this constitutes an infringement of the freedom of communications and of maritime commerce. This is clearly the case here. It is not for the Court to pass upon the rights of States which are not parties to the case before it; but it is clear that interference with a right of access to the ports of Nicaragua is likely to have an adverse effect on Nicaragua’s economy and its trading relations with any State whose vessels enjoy the right of access to its ports. Accordingly, the Court finds, in the context of the present proceedings between Nicaragua and the United States, that the laying of mines in or near Nicaraguan ports constituted an infringement, to Nicaragua’s detriment, of the freedom of communications and of maritime commerce.

254. The Court now turns to the question of the application of humanitarian law to the activities of the United States complained of in this case. Mention has already been made (paragraph 215 above) of the violations of customary international law by reason of the failure to give notice of the mining of the Nicaraguan ports, for which the Court has found the United States directly responsible. Except as regards the mines, Nicaragua has not however attributed any breach of humanitarian law to either United States personnel or the “UCLAs”, as distinct from the contras. The Applicant has claimed that acts perpetrated by the contras constitute breaches of the “fundamental norms protecting human rights”; it has not raised the question of the law applicable in the event of conflict such as that between the contras and the established Government. In effect, Nicaragua is accusing the contras of violations both of the law of human rights and humanitarian law, and is attributing responsibility for these acts to the United States. The Court has however found (paragraphs 115, 216) that this submission of Nicaragua cannot be upheld; but it has also found the United States responsible for the publication and dissemination of the manual on “Psychological Operations in Guerrilla Warfare” referred to in paragraphs 118 to 122 above.

255. The Court has also found (paragraphs 219 and 220 above) that general principles of humanitarian law include a particular prohibition, accepted by States, and extending to activities which occur in the context of armed conflicts, whether international in character or not. By virtue of such general principles, the United States is bound to refrain from encouragement of persons or groups engaged in the conflict in Nicaragua to commit violations of Article 3 which is common to all four Geneva Conventions of 12 August 1949. The question here does not of course relate to the definition of the circumstances in which one State may be regarded as responsible for acts carried out by another State, which probably do not include the possibility of incitement. The Court takes note of the advice given in the manual on psychological operations to “neutralize” certain “carefully selected and planned targets”, including judges, police officers, State Security officials, etc., after the local population have been gathered.
in order to “take part in the act and formulate accusations against the oppressor”. In the view of the Court, this must be regarded as contrary to the prohibition in Article 3 of the Geneva Conventions, with respect to non-combatants, of

“the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”

and probably also of the prohibition of “violence to life and person, in particular murder to all kinds, . . .”.

256. It is also appropriate to recall the circumstances in which the manual of psychological operations was issued. When considering whether the publication of such a manual, encouraging the commission of acts contrary to general principles of humanitarian law, is unlawful, it is material to consider whether that encouragement was offered to persons in circumstances where the commission of such acts was likely or foreseeable. The Court has however found (paragraph 121) that at the relevant time those responsible for the issue of the manual were aware of, at the least, allegations that the behaviour of the contra in the field was not consistent with humanitarian law; it was in fact even claimed by the CIA that the purpose of the manual was to “moderate” such behaviour. The publication and dissemination of a manual in fact containing the advice quoted above must therefore be regarded as an encouragement, which was likely to be effective, to commit acts contrary to general principles of international humanitarian law reflected in treaties.

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257. The Court has noted above (paragraphs 169 and 170) the attitude of the United States, as expressed in the finding of the Congress of 29 July 1985, linking United States support to the contras with alleged breaches by the Government of Nicaragua of its “solemn commitments to the Nicaraguan people, the United States, and the Organization of American States”. Those breaches were stated to involve questions such as the composition of the government, its political ideology and alignment, totalitarianism, human rights, militarization and aggression. So far as the question of “aggression in the form of armed subversion against its neighbours” is concerned, the Court has already dealt with the claimed justification of collective self-defence in response to armed attack, and will not return to that matter. It has also disposed of the suggestion of a right to collective counter-measures in face of an armed intervention. What is now in question is whether there is anything in the conduct of Nicaragua which might legally warrant counter-measures by the United States.

258. The questions as to which the Nicaraguan Government is said to have entered into a commitment are questions of domestic policy. The Court would not therefore normally consider it appropriate to engage in a verification of the truth of assertions of this kind, even assuming that it was in a position to do so. A State’s domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every State possesses a fundamental right to choose and implement its own political, economic and social systems. Consequently, there would normally be no need to make any inquiries, in a matter outside the Court’s jurisdiction, to ascertain in what sense and along what lines Nicaragua has actually exercised its right.

259. However, the assertion of a commitment raises the question of the possibility of a State binding itself by agreement in relation to a question of domestic policy, such as that relating to the holding of free elections on its territory. The Court cannot discover, within the range of subjects open to international agreement, any obstacle or provision to hinder a State from making a commitment of this kind. A State, which is free to decide upon the principle and methods of popular consultation within its domestic order, is sovereign for the purpose of accepting a limitation of its sovereignty in this field. This is a conceivable situation for a State which is bound by institutional links to a confederation of States, or indeed to an international organization. Both Nicaragua and the United States are members of the Organization of American States. The Charter of that Organization however goes no further in the direction of an agreed limitation on sovereignty of this kind than the provision in Article 3 (d) that

“The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy”; on the other hand, it provides for the right of every State “to organize itself as it sees fit” (Art. 12), and to “develop its cultural, political and economic life freely and naturally” (Art. 16).

260. The Court has set out above the facts as to the events of 1979, including the resolution of the XVIIIth Meeting of Consultation of Ministers for Foreign Affairs of the Organization of American States, and the communications of 12 July 1979 from the Junta of the Government of National Reconstruction of Nicaragua to the Secretary-General of the Organization, accompanied by a “Plan to secure peace”. The letter contained inter alia a list of the objectives of the Nicaraguan Junta and stated in particular its intention of installing the new régime by a peaceful, orderly transition and of respecting human rights under the supervision of the Inter-American Commission on Human Rights, which the Junta invited to visit Nicaragua “as soon as we are installed”. In this way, before its installation in Managua, the new régime soothed apprehensions as desired and expressed its intention of governing the country democratically.
261. However, the Court is unable to find anything in these documents, whether the resolution or the communication accompanied by the “Plan to secure peace”, from which it can be inferred that any legal undertaking was intended to exist. Moreover, the Junta made it plain in one of these documents that its invitation to the Organization of American States to supervise Nicaragua’s political life should not be allowed to obscure the fact that it was the Nicaraguans themselves who were to decide upon and conduct the country’s domestic policy. The resolution of 23 June 1979 also declares that the solution of their problems is a matter “exclusively” for the Nicaraguan people, while stating that that solution was to be based (in Spanish, deberia inspirarse) on certain foundations which were put forward merely as recommendations to the future government. This part of the resolution is a mere statement which does not comprise any formal offer which if accepted would constitute a promise in law, and hence a legal obligation. Nor can the Court take the view that Nicaragua actually undertook a commitment to organize free elections, and that this commitment was of a legal nature. The Nicaraguan Junta of National Reconstruction planned the holding of free elections as part of its political programme of government, following the recommendation of the XVIIth Meeting of Consultation of Foreign Ministers of the Organization of American States. This was an essentially political pledge, made not only to the Organization, but also to the people of Nicaragua, intended fully to be its first beneficiaries. But the Court cannot find an instrument with legal force, whether unilateral or synallagmatic, whereby Nicaragua has committed itself in respect of the principle or methods of holding elections. The Organization of American States Charter has already been mentioned, with its respect for the political independence of the member States: in the field of domestic policy, it goes no further than to list the social standards to the application of which the Members “agree to dedicate every effort”, including:

“The incorporation and increasing participation of the marginal sectors of the population, in both rural and urban areas, in the economic, social, civic, cultural, and political life of the nation, in order to achieve the full integration of the national community, acceleration of the process of social mobility, and the consolidation of the democratic system.” (Art. 43 (f))

It is evident that provisions of this kind are far from being a commitment as to the use of particular political mechanisms.

262. Moreover, even supposing that such a political pledge had had the force of a legal commitment, it could not have justified the United States insisting on the fulfilment of a commitment made not directly towards the United States, but towards the Organization, the latter being alone empowered to monitor its implementation. The Court can see no legal basis for the “special responsibility regarding the implementation of the commitments made” by the Nicaraguan Government which the United States considers itself to have assumed in view of “its role in the installation of the current Government of Nicaragua” (see paragraph 170 above). Moreover, even supposing that the United States were entitled to act in lieu of the Organization, it could hardly make use for the purpose of methods which the Organization could not use itself; in particular, it could not be authorized to use force in that event. Of its nature, a commitment like this is one of a category which, if violated, cannot justify the use of force against a sovereign State.

263. The finding of the United States Congress also expressed the view that the Nicaraguan Government had taken “significant steps towards establishing a totalitarian Communist dictatorship”. However the régime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State. Consequently, Nicaragua’s domestic policy options, even assuming that they correspond to the description given of them by the Congress finding, cannot justify on the legal plane the various actions of the Respondent complained of. The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.

264. The Court has also emphasized the importance to be attached, in other respects, to a text such as the Helsinki Final Act, or, on another level, to General Assembly resolution 2625 (XXV) which, as its name indicates, is a declaration on “Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations”. Texts like these, in relation to which the Court has pointed to the customary content of certain provisions such as the principles of the non-use of force and non-intervention, envisage the relations among States having different political, economic and social systems on the basis of coexistence among their various ideologies; the United States not only voiced no objection to their adoption, but took an active part in bringing it about.

265. Similar considerations apply to the criticisms expressed by the United States of the external policies and alliances of Nicaragua. Whatever the impact of individual alliances on regional or international political-military balances, the Court is only competent to consider such questions from the standpoint of international law. From that aspect, it is sufficient to say that State sovereignty evidently extends to the area of its foreign policy, and that there is no rule of customary international law to prevent a State from choosing and conducting a foreign policy in co-ordination with that of another State.
266. The Court also notes that these justifications, advanced solely in a political context which it is naturally not for the Court to appraise, were not advanced as legal arguments. The respondent State has always confined itself to the classic argument of self-defence, and has not attempted to introduce a legal argument derived from a supposed rule of "ideological intervention", which would have been a striking innovation. The Court would recall that one of the accusations of the United States against Nicaragua is violation of "the 1965 General Assembly Declaration on Intervention" (paragraph 169 above), by its support for the armed opposition to the Government in El Salvador. It is not aware of the United States having officially abandoned reliance on this principle, substituting for it a new principle "of ideological intervention", the definition of which would be discretionary. As stated above (paragraph 29), the Court is not solely dependent for its decision on the argument of the Parties before it with respect to the applicable law: it is required to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute even if these rules have not been invoked by a party. The Court is however not entitled to ascribe to States legal views which they do not themselves formulate.

267. The Court also notes that Nicaragua is accused by the 1985 finding of the United States Congress of violating human rights. This particular point requires to be studied independently of the question of the existence of a "legal commitment" by Nicaragua towards the Organization of American States to respect these rights; the absence of such a commitment would not mean that Nicaragua could with impunity violate human rights. However, where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves. The political pledge by Nicaragua was made in the context of the Organization of American States, the organs of which were consequently entitled to monitor its observance. The Court has noted above (paragraph 168) that the Nicaraguan Government has since 1979 ratified a number of international instruments on human rights, and one of these was the American Convention on Human Rights (the Pact of San José, Costa Rica). The mechanisms provided for therein have functioned. The Inter-American Commission on Human Rights in fact took action and compiled two reports (OEA/Ser.L/V/11.53 and 62) following visits by the Commission to Nicaragua at the Government's invitation. Consequently, the Organization was in a position, if it so wished, to take a decision on the basis of these reports.

268. In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of

ports, the destruction of oil installations, or again with the training, arming and equipping of the contras. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States, and cannot in any event be reconciled with the legal strategy of the respondent State, which is based on the right of collective self-defence.

269. The Court now turns to another factor which bears both upon domestic policy and foreign policy. This is the militarization of Nicaragua, which the United States deems excessive and such as to prove its aggressive intent, and in which it finds another argument to justify its activities with regard to Nicaragua. It is irrelevant and inappropriate, in the Court's opinion, to pass upon this allegation of the United States, since in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception.

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270. Having thus concluded its examination of the claims of Nicaragua based on customary international law, the Court must now consider its claims based on the Treaty of Friendship, Commerce and Navigation between the Parties, signed at Managua on 21 January 1956: Article XXIV, paragraph 2, of that Treaty provides for the jurisdiction of the Court for any dispute between the Parties as to its interpretation or application. The first claim which Nicaragua makes in relation to the Treaty is however one not based directly on a specific provision thereof. Nicaragua has argued that the United States, by its conduct in relation to Nicaragua, has deprived the Treaty of its object and purpose, and emptied it of real content. For this purpose, Nicaragua has relied on the existence of a legal obligation of States to refrain from acts which would impede the due performance of any treaties entered into by them. However, if there is a duty of a State not to impede the due performance of a treaty to which it is a party, that is not a duty imposed by the treaty itself. Nicaragua itself apparently contends that this is a duty arising under customary international law independently of the treaty, that it is implicit in the rule pacta sunt servanda. This claim therefore does not in fact fall under the heading of possible breach by the United States of the provisions of the 1956 Treaty, though it may involve the interpretation or application thereof.

271. In view of the Court's finding in its 1984 Judgment that the Court has jurisdiction both under the 1956 FCN Treaty and on the basis of the United States acceptance of jurisdiction under the Optional Clause of Article 36, paragraph 2, this poses no problem of jurisdiction in the present
case. It should however be emphasized that the Court does not consider that a compromissory clause of the kind included in Article XXIV, paragraph 2, of the 1956 FCN Treaty, providing for jurisdiction over disputes as to its interpretation or application, would enable the Court to entertain a claim alleging conduct depriving the treaty of its object and purpose. It is only because in the present case the Court has found that it has jurisdiction, apart from Article XXIV, over any legal dispute between the Parties concerning any of the matters enumerated in Article 36, paragraph 2, of the Statute, that it can proceed to examine Nicaragua's claim under this head. However, as indicated in paragraph 221 above, the Court has first to determine whether the actions of the United States complained of as breaches of the 1956 FCN Treaty have to be regarded as "measures . . . necessary to protect its essential security interests [sus intereses esenciales y seguridad]", since Article XXI of the Treaty provides that "the present Treaty shall not preclude the application of" such measures. The question thus arises whether Article XXI similarly affords a defence to a claim under customary international law based on allegation of conduct depriving the Treaty of its object and purpose if such conduct can be shown to be "measures . . . necessary to protect" essential security interests.

272. In the view of the Court, an act cannot be said to be one calculated to deprive a treaty of its object and purpose, or to impede its due performance, if the possibility of that act has been foreseen in the treaty itself, and it has been expressly agreed that the treaty "shall not preclude" the act, so that it will not constitute a breach of the express terms of the treaty. Accordingly, the Court cannot entertain either the claim of Nicaragua alleging conduct depriving the treaty of its object and purpose, or its claims of breach of specific articles of the treaty, unless it is first satisfied that the conduct complained of is not "measures . . . necessary to protect" the essential security interests of the United States. The Court will first proceed to examine whether the claims of Nicaragua in relation to the Treaty appear to be well founded, and then determine whether they are nevertheless justifiable by reference to Article XXI.

273. The argument that the United States has deprived the Treaty of its object and purpose has a scope which is not very clearly defined, but it appears that in Nicaragua's contention the Court could on this ground make a blanket condemnation of the United States for all the activities of which Nicaragua complains on more specific grounds. For Nicaragua, the Treaty is "without doubt a treaty of friendship which imposes on the Parties the obligation to conduct amicable relations with each other", and "Whatever the exact dimensions of the legal norm of 'friendship' there can be no doubt of a United States violation in this case". In other words, the Court is asked to rule that a State which enters into a treaty of friendship binds itself, for so long as the Treaty is in force, to abstain from any act toward the other party which could be classified as an unfriendly act, even if such act is not in itself the breach of an international obligation. Such a duty might of course be expressly stipulated in a treaty, or might even emerge as a necessary implication from the text; but as a matter of customary international law, it is not clear that the existence of such a far-reaching rule is evidenced in the practice of States. There must be a distinction, even in the case of a treaty of friendship, between the broad category of unfriendly acts, and the narrower category of acts tending to defeat the object and purpose of the Treaty. That object and purpose is the effective implementation of friendship in the specific fields provided for in the Treaty, not friendship in a vague general sense.

274. The Court has in this respect to note that the Treaty itself provides in Article XXIV, paragraph 1, as follows:

"Each Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other Party may make with respect to any matter affecting the operation of the present Treaty."

Nicaragua claims that the conduct of the United States is such as drastically to "affect the operation" of the Treaty; but so far as the Court is informed, no representations on the specific question have been made. The Court has therefore first to be satisfied that a claim based on the 1956 FCN Treaty is admissible even though no attempt has been made to use the machinery of Article XXIV, paragraph 1, to resolve the dispute. In general, treaty rules being lex specialis, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of such a claim. However, in the present case, the operation of Article XXIV, paragraph 1, if it had been invoked, would have been wholly artificial. While Nicaragua does allege that certain activities of the United States were in breach of the 1956 FCN Treaty, it has also claimed, and the Court has found, that they were violations of customary international law. In the Court's view, it would therefore be excessively formalistic to require Nicaragua first to exhaust the procedure of Article XXIV, paragraph 1, before bringing the matter to the Court. In its 1984 Judgment the Court has already dealt with the argument that Article XXIV, paragraph 2, of the Treaty required that the dispute be "one not satisfactorily adjusted by diplomacy"; and that this was not the case in view of the absence of negotiations between the Parties. The Court held that:

"it does not necessarily follow, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty" (I.C.J. Reports 1984, p. 428).
The point now at issue is different, since the claim of conduct impeding the operation of the Treaty is not advanced on the basis of the compensatory clause in the Treaty. The Court nevertheless considers that neither paragraph of Article XXIV constitutes a bar to examination of Nicaragua’s claims.

275. In respect of the claim that the United States activities have been such as to deprive the 1956 FCN Treaty of its object and purpose, the Court has to make a distinction. It is unable to regard all the acts complained of in that light; but it does consider that there are certain activities of the United States which are such as to undermine the whole spirit of a bilateral agreement directed to sponsoring friendship between the two States parties to it. These are: the direct attacks on ports, oil installations, etc., referred to in paragraphs 81 to 86 above; and the mining of Nicaraguan ports, mentioned in paragraph 80 above. Any action less calculated to serve the purpose of “strengthening the bonds of peace and friendship traditionally existing between” the Parties, stated in the Preamble of the Treaty, could hardly be imagined.

276. While the acts of economic pressure summarized in paragraphs 123 to 125 above are less flagrantly in contradiction with the purpose of the Treaty, the Court reaches a similar conclusion in respect of some of them. A State is not bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other specific legal obligation; but where there exists such a commitment, of the kind implied in a treaty of friendship and commerce, such an abrupt act of termination of commercial intercourse as the general trade embargo of 1 May 1985 will normally constitute a violation of the obligation not to defeat the object and purpose of the treaty. The 90 per cent cut in the sugar import quota of 23 September 1983 does not on the other hand seem to the Court to go so far as to constitute an act calculated to defeat the object and purpose of the Treaty. The cessation of economic aid, the giving of which is more of a unilateral and voluntary nature, could be regarded as such a violation only in exceptional circumstances. The Court has also to note that, by the very terms of the legislation authorizing such aid (the Special Central American Assistance Act, 1979), of which the Government of Nicaragua must have been aware, the continuance of aid was made subject to the appreciation of Nicaragua’s conduct by the President of the United States. As to the opposition to the grant of loans from international institutions, the Court cannot regard this as sufficiently linked with the 1956 FCN Treaty to constitute an act directed to defeating its object and purpose.

277. Nicaragua claims that the United States is in breach of Article I of the 1956 FCN Treaty, which provides that each Party is to accord “equitable treatment” to the nationals of the other. Nicaragua suggests that whatever meaning given to the expression “equitable treatment”

“it necessarily precludes the Government of the United States from . . . killing, wounding or kidnapping citizens of Nicaragua, and, more generally from threatening Nicaraguan citizens in the integrity of their persons or the safety of their property”.

It is Nicaragua’s claim that the treatment of Nicaraguan citizens complained of was inflicted by the United States or by forces controlled by the United States. The Court is however not satisfied that the evidence available demonstrates that the contras were “controlled” by the United States when committing such acts. As the Court has indicated (paragraph 110 above), the exact extent of the control resulting from the financial dependence of the contras on the United States authorities cannot be established; and it has not been able to conclude that the contras are subject to the United States to such an extent that any acts they have committed are imputable to that State (paragraph 115 above). Even if the provision for “equitable treatment” in the Treaty is read as involving an obligation not to kill, wound or kidnap Nicaraguan citizens in Nicaragua — as to which the Court expresses no opinion — those acts of the contras performed in the course of their military or paramilitary activities in Nicaragua are not conduct attributable to the United States.

278. Secondly, Nicaragua claims that the United States has violated the provisions of the Treaty relating to freedom of communication and commerce. For the reasons indicated in paragraph 253 above, the Court must uphold the contention that the mining of the Nicaraguan ports by the United States is in manifest contradiction with the freedom of navigation and commerce guaranteed by Article XIX, paragraph 1, of the 1956 Treaty. There remains the question whether such action can be justified under Article XXI (see paragraphs 280 to 282 below). In the commercial context of the Treaty, Nicaragua’s claim is justified not only as to the physical damage to its vessels, but also the consequential damage to its trade and commerce. Nicaragua however also contended that all the activities of the United States in and against Nicaragua are “violative of the 1956 Treaty”:

“Since the word ‘commerce’ in the 1956 Treaty must be understood in its broadest sense, all of the activities by which the United States has deliberately inflicted on Nicaragua physical damage and economic losses of all types, violate the principle of freedom of commerce which the Treaty establishes in very general terms.”

It is clear that considerable economic loss and damage has been inflicted
on Nicaragua by the actions of the contras: apart from the economic impact of acts directly attributable to the United States, such as the loss of fishing boats blown up by mines, the Nicaraguan Minister of Finance estimated loss of production in 1981–1984 due to inability to collect crops, etc., at some US$ 300 million. However, as already noted (paragraph 277 above) the Court has not found the relationship between the contras and the United States Government to have been proved to be such that the United States is responsible for all acts of the contras.

279. The trade embargo declared by the United States Government on 1 May 1985 has already been referred to in the context of Nicaragua’s contentions as to acts tending to defeat the object and purpose of the 1956 FCN Treaty. The question also arises of its compatibility with the letter and the spirit of Article XIX of the Treaty. That Article provides that “between the territories of the two Parties there shall be freedom of commerce and navigation” (para. 1) and continues

“3. Vessels of either Party shall have liberty, on equal terms with vessels of the other Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of such other Party open to foreign commerce and navigation . . .”

By the Executive Order dated 1 May 1985 the President of the United States declared “I hereby prohibit vessels of Nicaraguan registry from entering into United States ports, and transactions relating thereto”. The Court notes that on the same day the United States gave notice to Nicaragua to terminate the Treaty under Article XXV, paragraph 3, thereof; but that Article requires “one year’s written notice” for the termination to take effect. The freedom of Nicaraguan vessels, under Article XIX, paragraph 3, “to come with their cargoes to all ports, places and waters” of the United States could not therefore be interfered with during that period of notice, let alone terminated abruptly by the declaration of an embargo. The Court accordingly finds that the embargo constituted a measure in contradiction with Article XIX of the 1956 FCN Treaty.

280. The Court has thus found that the United States is in breach of a duty not to deprive the 1956 FCN Treaty of its object and purpose, and has committed acts which are in contradiction with the terms of the Treaty, subject to the question whether the exceptions in Article XXI, paragraphs 1 (c) and 1 (d), concerning respectively “traffic in arms” and “measures . . . necessary to fulfill” obligations “for the maintenance or restoration of international peace and security” or necessary to protect the “essential security interests” of a party, may be invoked to justify the acts complained of. In its Counter-Memorial on jurisdiction and admissibility, the United States relied on paragraph 1 (c) as showing the inapplicability of the 1956 FCN Treaty to Nicaragua’s claims. This paragraph appears however to be relevant only in respect of the complaint of supply of arms to the contras, and since the Court does not find that arms supply to be a breach of the Treaty, or an act calculated to deprive it of its object and purpose, paragraph 1 (c) does not need to be considered further. There remains the question of the relationship of Article XXI, paragraph 1 (d), to the direct attacks on ports, oil installations, etc.; the mining of Nicaraguan ports; and the general trade embargo of 1 May 1985 (paragraphs 275 to 276 above).

281. In approaching this question, the Court has first to bear in mind the chronological sequence of events. If the activities of the United States are to be covered by Article XXI of the Treaty, they must have been, at the time they were taken, measures necessary to protect its essential security interests. Thus the finding of the President of the United States on 1 May 1985 that “the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States”, even if it be taken as sufficient evidence that that was so, does not justify action by the United States previous to that date.

282. Secondly, the Court emphasizes the importance of the word “necessary” in Article XXI: the measures taken must not merely be such as tend to protect the essential security interests of the party taking them, but must be “necessary” for that purpose. Taking into account the whole situation of the United States in relation to Central America, so far as the Court is informed of it (and even assuming that the justification of self-defence, which the Court has rejected on the legal level, had some validity on the political level), the Court considers that the mining of Nicaraguan ports, and the direct attacks on ports and oil installations, cannot possibly be justified as “necessary” to protect the essential security interests of the United States. As to the trade embargo, the Court has to note the express justification for it given in the Presidential finding quoted in paragraph 125 above, and that the measure was one of an economic nature, thus one which fell within the sphere of relations contemplated by the Treaty. But by the terms of the Treaty itself, whether a measure is necessary to protect the essential security interests of a party is not, as the Court has emphasized (paragraph 222 above), purely a question for the subjective judgment of the party: the text does not refer to what the party “considers necessary” for that purpose. Since no evidence at all is available to show how Nicaraguan policies had in fact become a threat to “essential security interests” in May 1985, when those policies had been consistent, and consistently criticized by the United States, for four years previously, the Court is unable to find that the embargo was “necessary” to protect those interests. Accordingly, Article XXI affords
no defence for the United States in respect of any of the actions here under consideration.

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283. The third submission of Nicaragua in its Memorial on the merits, set out in paragraph 15 above, requests the Court to adjudge and declare that compensation is due to Nicaragua and “to receive evidence and to determine, in a subsequent phase of the present proceedings, the quantum of damages to be assessed as the compensation due to the Republic of Nicaragua”.

The fourth submission requests the Court to award to Nicaragua the sum of 370,200,000 United States dollars, “which sum constitutes the minimum valuation of the direct damages” claimed by Nicaragua. In order to decide on these submissions, the Court must satisfy itself that it possesses jurisdiction to do so. In general, jurisdiction to determine the merits of a dispute entails jurisdiction to determine reparation. More specifically, the Court notes that in its declaration of acceptance of jurisdiction under the Optional Clause of 26 August 1946, the United States expressly accepted the Court’s jurisdiction in respect of disputes concerning “the nature or extent of the reparation to be made for the breach of an international obligation”. The corresponding declaration by which Nicaragua accepted the Court’s jurisdiction contains no restriction of the powers of the Court under Article 36, paragraph 2 (d), of its Statute: Nicaragua has thus accepted the “same obligation”. Under the 1956 FCN Treaty, the Court has jurisdiction to determine “any dispute between the Parties as to the interpretation or application of the present Treaty” (Art. XXIV, para. 2); and as the Permanent Court of International Justice stated in the case concerning the Factory at Chorzów,

“Differences relating to reparation, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.” (Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21.)

284. The Court considers appropriate the request of Nicaragua for the nature and amount of the reparation due to it to be determined in a subsequent phase of the proceedings. While a certain amount of evidence has been provided, for example, in the testimony of the Nicaraguan Minister of Finance, of pecuniary loss sustained, this was based upon contentions as to the responsibility of the United States which were more far-reaching than the conclusions at which the Court has been able to arrive. The opportunity should be afforded Nicaragua to demonstrate and prove exactly what injury was suffered as a result of each action of the United States which the Court has found contrary to international law. Nor should it be overlooked that, while the United States has chosen not to appear or participate in the present phase of the proceedings, Article 53 of the Statute does not debar it from appearing to present its arguments on the question of reparation if it so wishes. On the contrary, the principle of the equality of the Parties requires that it be given that opportunity. It goes without saying, however, that in the phase of the proceedings devoted to reparation, neither Party may call in question such findings in the present Judgment as have become res judicata.

285. There remains the request of Nicaragua (paragraph 15 above) for an award, at the present stage of the proceedings, of $370,200,000 as the “minimum (and in that sense provisional) valuation of direct damages”. There is no provision in the Statute of the Court either specifically empowering the Court to make an interim award of this kind, or indeed debarring it from doing so. In view of the final and binding character of the Court’s judgments, under Articles 59 and 60 of the Statute, it would however only be appropriate to make an award of this kind, assuming that the Court possesses the power to do so, in exceptional circumstances, and where the entitlement of the State making the claim was already established with certainty and precision. Furthermore, in a case in which the respondent State is not appearing, so that its views on the matter are not known to the Court, the Court should refrain from any unnecessary act which might prove an obstacle to a negotiated settlement. It bears repeating that “the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties; as consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement...” (Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22, p. 13).

Accordingly, the Court does not consider that it can accede at this stage to the request made in the Fourth Submission of Nicaragua.

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286. By its Order of 10 May 1984, the Court indicated, pursuant to Article 41 of the Statute of the Court, the provisional measures which in its view “ought to be taken to preserve the respective rights of either party”, pending the final decision in the present case. In connection with the first such measure, namely that “The United States of America should immediately cease and refrain from any action restricting, blocking or endangering access to or from Nicaraguan ports, and, in particular, the laying of mines”,

132
the Court notes that no complaint has been made that any further action of this kind has been taken.

287. On 25 June 1984, the Government of Nicaragua addressed a communication to the Court referring to the Order indicating provisional measures, informing the Court of what Nicaragua regarded as "the failure of the United States to comply with that Order", and requesting the indication of further measures. The action by the United States complained of consisted in the fact that the United States was continuing "to sponsor and carry out military and paramilitary activities in and against Nicaragua". By a letter of 16 July 1984, the President of the Court informed the Agent of Nicaragua that the Court considered that that request should await the outcome of the proceedings on jurisdiction which were then pending before the Court. The Government of Nicaragua has not reverted to the question.

288. The Court considers that it should re-emphasize, in the light of its present findings, what was indicated in the Order of 10 May 1984:

"The right to sovereignty and to political independence possessed by the Republic of Nicaragua, like any other State of the region or of the world, should be fully respected and should not in any way be jeopardized by any military and paramilitary activities which are prohibited by the principles of international law, in particular the principle that States should refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any State, and the principle concerning the duty not to intervene in matters within the domestic jurisdiction of a State, principles embodied in the United Nations Charter and the Charter of the Organization of American States."

289. Furthermore, the Court would draw attention to the further measures indicated in its Order, namely that the Parties "should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court" and

"should each of them ensure that no action is taken which might prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case".

When the Court finds that the situation requires that measures of this kind should be taken, it is incumbent on each party to take the Court's indications seriously into account, and not to direct its conduct solely by reference to what it believes to be its rights. Particularly is this so in a situation of armed conflict where no reparation can effect the results of conduct which the Court may rule to have been contrary to international law.

* * *

290. In the present Judgment, the Court has found that the Respondent has, by its activities in relation to the Applicant, violated a number of principles of customary international law. The Court has however also to recall a further principle of international law, one which is complementary to the principles of a prohibitive nature examined above, and respect for which is essential in the world of today: the principle that the parties to any dispute, particularly any dispute the continuance of which is likely to endanger the maintenance of international peace and security, should seek a solution by peaceful means. Enshrined in Article 33 of the United Nations Charter, which also indicates a number of peaceful means which are available, this principle has also the status of customary law. In the present case, the Court has already taken note, in its Order indicating provisional measures and in its Judgment on jurisdiction and admissibility (I.C.J. Reports 1984, pp. 183-184, paras. 34 ff., pp. 438-441, paras. 102 ff.) of the diplomatic negotiation known as the Contadora Process, which appears to the Court to correspond closely to the spirit of the principle which the Court has here recalled.

291. In its Order indicating provisional measures, the Court took note of the Contadora Process, and of the fact that it had been endorsed by the United Nations Security Council and General Assembly (I.C.J. Reports 1984, pp. 183-184, para. 34). During that phase of the proceedings as during the phase devoted to jurisdiction and admissibility, both Nicaragua and the United States have expressed full support for the Contadora Process, and praised the results achieved so far. Therefore, the Court could not but take cognizance of this effort, which merits full respect and consideration as a unique contribution to the solution of the difficult situation in the region. The Court is aware that considerable progress has been achieved on the main objective of the process, namely agreement on texts relating to arms control and reduction, exclusion of foreign military bases or military interference and withdrawal of foreign advisers, prevention of arms traffic, stopping the support of groups aiming at the destabilization of any of the Governments concerned, guarantee of human rights and enforcement of democratic processes, as well as on co-operation for the creation of a mechanism for the verification of the agreements concerned. The work of the Contadora Group may facilitate the delicate and difficult negotiations, in accord with the letter and spirit of the United Nations Charter, that are now required. The Court recalls to both Parties to the present case the need to co-operate with the Contadora efforts in seeking a definitive and lasting peace in Central America, in accordance with the principle of customary international law that prescribes the peaceful settlement of international disputes.
292. For these reasons,

THE COURT

(1) By eleven votes to four,

Decides that in adjudicating the dispute brought before it by the Application filed by the Republic of Nicaragua on 9 April 1984, the Court is required to apply the "multilateral treaty reservation" contained in proviso (c) to the declaration of acceptance of jurisdiction made under Article 36, paragraph 2, of the Statute of the Court by the Government of the United States of America deposited on 26 August 1946;

IN FAVOUR: President Nagendra Singh; Vice-President de Lacharrière;
Judges Lachs, Oda, Ago, Schwebel, Sir Robert Jennings, Mbaye, Bedjaoui and Evensen; Judge ad hoc Colliard;
AGAINST: Judges Ruda, Elias, Sette-Camara and Ni.

(2) By twelve votes to three,

Rejects the justification of collective self-defence maintained by the United States of America in connection with the military and paramilitary activities in and against Nicaragua the subject of this case;

IN FAVOUR: President Nagendra Singh; Vice-President de Lacharrière;
Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;
AGAINST: Judges Oda, Schwebel and Sir Robert Jennings.

(3) By twelve votes to three,

Decides that the United States of America, by training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State;

IN FAVOUR: President Nagendra Singh; Vice-President de Lacharrière;
Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;
AGAINST: Judges Oda, Schwebel and Sir Robert Jennings.

(4) By twelve votes to three,

Decides that the United States of America, by certain attacks on Nicaraguan territory in 1983-1984, namely attacks on Puerto Sandino on 13 September and 14 October 1983; an attack on Corinto on 10 October 1983; an attack on Potosi Naval Base on 4/5 January 1984; an attack on San Juan del Sur on 7 March 1984; attacks on patrol boats at Puerto Sandino on 28 and 30 March 1984; and an attack on San Juan del Norte on 9 April 1984; and further by those acts of intervention referred to in subparagraph (3) hereof which involve the use of force, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State;

IN FAVOUR: President Nagendra Singh; Vice-President de Lacharrière;
Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui and Evensen; Judge ad hoc Colliard;
AGAINST: Judges Oda, Schwebel and Sir Robert Jennings.

(5) By twelve votes to three,

Decides that the United States of America, by directing or authorizing overflights of Nicaraguan territory, and by the acts imputable to the United States referred to in subparagraph (4) hereof, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to violate the sovereignty of another State;

IN FAVOUR: President Nagendra Singh; Vice-President de Lacharrière;
Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;
AGAINST: Judges Oda, Schwebel and Sir Robert Jennings.

(6) By twelve votes to three,

Decides that, by laying mines in the internal or territorial waters of the Republic of Nicaragua during the first months of 1984, the United States of America has acted, against the Republic of Nicaragua, in breach of its obligations under customary international law not to use force against another State, not to intervene in its affairs, not to violate its sovereignty and not to interrupt peaceful maritime commerce;

IN FAVOUR: President Nagendra Singh; Vice-President de Lacharrière;
Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;
AGAINST: Judges Oda, Schwebel and Sir Robert Jennings.

(7) By fourteen votes to one,

Decides that, by the acts referred to in subparagraph (6) hereof, the United States of America has acted, against the Republic of Nicaragua, in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua signed at Managua on 21 January 1956;

IN FAVOUR: President Nagendra Singh; Vice-President de Lacharrière;
Judges Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;
AGAINST: Judge Schwebel.

(8) By fourteen votes to one,

Decides that the United States of America, by failing to make known the existence and location of the mines laid by it, referred to in subparagraph
(6) hereof, has acted in breach of its obligations under customary international law in this respect:

IN FAVOUR: President Nagendra Singh; Vice-President de Lacharrière; Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Schwebel, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Collard;

AGAINST: Judge Oda.

(9) By fourteen votes to one,

Finds that the United States of America, by producing in 1983 a manual entitled Operaciones sicológicas en guerra de guerrillas, and disseminating it to contra forces, has encouraged the commission by them of acts contrary to general principles of humanitarian law; but does not find a basis for concluding that any such acts which may have been committed are imputable to the United States of America as acts of the United States of America;

IN FAVOUR: President Nagendra Singh; Vice-President de Lacharrière; Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Schwebel, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Collard;

AGAINST: Judge Oda.

(10) By twelve votes to three,

Decides that the United States of America, by the attacks on Nicaraguan territory referred to in subparagraph (4) hereof, and by declaring a general embargo on trade with Nicaragua on 1 May 1985, has committed acts calculated to deprive of its object and purpose the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956;

IN FAVOUR: President Nagendra Singh; Vice-President de Lacharrière; Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Collard;

AGAINST: Judges Oda, Schwebel and Sir Robert Jennings.

(11) By twelve votes to three,

Decides that the United States of America, by the attacks on Nicaraguan territory referred to in subparagraph (4) hereof, and by declaring a general embargo on trade with Nicaragua on 1 May 1985, has acted in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956;

IN FAVOUR: President Nagendra Singh; Vice-President de Lacharrière; Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Collard;

AGAINST: Judges Oda, Schwebel and Sir Robert Jennings.

(12) By twelve votes to three,

Decides that the United States of America is under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations;

IN FAVOUR: President Nagendra Singh; Vice-President de Lacharrière; Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Collard;

AGAINST: Judges Oda, Schwebel and Sir Robert Jennings.

(13) By twelve votes to three,

Decides that the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of obligations under customary international law enumerated above;

IN FAVOUR: President Nagendra Singh; Vice-President de Lacharrière; Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Collard;

AGAINST: Judges Oda, Schwebel and Sir Robert Jennings.

(14) By fourteen votes to one,

Decides that the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956;

IN FAVOUR: President Nagendra Singh; Vice-President de Lacharrière; Judges Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Collard;

AGAINST: Judge Schwebel.

(15) By fourteen votes to one,

Decides that the form and amount of such reparation, failing agreement between the Parties, will be settled by the Court, and reserves for this purpose the subsequent procedure in the case;

IN FAVOUR: President Nagendra Singh; Vice-President de Lacharrière; Judges Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Collard;

AGAINST: Judge Schwebel.

(16) Unanimously,

Recalls to both Parties their obligation to seek a solution to their disputes by peaceful means in accordance with international law.
Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-seventh day of June, one thousand nine hundred and eighty-six, in three copies, one of which will be placed in the archives of the Court and the others will be transmitted to the Government of the Republic of Nicaragua and to the Government of the United States of America, respectively.

(Signed) Nagendra Singh,
President.

(Signed) Santiago Torres Bernárdez,
Registrar.

President Nagendra Singh, Judges Lachs, Ruda, Elias, Ago, Sette-Camara and Ni append separate opinions to the Judgment of the Court.

Judges Oda, Schwebel and Sir Robert Jennings append dissenting opinions to the Judgment of the Court.

(Initialled) N.S.

(Initialled) S.T.B.
International Court of Justice

Land and Maritime Boundary between Cameroon and Nigeria
(Cameroon v. Nigeria)
Application to Intervene, Order of 21 October 1999

_I.C.J. Reports 1999_
ORDER OF 21 OCTOBER 1999

1999

ORDONNANCE DU 21 OCTOBRE 1999
ORDER

Present: President Schwelbel; Vice-President Weeramantry; Judges Oda, Bediaoui, Guillaume, Ranjva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, PARRA-ARANGUREN, Kooijmans, Rezek; Judges ad hoc Mbaye, Ajibola; Registrar Valencia-Ospina.

The International Court of Justice,

Composed as above,
After deliberation,

Having regard to Articles 48 and 62 of the Statute of the Court and to Articles 81, 83, 84 and 85 of the Rules of Court,

Having regard to the Application filed by the Republic of Cameroon in the Registry of the Court on 29 March 1994 instituting proceedings against the Federal Republic of Nigeria in respect of a dispute described as “relating essentially to the question of sovereignty over the Bakassi Peninsula”, in which the Court was also requested “to determine the course of the maritime boundary between the two States beyond the line fixed in 1975”,

Having regard to the Additional Application submitted by Cameroon on 6 June 1994,

Having regard to the Order of 16 June 1994, whereby the Court indicated that it had no objection to the Additional Application being treated as an amendment to the initial Application and fixed the time-limits for the filing of the Memorial of Cameroon and the Counter-Memorial of Nigeria, respectively,

Having regard to the Memorial filed by Cameroon and the preliminary objections submitted by Nigeria within the time-limits thus fixed,

Having regard to the Judgment of 11 June 1998, whereby the Court ruled on the preliminary objections raised by Nigeria,

Having regard to the Order of 30 June 1998, whereby the Court fixed a new time-limit for the filing of the Counter-Memorial of Nigeria, and to the Order of 3 March 1999, whereby it extended that time-limit,

Having regard to the Counter-Memorial filed by Nigeria within the time-limit thus extended,

Having regard to the Order of 30 June 1999, whereby the Court decided inter alia that Cameroon should submit a Reply and Nigeria should submit a Rejoinder, and fixed 4 April 2000 and 4 January 2001 respectively as the time-limits for the filing of those pleadings,

Makes the following Order:

1. Whereas, by a letter dated 27 June 1999, received in the Registry on 30 June 1999, the Prime Minister of the Republic of Equatorial Guinea submitted to the Court an “Application . . . to intervene in the case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria) pursuant to Article 62 of the Statute of the Court and Article 81 of the Rules of the Court”; and whereas that same letter appointed H.E. Mr. Ricardo Mangue Obama N’Fube, Minister of State, Secretary-General of the Presidency of the Government, as Agent;

2. Whereas, in the introduction to its Application, Equatorial Guinea refers to the eighth preliminary objection raised by Nigeria in the case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria) and quotes as follows paragraph 116 of the Judgment handed down by the Court on 11 June 1998 on the objections of Nigeria (I.C.J. Reports 1998, p. 324):

“The Court notes that the geographical location of the territories of the other States bordering the Gulf of Guinea, and in particular Equatorial Guinea and Sao Tome and Principe, demonstrates that it is evident that the prolongation of the maritime boundary between the Parties . . . will eventually run into maritime zones where the rights and interests of Cameroon and Nigeria will overlap those of
third States. It thus appears that rights and interests of third States will become involved if the Court accedes to Cameroon’s request. The Court cannot therefore, in the present case, give a decision on the eighth preliminary objection as a preliminary matter. In order to determine where a prolonged maritime boundary would run, where and to what extent it would meet possible claims of other States, and how its judgment would affect the rights and interests of these States, the Court would of necessity have to deal with the merits of Cameroon’s request. At the same time, the Court cannot rule out the possibility that the impact of the judgment required by Cameroon on the rights and interests of third States could be such that the Court would be prevented from rendering it in the absence of these States, and that consequently Nigeria’s eighth preliminary objection would have to be upheld at least in part. Whether such third States would choose to exercise their rights to intervene in these proceedings pursuant to the Statute remains to be seen” (emphasis added);

and whereas Equatorial Guinea adds:

“It is in this context that Equatorial Guinea comes before the Court. Equatorial Guinea wishes to be very clear that it has no intention of intervening in those aspects of the proceedings that relate to the land boundary between Cameroon and Nigeria, including determination of sovereignty over the Bakassi Peninsula. It is only the maritime boundary aspects of the case before the Court with which Equatorial Guinea is concerned; and, as is explained more fully below, it is the purpose of Equatorial Guinea’s intervention to inform the Court of Equatorial Guinea’s legal rights and interests so that these may remain unaffected as the Court proceeds to address the question of the maritime boundary between Cameroon and Nigeria, the parties to the case before it. Equatorial Guinea does not seek to become a party to the case”;  

3. Whereas, in its Application, Equatorial Guinea, referring to Article 81, paragraph 3 (4), of the Rules of Court sets out inter alia in these terms “the interest of a legal nature which [it] considers may be affected by the decision in that case”:

“in accordance with its national law, Equatorial Guinea claims the sovereign rights and jurisdiction which pertain to it under international law up to the median line between Equatorial Guinea and Nigeria on the one hand, and between Equatorial Guinea and Cameroon on the other hand. It is these legal rights and interests which Equatorial Guinea seeks to protect... Equatorial Guinea wishes to emphasize that it does not seek the Court’s determination of its boundaries with Cameroon or Nigeria. Equatorial Guinea does wish to protect its legal rights and interests, however, and that requires

that any Cameroon-Nigeria maritime boundary that may be determined by the Court should not cross over the median line with Equatorial Guinea. If the Court were to determine a Cameroon-Nigeria maritime boundary that extended into Equatorial Guinea waters, as defined by the median line, Equatorial Guinea’s rights and interests would be prejudiced... It is the purpose of Equatorial Guinea to present and to demonstrate its legal rights and interests to the Court and, as appropriate, to state its views as to how the maritime boundary claims of Cameroon or Nigeria may or may not affect the legal rights and interests of Equatorial Guinea”;

4. Whereas, in its Application, Equatorial Guinea, referring to Article 81, paragraph 2 (b), of the Rules of Court, sets out “the precise object of the intervention” as follows:

“First, generally, to protect the legal rights of the Republic of Equatorial Guinea in the Gulf of Guinea by all legal means available, and in this regard, therefore, to make use of the procedure established by Article 62 of the Statute of the Court.

Second, to inform the Court of the nature of the legal rights and interests of Equatorial Guinea that could be affected by the Court’s decision in the light of the maritime boundary claims advanced by the Parties to the case before the Court”;  

5. Whereas, in its Application, Equatorial Guinea, referring to Article 81, paragraph 2 (c), of the Rules of Court, expresses the following opinion concerning the “basis of jurisdiction which is claimed to exist as between [it] and the parties to the case”:

“The Republic of Equatorial Guinea does not seek to be a party to the case before the Court. There is no basis for jurisdiction under the Statute and Rules of the Court which arises out of the pre-existing understandings between Equatorial Guinea, Nigeria and Cameroon. Equatorial Guinea has not made a declaration under Article 36 (2) of the Statute of the Court nor is there an agreement in force among the three States which confers jurisdiction on the Court in this regard. It would be open, of course, to the three countries affirmatively to request the Court not only to determine the Cameroon-Nigeria maritime boundary but also to determine Equatorial Guinea’s maritime boundaries with these two States. However, Equatorial Guinea has made no such request and wishes to continue to seek to determine its maritime boundaries with its neighbours through negotiations.

Accordingly, Equatorial Guinea’s request to intervene is based solely upon Article 62 of the Statute of the Court”;

6
6. Whereas, in ending its Application, Equatorial Guinea formulates the following conclusion:

"On the basis of the foregoing observations, Equatorial Guinea respectfully requests permission to intervene in the present proceedings between Cameroon and Nigeria for the object and purpose specified herein, and to participate in those proceedings in accordance with Article 85 of the Rules of the Court";

7. Whereas, in accordance with Article 83, paragraph 1, of the Rules of Court, the Deputy-Registrar, by letters dated 30 June 1999, transmitted certified copies of the Application for permission to intervene to the Government of Cameroon and the Government of Nigeria, which were informed that the Court had fixed 16 August 1999 as the time-limit for the submission of their written observations on that Application; and whereas, in accordance with paragraph 2 of that same provision, the Deputy-Registrar, on 30 June 1999, also transmitted a copy of the Application to the Secretary-General of the United Nations;

8. Whereas Cameroon and Nigeria each submitted written observations within the time-limit thus fixed; and whereas the Registry transmitted to each Party a copy of the other’s observations, as well as copies of the observations of both Parties to Equatorial Guinea;

9. Whereas, in its written observations, Cameroon informs the Court that it “has no objection in principle to [the intervention of Equatorial Guinea], limited to the maritime boundary, which could allow the Court to be better informed on the general background to the case and to determine more completely the dispute submitted to it”; whereas it adds, referring to the Judgment handed down by the Court on 11 June 1998 (Preliminary Objections), that “the Court envisaged the possibility that third States might intervene, amongst which was clearly the Republic of Equatorial Guinea”; and whereas it considers that “the intervention of Equatorial Guinea should allow the Court to decide on a delimitation of the boundary which will be stable and final in relation to the States involved”; and whereas, in those same written observations, Cameroon moreover

“entirely reserves its position in relation to the validity and possible consequences of the unilateral delimitation undertaken by Equatorial Guinea, whose claims, based solely on the principle of equidistance, do not take into account the specia geographical features of the area in dispute”;

10. Whereas, in its written observations, Nigeria notes that “Equatorial Guinea does not seek to intervene as a party in the proceedings”; and whereas it adds the following:

“Whether or not Equatorial Guinea’s Application is accepted, it will in Nigeria’s view make no difference to the legal position of Nigeria to the present proceedings, or to the jurisdiction of the Court. On that basis, Nigeria leaves it to the Court to judge whether and to what extent it is appropriate or useful to grant Equatorial Guinea’s Application”;

11. Whereas communications were subsequently addressed to the Registry by the Parties and by Equatorial Guinea, and whereas the Registry transmitted copies of each of those communications to the other two States; whereas Equatorial Guinea, by a letter dated 3 September 1999, noted that neither Cameroon nor Nigeria “had object in principle to the intervention of Equatorial Guinea”; whereas Nigeria, by a letter dated 13 September 1999, referred to certain passages in the written observations of Cameroon and maintained that Cameroon “misrepresented the position” of Equatorial Guinea, in that “[a]s Nigeria understands the position, Equatorial Guinea did not seek to intervene as a party, but as a third party”; whereas Cameroon, by a letter dated 11 October 1999, indicated that “it [did] not dispute the right of Equatorial Guinea to intervene as a non-party intervenor” and expressed the view that “it [was] not for Nigeria to take the place of Equatorial Guinea in deciding on the latter’s entitlement to intervene”, it being for the Court itself to determine the legal effects of such an intervention; and whereas Equatorial Guinea, in a further communication, dated 11 October 1999, observed that “there [could] be no question of the Court’s eventual Judgment determining the maritime boundaries of Equatorial Guinea, whether with Cameroon or Nigeria” and that it “[sought] the status of a non-party intervenor”;

12. Whereas neither of the Parties objects to the Application by Equatorial Guinea for permission to intervene being granted;

13. Whereas, in the opinion of the Court, Equatorial Guinea has sufficiently established that it has an interest of a legal nature which could be affected by any judgment which the Court might reach down for the purpose of determining the maritime boundary between Cameroon and Nigeria;

14. Whereas, moreover, as a Chamber of the Court has already had occasion to observe,

“[s]o far as the object of [a State’s] intervention is to inform the Court of the nature of the legal rights [of that State] which are in issue in the dispute, it cannot be said that this object is not a proper one: it seems indeed to accord with the function of intervention” (Land, Island and Maritime Frontier Dispute (El Salvador/Honduras). Application by Nicaragua for Permission to Intervene. Judgment of 13 September 1990, I.C.J. Reports 1990, p. 130, para. 90);

15. Whereas in addition, as the same Chamber pointed out,

“[i]t . . . follows . . . from the juridical nature and from the purposes of intervention that the existence of a valid link of jurisdiction
between the would-be intervener and the parties is not a requirement for the success of the application. On the contrary, the procedure of intervention is to ensure that a State with possibly affected interests may be permitted to intervene even though there is no jurisdictional link and it therefore cannot become a party” (I.C.J. Reports 1990, p. 135, para. 100);

16. Whereas, in view of the position of the Parties and the conclusions which the Court itself has reached, the Court considers that there is nothing to prevent the Application by Equatorial Guinea for permission to intervene from being granted;

17. Whereas copies of the pleadings and documents annexed, as filed in the case at present, have already been communicated to Equatorial Guinea pursuant to Article 53, paragraph 1, of the Rules of Court; and whereas a copy of the Reply of Cameroon and of the Rejoinder of Nigeria, which the Court has directed them to submit pursuant to its Order of 30 June 1999, will also be so communicated; whereas, in accordance with the provisions of Article 85 of the Rules of Court, it is necessary to fix time-limits for the filing, respectively, of a “written statement” by Equatorial Guinea and of “written observations” by Cameroon and by Nigeria on that statement; and whereas those time-limits must “so far as possible, coincide with those already fixed for the pleadings in the case”, in the present instance by the above-mentioned Order of 30 June 1999;

18. For these reasons,

THE COURT,

Unanimously,

1. Decides that the Republic of Equatorial Guinea is permitted to intervene in the case, pursuant to Article 62 of the Statute, to the extent, in the manner and for the purposes set out in its Application for permission to intervene;

2. Fixes the following time-limits for the filing of the written statement and the written observations referred to in Article 85, paragraph 1, of the Rules of Court:

   4 April 2001 for the written statement of the Republic of Equatorial Guinea;

   4 July 2001 for the written observations of the Republic of Cameroon and of the Federal Republic of Nigeria; and

3. Reserves the subsequent procedure for further decision.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-first day of October, one thousand nine hundred and ninety-nine, in four copies, one of which will be placed in the archives of the Court and the others transmitted to the


(Signed) Stephen M. SCHWEBEL,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.
International Court of Justice

LaGrand
(Germany v. United States of America)
Judgment

I.C.J. Reports 2001
INTERNATIONAL COURT OF JUSTICE

YEAR 2001

27 June 2001

LAGRAND CASE

(GERMANY v. UNITED STATES OF AMERICA)

Facts of the case.

* * *


Jurisdiction of Court in respect of Germany’s first submission — Recognition by United States of existence of dispute arising out of breach of subparagraph (b) of Article 36, paragraph 1, of Vienna Convention on Consular Relations — Recognition by United States of Court’s jurisdiction to hear this dispute so far as concerns Germany’s own rights — Objection by United States to Court’s jurisdiction over Germany’s claim founded on diplomatic protection — Objection by United States to Court’s jurisdiction over alleged breach of subparagraphs (a) and (c) of Article 36, paragraph 1, of Convention.

Jurisdiction of Court in respect of Germany’s third submission concerning implementation of Order of 3 March 1999 indicating provisional measures.

Jurisdiction of Court in respect of Germany’s fourth submission — Objection by United States — United States argument that submission seeking guarantees of non-repetition falls outside terms of Optional Protocol.

* * *

Admissibility of Germany’s submissions.

United States objection to admissibility of Germany’s second, third and fourth submissions — United States argument that Court cannot be turned into ultimate court of appeal in criminal proceedings before its own domestic courts.

United States objection to admissibility of Germany’s third submission —

* * *

Germany’s first submission — Question of disregard by United States of its legal obligations to Germany under Articles 5 and 36, paragraph 1, of Convention.

Submission advanced by Germany in own right — Recognition by United States of breach of Article 36, paragraph 1 (b), of Convention — Article 5, paragraph 1, establishing interrelated regime designed to facilitate implementation of system of consular protection.

Submission by Germany based on diplomatic protection — Article 36, paragraph 1 (b), of Convention and obligations of receiving State to detained person and to sending State.

* * *

Germany’s second submission — Question of disregard by United States of its legal obligation under Article 36, paragraph 2, of Convention.

Argument of United States that Article 36, paragraph 2, applicable only to rights of sending State.

“Procedural default” rule — Distinction to be drawn between rule as such and application in present case.

* * *

Germany’s third submission — Question of disregard by United States of its legal obligation to comply with Order indicating provisional measures of 3 March 1999.

Court called upon to rule expressly on question of legal effects of orders under Article 41 of Statute — Interpretation of that provision — Comparison of French and English texts — French and English versions of Statute “equally authentic” by virtue of Article 111 of United Nations Charter — Article 33, paragraph 4, of Vienna Convention on Law of Treaties — Object and purpose of Statute — Context — Principle that party to legal proceedings must abstain from any measure which might aggravate or extend the dispute — Preparatory work of Article 41 — Article 94 of United Nations Charter.

Question of binding nature of Order of 3 March 1999 — Measures taken by United States to give effect to Order — No request for reparation in Germany’s third submission — Time pressure due to circumstances in which proceedings were instituted.

* * *

Germany’s fourth submission — Question of obligation to provide certain assurances of non-repetition.
General request for assurance of non-repetition — Measures taken by United States to prevent recurrence of violation of Article 36, paragraph 1 (b) — Commitment undertaken by United States to ensure implementation of specific measures adopted in performance of obligations under that provision.

Consideration of other assurances requested by Germany — Germany's characterization of individual right provided for in Article 36, paragraph 1, as human right — Court's power to determine existence of violation of international obligation and, if necessary, to hold that domestic law has caused violation — United States having apologized to Germany for breach of Article 36, paragraph 1, of Convention — Germany not having requested material reparation for injury to itself and to LaGrand brothers — Question of review and reconsideration of certain sentences.

JUDGMENT

Present: President Guillaume; Vice-President Shi; Judges Oda, Bediaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetic, Higgins, Parra-Aranguren, Koomans, Rezek, Al-Khasawneh, Buergethal; Registrar Couvreur.

In the LaGrand case,

between

the Federal Republic of Germany,

represented by

Mr. Gerhard Westdickenberg, Director General for Legal Affairs and Legal Adviser, Federal Foreign Office of the Federal Republic of Germany,

H.E. Mr. Eberhard U. B. von Puttkamer, Ambassador of the Federal Republic of Germany to the Kingdom of the Netherlands,

as Agents;

Mr. Bruno Simma, Professor of Public International Law at the University of Munich,

as Co-Agent and Counsel;

Mr. Pierre-Marie Dupuy, Professor of Public International Law at the University of Paris (Pantheon-Assas) and at the European University Institute in Florence,

Mr. Donald Francis Donovan, Debevoise & Plimpton, New York,

Mr. Hans-Peter Kaul, Head of the Public International Law Division, Federal Foreign Office of the Federal Republic of Germany,

Mr. Daniel Khan, University of Munich,

Mr. Andreas Paulus, University of Munich,

as Counsel;

Mr. Eberhard Desch, Federal Ministry of Justice of the Federal Republic of Germany,

Mr. S. Johannes Trommer, Embassy of the Federal Republic of Germany in the Netherlands,

Mr. Andreas Götze, Federal Foreign Office of the Federal Republic of Germany,

as Advisers;

Ms Fiona Sneddon,

as Assistant,

and

the United States of America,

represented by

Mr. James H. Thessin, Acting Legal Adviser, United States Department of State,

as Agent;

Ms Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, United States Department of State,

Mr. D. Stephen Mathias, Assistant Legal Adviser for United Nations Affairs, United States Department of State,

as Deputy Agents;

The Honourable Janet Napolitano, Attorney General, State of Arizona,

Mr. Michael J. Matheson, Professor of International Law, School of Advanced International Studies, Johns Hopkins University; former Acting Legal Adviser, United States Department of State,

Mr. Theodor Meron, Counsellor on International Law, United States Department of State; Charles L. Denison Professor of International Law, New York University; Associate Member of the Institute of International Law,

Mr. Stefan Trechsel, Professor of Criminal Law and Procedure, University of Zurich Faculty of Law,

as Counsel and Advocates;

Mr. Shabtai Rosenne, Member of the Israel Bar; Honorary Member of the American Society of International Law; Member of the Institute of International Law,

Ms Norma B. Martens, Assistant Attorney General, State of Arizona,

Mr. Paul J. McMurdie, Assistant Attorney General, State of Arizona,

Mr. Robert J. Erickson, Principal Deputy Chief, Appellate Section, Criminal Division, United States Department of Justice,

Mr. Allen S. Weiner, Counsellor for Legal Affairs, Embassy of the United States of America in the Netherlands,

Ms Jessica R. Holmes, Attaché, Office of the Counsellor for Legal Affairs, Embassy of the United States of America in the Netherlands,

as Counsel,
The Court,
composed as above,
after deliberation,

delivers the following Judgment:

1. On 2 March 1999 the Federal Republic of Germany (hereinafter referred to as "Germany") filed in the Registry of the Court an Application instituting proceedings against the United States of America (hereinafter referred to as the "United States") for "violations of the Vienna Convention on Consular Relations [of 24 April 1963]" (hereinafter referred to as the "Vienna Convention").

In its Application, Germany based the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention (hereinafter referred to as the "Optional Protocol").

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was forthwith communicated to the Government of the United States; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. On 2 March 1999, the day on which the Application was filed, the German Government also filed in the Registry of the Court a request for the indication of provisional measures based on Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court.

By a letter dated 2 March 1999, the Vice-President of the Court, acting President in the case, addressed the Government of the United States in the following terms:

"Exercising the functions of the presidency in terms of Articles 13 and 32 of the Rules of Court, and acting in conformity with Article 74, paragraph 4, of the said Rules, I hereby draw the attention of [the] Government [of the United States] to the need to act in such a way as to enable any Order the Court will make on the request for provisional measures to have its appropriate effects."

By an Order of 3 March 1999, the Court indicated certain provisional measures (see paragraph 32 below).

4. In accordance with Article 43 of the Rules of Court, the Registrar sent the notification referred to in Article 63, paragraph 1, of the Statute to all States parties to the Vienna Convention or to that Convention and the Optional Protocol.

5. By an Order of 5 March 1999, the Court, taking account of the views of the Parties, fixed 16 September 1999 and 27 March 2000, respectively, as the time-limits for the filing of a Memorial by Germany and of a Counter-Memorial by the United States.

The Memorial and Counter-Memorial were duly filed within the time-limits so prescribed.

6. By letter of 26 October 2000, the Agent of Germany expressed his Government's desire to produce five new documents in accordance with Article 56 of the Rules.

By letter of 6 November 2000, the Agent of the United States informed the Court that his Government consented to the production of the first and second documents, but not to that of the third, fourth and fifth documents.

7. Pursuant to Article 53, paragraph 2, of the Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made available to the public at the opening of the oral proceedings.

8. Public hearings were held from 13 to 17 November 2000, at which the Court heard the oral arguments and replies of:

For Germany:
Mr. Gerhard Westdickenberg,
Mr. Bruno Simma,
Mr. Daniel Khan,
Mr. Hans-Peter Kaul,
Mr. Andreas Paulus,
Mr. Donald Francis Donovan,
Mr. Pierre-Marie Dupuy.

For the United States:
Mr. James H. Thessin,
The Honourable Janet Napolitano,
Mr. Theodor Meron,
Ms. Catherine W. Brown,
Mr. D. Stephen Mathias,
Mr. Stefan Trechsel,
Mr. Michael J. Matheson.

9. At the hearings, Members of the Court put questions to Germany, to which replies were given in writing, in accordance with Article 61, paragraph 4, of the Rules of Court.

In addition, the United States, acting within the time-limit accorded it for this purpose, commented on the new documents filed by Germany on 26 October 2000 (see paragraph 6 above) and produced documents in support of those comments.

* * *

10. In its Application, Germany formulated the decision requested in the following terms:

"Accordingly the Federal Republic of Germany asks the Court to adjudge and declare

(1) that the United States, in arresting, detaining, trying, convicting and sentencing Karl and Walter LaGrand, as described in the preceding statement of facts, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, as provided by Articles 5 and 36 of the Vienna Convention,

(2) that Germany is therefore entitled to reparation,

(3) that the United States is under an international legal obligation not to
apply the doctrine of 'procedural default' or any other doctrine of
national law, so as to preclude the exercise of the rights accorded
under Article 35 of the Vienna Convention; and

(4) that the United States is under an international obligation to carry out
in conformity with the foregoing international legal obligations any
future detention of or criminal proceedings against any other German
national in its territory, whether by a constituent, legislative, executive,
judicial or other power, whether that power holds a superior or
subordinate position in the organization of the United States, and
whether that power's functions are of an international or internal
character;

and that, pursuant to the foregoing international legal obligations,

(1) the criminal liability imposed on Karl and Walter LaGrand in viola-
tion of international legal obligations is void, and should be recog-
nized as void by the legal authorities of the United States;
(2) the United States should provide reparation, in the form of compen-
sation and satisfaction, for the execution of Karl LaGrand on 24 Feb-
uary 1999;
(3) the United States should restore the status quo ante in the case of
Walter LaGrand, that is re-establish the situation that existed before
the detention of, proceedings against, and conviction and sentencing
of that German national in violation of the United States' interna-
tional legal obligation took place; and
(4) the United States should provide Germany a guarantee of the non-
repetition of the illegal acts.”

11. In the course of the written proceedings, the following submissions were
presented by the Parties:

On behalf of the Government of Germany,
in the Memorial:

“Having regard to the facts and points of law set forth in the present
Memorial, and without prejudice to such elements of fact and law and to
such evidence as may be submitted at a later time, and likewise without
prejudice to the right to supplement and amend the present Submissions,
the Federal Republic of Germany respectfully requests the Court to adjudge
and declare

(1) that the United States, by not informing Karl and Walter LaGrand
without delay following their arrest of their rights under Article 36
subparagraph 1 (b) of the Vienna Convention on Consular Relations,
and by depriving Germany of the possibility of rendering consular
assistance, which ultimately resulted in the execution of Karl and
Walter LaGrand, violated its international legal obligations to Ger-
m any, in its own right and in its right of diplomatic protection of its
nationals, under Articles 5 and 36 paragraph 1 of the said Conven-
tion;

(2) that the United States, by applying rules of its domestic law, in par-
ticular the doctrine of procedural default, which barred Karl and Wal-
ter LaGrand from raising their claims under the Vienna Convention
on Consular Relations, and by ultimately executing them, violated its
international legal obligation to Germany under Article 36 para-
graph 2 of the Vienna Convention to give full effect to the purposes
for which the rights accorded under Article 36 of the said Convention
are intended;

(3) that the United States, by failing to take all measures at its disposal to
ensure that Walter LaGrand was not executed pending the final deci-
sion of the International Court of Justice on the matter, violated its
international legal obligation to comply with the Order on provisional
measures issued by the Court on 3 March 1999, and to refrain from
any action which might interfere with the subject matter of a dispute
while judicial proceedings are pending;
and

(4) that the United States shall provide Germany a guarantee that it will
not repeat its illegal acts and ensure that, in any future cases of deten-
tion of or criminal proceedings against German nationals, United
States domestic law and practice will not constitute a bar to the effec-
tive exercise of the rights under Article 36 of the Vienna Convention
on Consular Relations.”

On behalf of the Government of the United States,
in the Counter-Memorial:

“Accordingly, on the basis of the facts and arguments set forth in this
Counter-Memorial, and without prejudice to the right further to amend
and supplement these submissions in the future, the United States asks the
Court to adjudge and declare that:

(1) there was a breach of the United States obligation to Germany under
Article 36 (1) (b) of the Vienna Convention on Consular Relations, in
that the competent authorities of the United States did not promptly
give to Karl and Walter LaGrand the notification required by that
Article, and that the United States has apologized to Germany for this
breach, and is taking substantial measures aimed at preventing any
recurrence; and

(2) that all other claims and submissions of the Federal Republic of Ger-
many are dismissed.”

12. At the oral proceedings, the following submissions were presented by the
Parties:

On behalf of the Government of Germany,

“The Federal Republic of Germany respectfully requests the Court to
adjudge and declare

(1) that the United States, by not informing Karl and Walter LaGrand
without delay following their arrest of their rights under Article 36,
subparagraph 1 (b), of the Vienna Convention on Consular Rela-
tions, and by depriving Germany of the possibility of rendering con-
sular assistance, which ultimately resulted in the execution of Karl and Walter LaGrand, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, under Articles 5 and 36, paragraph 1, of the said Convention;

(2) that the United States, by applying rules of its domestic law, in particular the doctrine of procedural default, which barred Karl and Walter LaGrand from raising their claims under the Vienna Convention on Consular Relations, and by ultimately executing them, violated its international legal obligation to Germany under Article 36, paragraph 2, of the Vienna Convention to give full effect to the purposes for which the rights accorded under Article 36 of the said Convention are intended;

(3) that the United States, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice on the matter, violated its international legal obligation to comply with the Order on provisional measures issued by the Court on 3 March 1999, and to refrain from any action which might interfere with the subject-matter of a dispute while judicial proceedings are pending;

and, pursuant to the foregoing international legal obligations,

(4) that the United States shall provide Germany an assurance that it will not repeat its unlawful acts and that, in any future cases of detention or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations. In particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36.”

On behalf of the Government of the United States,

“The United States of America respectfully requests the Court to adjudge and declare that:

(1) There was a breach of the United States obligation to Germany under Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations, in that the competent authorities of the United States did not promptly give to Karl and Walter LaGrand the notification required by that Article, and that the United States has apologized to Germany for this breach, and is taking substantial measures aimed at preventing any recurrence; and

(2) All other claims and submissions of the Federal Republic of Germany are dismissed.”

* * *

13. Walter LaGrand and Karl LaGrand were born in Germany in 1962 and 1963 respectively, and were German nationals. In 1967, when they were still young children, they moved with their mother to take up permanent residence in the United States. They returned to Germany only once, for a period of about six months in 1974. Although they lived in the United States for most of their lives, and became the adoptive children of a United States national, they remained at all times German nationals, and never acquired the nationality of the United States. However, the United States has emphasized that both had the demeanour and speech of Americans rather than Germans, that neither was known to have spoken German, and that they appeared in all respects to be native citizens of the United States.

14. On 7 January 1982, Karl LaGrand and Walter LaGrand were arrested in the United States by law enforcement officers on suspicion of having been involved earlier the same day in an attempted armed bank robbery in Marana, Arizona, in the course of which the bank manager was murdered and another bank employee seriously injured. They were subsequently tried before the Superior Court of Pima County, Arizona, which, on 17 February 1984, convicted them both of murder in the first degree, attempted murder in the first degree, attempted armed robbery and two counts of kidnapping. On 14 December 1984, each was sentenced to death for first degree murder and to concurrent sentences of imprisonment for the other charges.

15. At all material times, Germany as well as the United States were parties to both the Vienna Convention on Consular Relations and the Optional Protocol to that Convention. Article 36, paragraph 1 (b), of the Vienna Convention provides that:

“if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.”

It is not disputed that at the time the LaGrands were convicted and sentenced, the competent United States authorities had failed to provide the LaGrands with the information required by this provision of the Vienna Convention, and had not informed the relevant German consular post of the LaGrands’ arrest. The United States concedes that the competent authorities failed to do so, even after becoming aware that the LaGrands were German nationals and not United States nationals, and admits that
the United States has therefore violated its obligations under this provision of the Vienna Convention.

16. However, there is some dispute between the Parties as to the time at which the competent authorities in the United States became aware of the fact that the LaGrands were German nationals. Germany argues that the authorities of Arizona were aware of this from the very beginning, and in particular that probation officers knew by April 1982. The United States argues that at the time of their arrest, neither of the LaGrands identified himself to the arresting authorities as a German national, and that Walter LaGrand affirmatively stated that he was a United States citizen. The United States position is that its “competent authorities” for the purposes of Article 36, paragraph 1 (b), of the Vienna Convention were the arresting and detaining authorities, and that these became aware of the German nationality of the LaGrands by late 1984, and possibly by mid-1983 or earlier, but in any event not at the time of their arrest in 1982. Although other authorities, such as immigration authorities or probation officers, may have known this even earlier, the United States argues that these were not “competent authorities” for the purposes of this provision of the Vienna Convention. The United States has also suggested that at the time of their arrest, the LaGrands may themselves have been unaware that they were not nationals of the United States.

17. At their trial, the LaGrands were represented by counsel assigned by the court, as they were unable to afford legal counsel of their own choice. Their counsel at trial did not raise the issue of non-compliance with the Vienna Convention, and did not themselves contact the German consular authorities.

18. The convictions and sentences pronounced by the Superior Court of Pima County, Arizona, were subsequently challenged by the LaGrands in three principal sets of legal proceedings.

19. The first set of proceedings consisted of appeals against the convictions and sentences to the Supreme Court of Arizona, which were rejected by that court on 30 January 1987. The United States Supreme Court, in the exercise of its discretion, denied applications by the LaGrands for further review of these judgments on 5 October 1987.

20. The second set of proceedings involved petitions by the LaGrands for post-conviction relief, which were denied by an Arizona state court in 1989. Review of this decision was denied by the Supreme Court of Arizona in 1990, and by the United States Supreme Court in 1991.

21. At the time of these two sets of proceedings, the LaGrands had still not been informed by the competent United States authorities of their rights under Article 36, paragraph 1 (b), of the Vienna Convention, and the German consular post had still not been informed of their arrest. The issue of the lack of consular notification, which had not been raised at trial, was also not raised in these two sets of proceedings.

22. The relevant German consular post was only made aware of the case in June 1992 by the LaGrands themselves, who had learnt of their rights from other sources, and not from the Arizona authorities. In December 1992, and on a number of subsequent occasions between then and February 1999, an official of the Consulate-General of Germany in Los Angeles visited the LaGrands in prison. Germany claims that it subsequently helped the LaGrands’ attorneys to investigate the LaGrands’ childhood in Germany, and to raise the issue of the omission of consular advice in further proceedings before the federal courts.

23. The LaGrands commenced a third set of legal proceedings by filing applications for writs of habeas corpus in the United States District Court for the District of Arizona, seeking to have their convictions — or at least their death sentences — set aside. In these proceedings they raised a number of different claims, which were rejected by that court in orders dated 24 January 1995 and 16 February 1995. One of these claims was that the United States authorities had failed to notify the German consulate of their arrest, as required by the Vienna Convention. This claim was rejected on the basis of the “procedural default” rule. According to the United States, this rule:

“is a federal rule that, before a state criminal defendant can obtain relief in federal court, the claim must be presented to a state court. If a state defendant attempts to raise a new issue in a federal habeas corpus proceeding, the defendant can only do so by showing cause and prejudice. Cause is an external impediment that prevents a defendant from raising a claim and prejudice must be obvious on its face. One important purpose of this rule is to ensure that the state courts have an opportunity to address issues going to the validity of state convictions before the federal courts intervene.”

The United States District Court held that the LaGrands had not shown an objective external factor that prevented them from raising the issue of the lack of consular notification earlier. On 16 January 1998, this judgment was affirmed on appeal by the United States Court of Appeals,
Ninth Circuit, which also held that the LaGrands’ claim relating to the Vienna Convention was “procedurally defaulted”, as it had not been raised in any of the earlier proceedings in state courts. On 2 November 1998, the United States Supreme Court denied further review of this judgment.

24. On 21 December 1998, the LaGrands were formally notified by the United States authorities of their right to consular access.

25. On 15 January 1999, the Supreme Court of Arizona decided that Karl LaGrand was to be executed on 24 February 1999, and that Walter LaGrand was to be executed on 3 March 1999. Germany claims that the German Consulate learned of these dates on 19 January 1999.

26. In January and early February 1999, various interventions were made by Germany seeking to prevent the execution of the LaGrands. In particular, the German Foreign Minister and German Minister of Justice wrote to their respective United States counterparts on 27 January 1999; the German Foreign Minister wrote to the Governor of Arizona on the same day; the German Chancellor wrote to the President of the United States and to the Governor of Arizona on 2 February 1999; and the President of the Federal Republic of Germany wrote to the President of the United States on 5 February 1999. These letters referred to German opposition to capital punishment generally, but did not raise the issue of the absence of consular notification in the case of the LaGrands. The latter issue was, however, raised in a further letter, dated 22 February 1999, two days before the scheduled date of execution of Karl LaGrand, from the German Foreign Minister to the United States Secretary of State.

27. On 23 February 1999, the Arizona Board of Executive Clemency rejected an appeal for clemency by Karl LaGrand. Under the law of Arizona, this meant that the Governor of Arizona was prevented from granting clemency.

28. On the same day, the Arizona Superior Court in Pima County rejected a further petition by Walter LaGrand, based inter alia on the absence of consular notification, on the ground that these claims were “procedurally precluded”.

29. On 24 February 1999, certain last-minute federal court proceedings brought by Karl LaGrand ultimately proved to be unsuccessful. In the course of these proceedings the United States Court of Appeals, Ninth Circuit, again held the issue of failure of consular notification to be procedurally defaulted. Karl LaGrand was executed later that same day.

30. On 2 March 1999, the day before the scheduled date of execution of Walter LaGrand, at 7.30 p.m. (The Hague time), Germany filed in the Registry of this Court the Application instituting the present proceedings against the United States (see paragraph 1 above), accompanied by a request for the following provisional measures:

“The United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of that Order.”

By a letter of the same date, the German Foreign Minister requested the Secretary of State of the United States “to urge [the] Governor [of Arizona] for a suspension of Walter LaGrand’s execution pending a ruling by the International Court of Justice”.

31. On the same day, the Arizona Board of Executive Clemency met to consider the case of Walter LaGrand. It recommended against a commutation of his death sentence, but recommended that the Governor of Arizona grant a 60-day reprieve having regard to the Application filed by Germany in the International Court of Justice. Nevertheless, the Governor of Arizona decided, “in the interest of justice and with the victims in mind”, to allow the execution of Walter LaGrand to go forward as scheduled.

32. In an Order of 3 March 1999, this Court found that the circumstances required it to indicate, as a matter of the greatest urgency and without any other proceedings, provisional measures in accordance with Article 41 of its Statute and with Article 75, paragraph 1, of its Rules (I.C.J. Reports 1999 (I), p. 15, para. 26); it indicated provisional measures in the following terms:

“(a) The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order;

(b) The Government of the United States of America should transmit this Order to the Governor of the State of Arizona.”

33. On the same day, proceedings were brought by Germany in the United States Supreme Court against the United States and the Governor of Arizona, seeking inter alia to enforce compliance with this Court’s Order indicating provisional measures. In the course of these proceedings, the United States Solicitor General as counsel of record took the position, inter alia, that “an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief”. On the same date, the United States Supreme Court dismissed the motion by Germany, on the ground of the tardiness of Germany’s application and of jurisdictional barriers under United States domestic law.

34. On that same day, proceedings were also instituted in the United
States Supreme Court by Walter LaGrand. These proceedings were decided against him. Later that day, Walter LaGrand was executed.

* * *

35. The Court must as a preliminary matter deal with certain issues, which were raised by the Parties in these proceedings, concerning the jurisdiction of the Court in relation to Germany’s Application, and the admissibility of its submissions.

* * *

36. In relation to the jurisdiction of the Court, the United States, without having raised preliminary objections under Article 79 of the Rules of Court, nevertheless presented certain objections thereto.

Germany bases the jurisdiction of the Court on Article I of the Optional Protocol, which reads as follows:

“Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.”

Germany contends that the

“proceedings instituted by [it] in the present case raise questions of the interpretation and application of the Vienna Convention on Consular Relations and of the legal consequences arising from the non-observance on the part of the United States of certain of its provisions vis-à-vis Germany and two of its nationals”.

Accordingly, Germany states that all four of its submissions

“are covered by one and the same jurisdictional basis, namely Art. 1 of the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes of 24 April 1963”.

* *

37. The Court will first examine the question of its jurisdiction with respect to the first submission of Germany. Germany relies on paragraph 1 of Article 36 of the Vienna Convention, which provides:

“With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.”

38. Germany alleges that the failure of the United States to inform the LaGrand brothers of their right to contact the German authorities “prevented Germany from exercising its rights under Art. 36 (1) (a) and (c) of the Convention” and violated “the various rights conferred upon the sending State vis-à-vis its nationals in prison, custody or detention as provided for in Art. 36 (1) (b) of the Convention”. Germany further alleges that by breaching its obligations to inform, the United States also violated individual rights conferred on the detainees by Article 36, paragraph 1 (a), second sentence, and by Article 36, paragraph 1 (b). Germany accordingly claims that it “was injured in the person of its two nationals”, a claim which Germany raises “as a matter of diplomatic protection on behalf of Walter and Karl LaGrand”.

39. The United States acknowledges that “there was a breach of the U.S. obligation . . . to inform the LaGrand brothers that they could ask that a German consular post be notified of their arrest and detention”. It does not deny that this violation of Article 36, paragraph 1 (b), has given rise to a dispute between the two States and recognizes that the Court has
jurisdiction under the Optional Protocol to hear this dispute in so far as it concerns Germany’s own rights.

40. Concerning Germany’s claims of violation of Article 36, paragraph 1 (a) and (c), the United States however calls these claims “particularly misplaced” on the grounds that the “underlying conduct complained of is the same” as the claim of the violation of Article 36, paragraph 1 (b). It contends, moreover, that “to the extent that this claim by Germany is based on the general law of diplomatic protection, it is not within the Court’s jurisdiction” under the Optional Protocol because it “does not concern the interpretation or application of the Vienna Convention”. The United States points to the distinction between jurisdiction over treaties and jurisdiction over customary law and observes that “[e]ven if a treaty norm and a customary norm were to have exactly the same content”, each would have its “separate applicability”. It contests the German assertion that diplomatic protection “enters through the intermediary of the Vienna Convention” and submits:

“the Vienna Convention deals with consular assistance . . . it does not deal with diplomatic protection. Legally, a world of difference exists between the right of the consul to assist an incarcerated national of his country, and the wholly different question whether the State can espouse the claims of its national through diplomatic protection. The former is within the jurisdiction of the Court under the Optional Protocol; the latter is not . . . Germany based its right of diplomatic protection on customary law . . . [T]his case comes before this Court not under Article 36, paragraph 2, of its Statute, but under Article 36, paragraph 1. Is it not obvious . . . that whatever rights Germany has under customary law, they do not fall within the jurisdiction of this Court under the Optional Protocol?”

41. Germany responds that the breach of paragraph 1 (a) and (c) of Article 36 must be distinguished from that of paragraph 1 (b), and that as a result, the Court should not only rule on the latter breach, but also on the violation of paragraph 1 (a) and (c). Germany further asserts “that application of the Convention in the sense of the Optional Protocol very well encompasses the consequences of a violation of individual rights under the Convention, including the espousal of respective claims by the State of nationality”.

42. The Court cannot accept the United States objections. The dispute between the Parties as to whether Article 36, paragraph 1 (a) and (c), of the Vienna Convention have been violated in this case in consequence of the breach of paragraph 1 (b) does relate to the interpretation and application of the Convention. This is also true of the dispute as to whether paragraph 1 (b) creates individual rights and whether Germany has standing to assert those rights on behalf of its nationals. These are consequently disputes within the meaning of Article I of the Optional Protocol. Moreover, the Court cannot accept the contention of the United States that Germany’s claim based on the individual rights of the LaGrand brothers is beyond the Court’s jurisdiction because diplomatic protection is a concept of customary international law. This fact does not prevent a State party to a treaty, which creates individual rights, from taking up the case of one of its nationals and instituting international judicial proceedings on behalf of that national, on the basis of a general jurisdictional clause in such a treaty. Therefore the Court concludes that it has jurisdiction with respect to the whole of Germany’s first submission.

43. The United States does not challenge the Court’s jurisdiction in regard to Germany’s second submission. Nor does it as such address the issue of the jurisdiction of the Court over the third submission concerning the binding nature of the Order of the Court of 3 March 1999 indicating provisional measures. It argues, however, that this submission is inadmissible (see paragraphs 50 and 53-55 below), and that the Court can fully and adequately dispose of the merits of this case without having to rule on the submission.

44. Germany asserts that the Court’s Order of 3 March 1999 was intended to “enforce” the rights enjoyed by Germany under the Vienna Convention and “preserve those rights pending its decision on the merits”. Germany claims that a dispute as to “whether the United States were obliged to comply and did comply with the Order” necessarily arises out of the interpretation or application of the Convention and thus falls within the jurisdiction of the Court. Germany argues further that questions “relating to the non-compliance with a decision of the Court under Article 41, para. 1, of the Statute, e.g. Provisional Measures, are an integral component of the entire original dispute between the parties”. Moreover, Germany contends that its third submission also implicates “an auxiliary and subsidiary matter . . . the inherent jurisdiction of the Court for claims as closely interrelated with each other as the ones before the Court in the present case”.

45. The third submission of Germany concerns issues that arise directly out of the dispute between the Parties before the Court over which the Court has already held that it has jurisdiction (see paragraph 42 above), and which are thus covered by Article I of the Optional Protocol. The Court reaffirms, in this connection, what it said in its Judgment in the
Fisheries Jurisdiction case, where it declared that in order to consider the dispute in all its aspects it may also deal with a submission that "is one based on facts subsequent to the filing of the Application, but arising directly out of the question which is the subject-matter of that Application. As such it falls within the scope of the Court’s jurisdiction . . ." (Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 203, para. 72). Where the Court has jurisdiction to decide a case, it also has jurisdiction to deal with submissions requesting it to determine that an order indicating measures which seeks to preserve the rights of the Parties to this dispute has not been complied with.

46. The United States objects to the jurisdiction of the Court over the fourth submission in so far as it concerns a request for assurances and guarantees of non-repetition. The United States submits that its "jurisdictional argument [does] not apply to jurisdiction to order cessation of a breach or to order reparation, but is limited to the question of assurances and guarantees . . . [which] are conceptually distinct from reparation". It contends that Germany’s fourth submission "goes beyond any remedy that the Court can or should grant, and should be rejected. The Court’s power to decide cases . . . does not extend to the power to order a State to provide any ‘guarantee’ intended to confer additional legal rights on the Applicant State . . . The United States does not believe that it can be the role of the Court . . . to impose any obligations that are additional to or that differ in character from those to which the United States consented when it ratified the Vienna Convention."

47. Germany counters this argument by asserting that "a dispute whether or not the violation of a provision of the Vienna Convention gives rise to a certain remedy is a dispute concerning ‘the application and interpretation’ of the aforesaid Convention, and thus falls within the scope of Art. I of the Optional Protocol”.

Germany notes in this regard that the Court, in its Order of 9 April 1998 in the case concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America), held that "there exists a dispute as to whether the relief sought by Paraguay is a remedy available under the Vienna Convention, in particular in relation to Articles 5 and 36 thereof; and . . . this is a dispute arising out of the application of the Convention within the meaning of Article 1 of the Optional Protocol concerning the Compulsory Settlement of Disputes of 24 April 1963" (I.C.J. Reports 1998, p. 256, para. 31).

48. The Court considers that a dispute regarding the appropriate remedies for the violation of the Convention alleged by Germany is a dispute that arises out of the interpretation or application of the Convention and thus is within the Court’s jurisdiction. Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation (Factory at Chorzów, P.C.I.J., Series A, No. 9, p. 22). Consequently, the Court has jurisdiction in the present case with respect to the fourth submission of Germany.

49. The United States has argued that the submissions of Germany are inadmissible on various grounds. The Court will consider these objections in the order presented by the United States.

50. The United States objects first to Germany’s second, third and fourth submissions. According to the United States, these submissions are inadmissible because Germany seeks to have this Court “play the role of ultimate court of appeal in national criminal proceedings”, a role which it is not empowered to perform. The United States maintains that many of Germany’s arguments, in particular those regarding the rule of “procedural default”, ask the Court “to address and correct . . . asserted violations of US law and errors of judgment by US judges” in criminal proceedings in national courts.

51. Germany denies that it requests the Court to act as an appellate criminal court, or that Germany’s requests are in any way aimed at interfering with the administration of justice within the United States judicial system. It maintains that it is merely asking the Court to adjudge and declare that the conduct of the United States was inconsistent with its international legal obligations towards Germany under the Vienna Convention, and to draw from this failure certain legal consequences provided for in the international law of State responsibility.

52. The Court does not agree with these arguments of the United
States concerning the admissibility of the second, third and fourth German submissions. In the second submission, Germany asks the Court to interpret the scope of Article 36, paragraph 2, of the Vienna Convention; the third submission seeks a finding that the United States violated an Order issued by this Court pursuant to Article 41 of its Statute; and in Germany’s fourth submission, the Court is asked to determine the applicable remedies for the alleged violations of the Convention. Although Germany deals extensively with the practice of American courts as it bears on the application of the Convention, all three submissions seek to require the Court to do no more than apply the relevant rules of international law to the issues in dispute between the Parties to this case. The exercise of this function, expressly mandated by Article 38 of its Statute, does not convert this Court into a court of appeal of national criminal proceedings.

53. The United States also argues that Germany’s third submission is inadmissible because of the manner in which these proceedings were brought before the Court by Germany. It notes that German consular officials became aware of the LaGrands’ cases in 1992, but that the German Government did not express concern or protest to the United States authorities for some six and a half years. It maintains that the issue of the absence of consular notification was not raised by Germany until 22 February 1999, two days before the date scheduled for Karl LaGrand’s execution, in a letter from the German Foreign Minister to the Secretary of State of the United States (see paragraph 26 above). Germany then filed the Application instituting these proceedings, together with a request for provisional measures, after normal business hours in the Registry in the evening of 2 March 1999, some 27 hours before the execution of Walter LaGrand (see paragraph 30 above).

54. The United States rejects the contention that Germany found out only seven days before the filing of its Application that the authorities of Arizona knew as early as 1982 that the LaGrands were German nationals; according to the United States, their German nationality was referred to in pre-sentence reports prepared in 1984, which should have been familiar to German consular officers much earlier than 1999, given Germany’s claims regarding the vigour and effectiveness of its consular assistance.

55. According to the United States, Germany’s late filing compelled the Court to respond to its request for provisional measures by acting ex parte, without full information. The United States claims that the procedure followed was inconsistent with the principles of “equality of the Parties” and of giving each Party a sufficient opportunity to be heard, and that this would justify the Court in not addressing Germany’s third submission which is predicated wholly upon the Order of 3 March 1999.

56. Germany acknowledges that delay on the part of a claimant State may render an application inadmissible, but maintains that international law does not lay down any specific time-limit in that regard. It contends that it was only seven days before it filed its Application that it became aware of all the relevant facts underlying its claim, in particular, the fact that the authorities of Arizona knew of the German nationality of the LaGrands since 1982. According to Germany, it cannot be accused of negligence in failing to obtain the 1984 pre-sentence reports earlier. It also maintains that in the period between 1992, when it learned of the LaGrands’ cases, and the filing of its Application, it engaged in a variety of activities at the diplomatic and consular level. It adds that it had been confident for much of this period that the United States would ultimately rectify the violations of international law involved.

57. The Court recognizes that Germany may be criticized for the manner in which these proceedings were filed and for their timing. The Court recalls, however, that notwithstanding its awareness of the consequences of Germany’s filing at such a late date it nevertheless considered it appropriate to enter the Order of 3 March 1999, given that an irreparable prejudice appeared to be imminent. In view of these considerations, the Court considers that Germany is now entitled to challenge the alleged failure of the United States to comply with the Order. Accordingly, the Court finds that Germany’s third submission is admissible.

58. The United States argues further that Germany’s first submission, as far as it concerns its right to exercise diplomatic protection with respect to its nationals, is inadmissible on the ground that the LaGrands did not exhaust local remedies. The United States maintains that the alleged breach concerned the duty to inform the LaGrands of their right to consular access, and that such a breach could have been remedied at the trial stage, provided it was raised in a timely fashion. The United States contends that when a person fails, for example, to sue in a national court before a statute of limitations has expired, the claim is both procedurally barred in national courts and inadmissible in international tribunals for failure to exhaust local remedies. It adds that the failure of counsel for the LaGrands to raise the breach of the Vienna Convention at the appropriate stage and time of the proceedings does not excuse the non-exhaustion of local remedies. According to the United States, this
failure of counsel is imputable to their clients because the law treats defendants and their lawyers as a single entity in terms of their legal positions. Moreover, the State is not accountable for the errors or mistaken strategy by lawyers.

59. Germany responds that international law requires the exhaustion of only those remedies which are legally and practically available. Germany claims that in this case there was no remedy which the LaGrands failed to invoke that would have been available in the specific context of their case. This is so because, prior to 1992, the LaGrands could not resort to the available remedies, since they were unaware of their rights due to failure of the United States authorities to comply with the requirements of the Vienna Convention; thereafter, the “procedural default” rule prevented them from seeking any remedy.

60. The Court notes that it is not disputed that the LaGrands sought to plead the Vienna Convention in United States courts after they learned in 1992 of their rights under the Convention; it is also not disputed that by that date the procedural default rule barred the LaGrands from obtaining any remedy in respect of the violation of those rights. Counsel assigned to the LaGrands failed to raise this point earlier in a timely fashion. However, the United States may not now rely before this Court on this fact in order to preclude the admissibility of Germany’s first submission, as it was the United States itself which had failed to carry out its obligation under the Convention to inform the LaGrand brothers.

* *

61. The United States also contends that Germany’s submissions are inadmissible on the ground that Germany seeks to have a standard applied to the United States that is different from its own practice. According to the United States, Germany has not shown that its system of criminal justice requires the annulment of criminal convictions where there has been a breach of the duty of consular notification; and that the practice of Germany in similar cases has been to do no more than offer an apology. The United States maintains that it would be contrary to basic principles of administration of justice and equality of the Parties to apply against the United States alleged rules that Germany appears not to accept for itself.

62. Germany denies that it is asking the United States to adhere to standards which Germany itself does not abide by; it maintains that its law and practice is fully in compliance with the standards which it invokes. In this regard, it explains that the German Code of Criminal Procedure provides a ground of appeal where a legal norm, including a norm of international law, is not applied or incorrectly applied and where there is a possibility that the decision was impaired by this fact.

63. The Court need not decide whether this argument of the United States, if true, would result in the inadmissibility of Germany’s submissions. Here the evidence adduced by the United States does not justify the conclusion that Germany’s own practice fails to conform to the standards it demands from the United States in this litigation. The United States relies on certain German cases to demonstrate that Germany has itself proffered only an apology for violating Article 36 of the Vienna Convention, and that State practice shows that this is the appropriate remedy for such a violation. But the cases concerned entailed relatively light criminal penalties and are not evidence as to German practice where an arrested person, who has not been informed without delay of his or her rights, is facing a severe penalty as in the present case. It is no doubt the case, as the United States points out, that Article 36 of the Vienna Convention imposes identical obligations on States, irrespective of the gravity of the offence a person may be charged with and of the penalties that may be imposed. However, it does not follow that therefrom that the remedies for a violation of this Article must be identical in all situations. While an apology may be an appropriate remedy in some cases, it may in others be insufficient. The Court accordingly finds that this claim of inadmissibility must be rejected.

* *

64. Having determined that the Court has jurisdiction, and that the submissions of Germany are admissible, the Court now turns to the merits of each of these four submissions.

* *

65. Germany’s first submission requests the Court to adjudge and declare:

“that the United States, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36 paragraph 1 (b) of the Vienna Convention on Consular Relations, and by depriving Germany of the possibility of rendering consular assistance, which ultimately resulted in the execution of Karl and Walter LaGrand, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, under Articles 5 and 36 paragraph 1 of the said Convention”.
66. Germany claims that the United States violated its obligation under Article 36, paragraph 1 (b), to “inform a national of the sending State without delay of his or her right to inform the consular post of his home State of his arrest or detention”. Specifically, Germany maintains that the United States violated its international legal obligation to Germany under Article 36, paragraph 1 (b), by failing to inform the German nationals Karl and Walter LaGrand “without delay” of their rights under that subparagraph.

67. The United States acknowledges, and does not contest Germany’s basic claim, that there was a breach of its obligation under Article 36, paragraph 1 (b), of the Convention “promptly to inform the LaGrand brothers that they could ask that a German consular post be notified of their arrest and detention”.

68. Germany also claims that the violation by the United States of Article 36, paragraph 1 (b), led to consequential violations of Article 36, paragraph 1 (a) and (c). It points out that, when the obligation to inform the arrested person without delay of his or her right to contact the consulate is disregarded, “the other rights contained in Article 36, paragraph 1, become in practice irrelevant, indeed meaningless”. Germany maintains that, “[b]y informing the LaGrand brothers of their right to inform the consulate more than 16 years after their arrest, the United States ... clearly failed to meet the standard of Article 36 [(1) (c)].” It concludes that, by not preventing the execution of Karl and Walter LaGrand, and by “making irreversible its earlier breaches of Art. 5 and 36 (1) and (2) and causing irreparable harm, the United States violated its obligations under international law”.

69. The United States argues that the underlying conduct complained of by Germany is one and the same, namely, the failure to inform the LaGrand brothers as required by Article 36, paragraph 1 (b). Therefore, it disputes any other basis for Germany’s claims that other provisions, such as subparagraphs (a) and (c) of Article 36, paragraph 1, of the Convention, were also violated. The United States asserts that Germany’s claims regarding Article 36, paragraph 1 (a) and (c), are “particularly misplaced” in that the LaGrands were able to and did communicate freely with consular officials after 1992. There was, in the view of the United States, “no deprivation of Germany’s right to provide consular assistance, under Article 5 or Article 36, to Karl or Walter LaGrand” and “Germany’s attempt to transform a breach of one obligation into an additional breach of a wholly separate and distinct obligation should be rejected by the Court.”

70. In response, Germany asserts that it is “commonplace that one and the same conduct may result in several violations of distinct obligations”. Hence, when a detainee’s right to notification without delay is violated, he or she cannot establish contact with the consulate, receive visits from consular officers, nor be supported by adequate counsel. “Therefore, violation of this right is bound to imply violation of the other rights . . . [and] later observance of the rights of Article 36, paragraph 1 (a) and (c), could not remedy the previous violation of those provisions.”

71. Germany further contends that there is a causal relationship between the breach of Article 36 and the ultimate execution of the LaGrand brothers. Germany’s inability to render prompt assistance was, in its view, a “direct result of the United States’ breach of its Vienna Convention obligations”. It is claimed that, had Germany been properly afforded its rights under the Vienna Convention, it would have been able to intervene in time and present a “persuasive mitigation case” which “likely would have saved” the lives of the brothers. Germany believes that, “[h]ad proper notification been given under the Vienna Convention, competent trial counsel certainly would have looked to Germany for assistance in developing this line of mitigating evidence”. Moreover, Germany argues that, due to the doctrine of procedural default and the high post-conviction threshold for proving ineffective counsel under United States law, Germany’s intervention at a stage later than the trial phase could not “remedy the extreme prejudice created by the counsel appointed to represent the LaGrands”.

72. The United States terms these arguments as “suppositions about what might have occurred had the LaGrand brothers been properly informed of the possibility of consular notification”. It calls into question Germany’s assumption that German consular officials from Los Angeles would rapidly have given extensive assistance to the LaGrands’ defence counsel before the 1984 sentencing, and contests that such consular assistance would have affected the outcome of the sentencing proceedings. According to the United States, these arguments “rest on speculation” and do not withstand analysis. Finally, the United States finds it extremely doubtful that the early childhood “mitigating evidence” mentioned by Germany, if introduced at the trial, would have persuaded the sentencing judge to be lenient, as the brothers’ subsequent 17 years of experiences in the United States would have been given at least equal weight. The United States points out, moreover, that such evidence was in fact presented at trial.

73. The Court will first examine the submission Germany advances in its own right. The Court observes, in this connection, that the United States does not deny that it violated paragraph 1 (b) in relation to Ger-
many. The Court also notes that as a result of this breach, Germany did not learn until 1992 of the detention, trial and sentencing of the LaGrand brothers. The Court concludes therefore that on the facts of this case, the breach of the United States had the consequence of depriving Germany of the exercise of the rights accorded it under Article 36, paragraph 1 (a) and paragraph 1 (c), and thus violated these provisions of the Convention. Although the violation of paragraph 1 (b) of Article 36 will not necessarily always result in the breach of the other provisions of this Article, the Court finds that the circumstances of this case compel the opposite conclusion, for the reasons indicated below. In view of this finding, it is not necessary for the Court to deal with Germany’s further claim under Article 5 of the Convention.

74. Article 36, paragraph 1, establishes an interrelated régime designed to facilitate the implementation of the system of consular protection. It begins with the basic principle governing consular protection: the right of communication and access (Art. 36, para. 1 (a)). This clause is followed by the provision which spells out the modalities of consular notification (Art. 36, para. 1 (b)). Finally Article 36, paragraph 1 (c), sets out the measures consular officers may take in rendering consular assistance to their nationals in the custody of the receiving State. It follows that when the sending State is unaware of the detention of its nationals due to the failure of the receiving State to provide the requisite consular notification without delay, which was true in the present case during the period between 1982 and 1992, the sending State has been prevented for all practical purposes from exercising its rights under Article 36, paragraph 1. It is immaterial for the purposes of the present case whether the LaGrands would have sought consular assistance from Germany, whether Germany would have rendered such assistance, or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights, and that Germany and the LaGrands were in effect prevented by the breach of the United States from exercising them, had they so chosen.

75. Germany further contends that “the breach of Article 36 by the United States did not only infringe upon the rights of Germany as a State party to the [Vienna] Convention but also entailed a violation of the individual rights of the LaGrand brothers”. Invoking its right of diplomatic protection, Germany also seeks relief against the United States on this ground.

Germany maintains that the right to be informed of the rights under Article 36, paragraph 1 (b), of the Vienna Convention, is an individual right of every national of a State party to the Convention who enters the territory of another State party. It submits that this view is supported by the ordinary meaning of the terms of Article 36, paragraph 1 (b), of the Vienna Convention, since the last sentence of that provision speaks of the “rights” under this subparagraph of “the person concerned”, i.e., of the foreign national arrested or detained. Germany adds that the provision in Article 36, paragraph 1 (b), according to which it is for the arrested person to decide whether consular notification is to be provided, has the effect of conferring an individual right upon the foreign national concerned. In its view, the context of Article 36 supports this conclusion since it relates to both the concerns of the sending and receiving States and to those of individuals. According to Germany, the travaux préparatoires of the Vienna Convention lend further support to this interpretation. In addition, Germany submits that the “United Nations Declaration on the human rights of individuals who are not nationals of the country in which they live”, adopted by General Assembly resolution 40/144 on 13 December 1985, confirms the view that the right of access to the consulate of the home State, as well as the information on this right, constitute individual rights of foreign nationals and are to be regarded as human rights of aliens.

76. The United States questions what this additional claim of diplomatic protection contributes to the case and argues that there are no parallels between the present case and cases of diplomatic protection involving the espousal by a State of economic claims of its nationals. The United States maintains that the right of a State to provide consular assistance to nationals detained in another country, and the right of a State to espouse the claims of its nationals through diplomatic protection, are legally different concepts.

The United States contends, furthermore, that rights of consular notification and access under the Vienna Convention are rights of States, and not of individuals, even though these rights may benefit individuals by permitting States to offer them consular assistance. It maintains that the treatment due to individuals under the Convention is inextricably linked to and derived from the right of the State, acting through its consular officer, to communicate with its nationals, and does not constitute a fundamental right or a human right. The United States argues that the fact that Article 36 by its terms recognizes the rights of individuals does not determine the nature of those rights or the remedies required under the Vienna Convention for breaches of that Article. It points out that Article 36 begins with the words “[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State”, and that this wording gives no support to the notion that the rights and obligations enumerated in paragraph 1 of that Article are intended to ensure that nationals of the sending State have any particular rights or
treatment in the context of a criminal prosecution. The *travaux préparatoires* of the Vienna Convention according to the United States do not reflect a consensus that Article 36 was addressing immutable individual rights, as opposed to individual rights derivative of the rights of States.

77. The Court notes that Article 36, paragraph 1 (b), spells out the obligations the receiving State has towards the detained person and the sending State. It provides that, at the request of the detained person, the receiving State must inform the consular post of the sending State of the individual’s detention “without delay”. It provides further that any communication by the detained person addressed to the consular post of the sending State must be forwarded to it by authorities of the receiving State “without delay”. Significantly, this subparagraph ends with the following language: “The said authorities shall inform the person concerned without delay of his rights under this subparagraph” (emphasis added). Moreover, under Article 36, paragraph 1 (c), the sending State’s right to provide consular assistance to the detained person may not be exercised “if he expressly opposes such action”. The clarity of these provisions, viewed in their context, admits of no doubt. It follows, as has been held on a number of occasions, that the Court must apply these as they stand (see *Acquisition of Polish Nationality, Advisory Opinion, 1923, P.C.J., Series B, No. 7*, p. 20; *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 8; *Arbitral Award of 31 July 1989, Judgment, I.C.J. Reports 1991*, pp. 69-70, para. 48; *Territorial Dispute (Libyan Arab Jamahiriya-Chad), Judgment, I.C.J. Reports 1994*, p. 25, para. 51). Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person. These rights were violated in the present case.

78. At the hearings, Germany further contended that the right of the individual to be informed without delay under Article 36, paragraph 1, of the Vienna Convention was not only an individual right but has today assumed the character of a human right. In consequence, Germany added, “the character of the right under Article 36 as a human right renders the effectiveness of this provision even more imperative”. The Court having found that the United States violated the rights accorded by Article 36, paragraph 1, to the LaGrand brothers, it does not appear necessary to it to consider the additional argument developed by Germany in this regard.

* * *

79. The Court will now consider Germany’s second submission, in which it asks the Court to adjudge and declare:

“that the United States, by applying rules of its domestic law, in particular the doctrine of procedural default, which barred Karl and Walter LaGrand from raising their claims under the Vienna Convention on Consular Relations, and by ultimately executing them, violated its international legal obligation to Germany under Article 36 paragraph 2 of the Vienna Convention to give full effect to the purposes for which the rights accorded under Article 36 of the said Convention are intended”.

80. Germany argues that, under Article 36, paragraph 2, of the Vienna Convention

“the United States is under an obligation to ensure that its municipal ‘laws and regulations . . . enable full effect to be given to the purposes for which the rights accorded under this article are intended’ [and that it] is in breach of this obligation by upholding rules of domestic law which make it impossible to successfully raise a violation of the right to consular notification in proceedings subsequent to a conviction of a defendant by a jury”.

81. Germany points out that the “procedural default” rule is among the rules of United States domestic law whose application make it impossible to invoke a breach of the notification requirement. According to Germany, this rule “is closely connected with the division of labour between federal and state jurisdiction in the United States . . . [where] [c]riminal jurisdiction belongs to the states except in cases provided for in the Constitution”. This rule, Germany explains, requires “exhaustion of remedies at the state level before a *habeas corpus* motion can be filed with federal Courts”.

Germany emphasizes that it is not the “procedural default” rule as such that is at issue in the present proceedings, but the manner in which it was applied in that it “deprived the brothers of the possibility to raise the violations of their right to consular notification in US criminal proceedings”.

82. Furthermore, having examined the relevant United States jurisprudence, Germany contends that the procedural default rule had “made it impossible for the LaGrand brothers to effectively raise the issue of the lack of consular notification after they had at last learned of their rights and established contact with the German consulate in Los Angeles in 1992”.

83.
83. Finally, Germany states that it seeks

"[n]othing . . . more than compliance, or, at least, a system in place which does not automatically reproduce violation after violation of the Vienna Convention, only interrupted by the apologies of the United States Government”.

84. The United States objects to Germany’s second submission, since it considers that “Germany’s position goes far beyond the wording of the Convention, the intentions of the parties when it was negotiated, and the practice of States, including Germany’s practice”.

85. In the view of the United States:

"[t]he Vienna Convention does not require States Party to create a national law remedy permitting individuals to assert claims involving the Convention in criminal proceedings. If there is no such requirement, it cannot violate the Convention to require that efforts to assert such claims be presented to the first court capable of adjudicating them”.

According to the United States,

"[i]f there is no obligation under the Convention to create such individual remedies in criminal proceedings, the rule of procedural default — requiring that claims seeking such remedies be asserted at an appropriately early stage — cannot violate the Convention”.

86. The United States believes that Article 36, paragraph 2, “has a very clear meaning” and

“means, as it says, that the rights referred to in paragraph 1 shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso that said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under the Article are intended”.

In the view of the United States,

"[i]n the context of a foreign national in detention, the relevant laws and regulations contemplated by Article 36 (2) are those that may affect the exercise of specific rights under Article 36 (1), such as those addressing the timing of communications, visiting hours, and security in a detention facility. There is no suggestion in the text of Article 36 (2) that the rules of criminal law and procedure under which a defendant would be tried or have his conviction and sentence reviewed by appellate courts are also within the scope of this provision.”

87. The United States concludes that Germany’s second submission must be rejected “because it is premised on a misinterpretation of Article 36, paragraph 2, which reads the context of the provision — the exercise of a right under paragraph 1 — out of existence”.

88. Article 36, paragraph 2, of the Vienna Convention reads as follows:

“The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.”

89. The Court cannot accept the argument of the United States which proceeds, in part, on the assumption that paragraph 2 of Article 36 applies only to the rights of the sending State and not also to those of the detained individual. The Court has already determined that Article 36, paragraph 1, creates individual rights for the detained person in addition to the rights accorded the sending State, and that consequently the reference to “rights” in paragraph 2 must be read as applying not only to the rights of the sending State, but also to the rights of the detained individual (see paragraph 77 above).

90. Turning now to the “procedural default” rule, the application of which in the present case Germany alleges violated Article 36, paragraph 2, the Court emphasizes that a distinction must be drawn between that rule as such and its specific application in the present case. In itself, the rule does not violate Article 36 of the Vienna Convention. The problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information “without delay”, thus preventing the person from seeking and obtaining consular assistance from the sending State.

91. In this case, Germany had the right at the request of the LaGrands “to arrange for [their] legal representation” and was eventually able to provide some assistance to that effect. By that time, however, because of the failure of the American authorities to comply with their obligation under Article 36, paragraph 1 (b), the procedural default rule prevented counsel for the LaGrands to effectively challenge their convictions and sentences other than on United States constitutional grounds. As a result, although United States courts could and did examine the professional competence of counsel assigned to the indigent LaGrands by reference to United States constitutional standards, the procedural default rule prevented them from attaching any legal significance to the fact, inter alia, that the violation of the rights set forth in Article 36, paragraph 1, prevented Germany, in a timely fashion, from retaining private counsel for
them and otherwise assisting in their defence as provided for by the Convention. Under these circumstances, the procedural default rule had the effect of preventing “full effect [from being] given to the purposes for which the rights accorded under this article are intended”, and thus violated paragraph 2 of Article 36.

* * *

92. The Court will now consider Germany’s third submission, in which it asks the Court to adjudge and declare:

“that the United States, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice on the matter, violated its international legal obligation to comply with the Order on provisional measures issued by the Court on 3 March 1999, and to refrain from any action which might interfere with the subject matter of a dispute while judicial proceedings are pending”.

93. In its Memorial, Germany contended that “[p]rovisional [m]easures indicated by the International Court of Justice [were] binding by virtue of the law of the United Nations Charter and the Statute of the Court”. In support of its position, Germany developed a number of arguments in which it referred to the “principle of effectiveness”, to the “procedural prerequisites” for the adoption of provisional measures, to the binding nature of provisional measures as a “necessary consequence of the bindingness of the final decision”, to “Article 94 (1), of the United Nations Charter”, to “Article 41 (1), of the Statute of the Court” and to the “practice of the Court”. Referring to the duty of the “parties to a dispute before the Court . . . to preserve its subject-matter”, Germany added that:

“[a]part from having violated its duties under Art. 94 (1) of the United Nations Charter and Art. 41 (1) of the Statute, the United States has also violated the obligation to refrain from any action which might interfere with the subject-matter of a dispute while judicial proceedings are pending”.

At the hearings, Germany further stated the following:

“A judgment by the Court on jurisdiction or merits cannot be treated on exactly the same footing as a provisional measure . . . Article 59 and Article 60 [of the Statute] do not apply to provisional measures or, to be more exact, apply to them only by implication; that is to say, to the extent that such measures, being both incidental

and provisional, contribute to the exercise of a judicial function whose end-result is, by definition, the delivery of a judicial decision. There is here an inherent logic in the judicial procedure, and to disregard it would be tantamount, as far as the Parties are concerned, to deviating from the principle of good faith and from what the German pleadings call ‘the principle of institutional effectiveness’ . . . [P]rovisional measures . . . are indeed legal decisions, but they are decisions of procedure . . . Since their decisional nature is, however, implied by the logic of urgency and by the need to safeguard the effectiveness of the proceedings, they accordingly create genuine legal obligations on the part of those to whom they are addressed.”

94. Germany claims that the United States committed a threefold violation of the Court’s Order of 3 March 1999:

“(1) Immediately after the International Court of Justice had rendered its Order on Provisional Measures, Germany appealed to the US Supreme Court in order to reach a stay of the execution of Walter LaGrand, in accordance with the International Court’s Order to the same effect. In the course of these proceedings — and in full knowledge of the Order of the International Court — the Office of the Solicitor General, a section of the US Department of Justice — in a letter to the Supreme Court argued once again that: ‘an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief’.

This statement of a high-ranking official of the Federal Government . . . had a direct influence on the decision of the Supreme Court.

(2) In the following, the US Supreme Court — an agency of the United States — refused by a majority vote to order that the execution be stayed. In doing so, it rejected the German arguments based essentially on the Order of the International Court of Justice on Provisional Measures . . .

(3) Finally, the Governor of Arizona did not order a stay of the execution of Walter LaGrand although she was vested with the right to do so by the laws of the State of Arizona. Moreover, in the present case, the Arizona Executive Board of Clemency — for the first time in the history of this institution — had issued a recommendation for a temporary stay, not least in light of the international legal issues involved in the case . . .”

95. The United States argues that it “did what was called for by the Court’s 3 March Order, given the extraordinary and unprecedented cir-
circumstances in which it was forced to act”. It points out in this connection that the United States Government “immediately transmit(ted) the Order to the Governor of Arizona”, that “the United States placed the Order in the hands of the one official who, at that stage, might have had legal authority to stop the execution” and that by a letter from the Legal Counsellor of the United States Embassy in The Hague dated 8 March 1999, it informed the International Court of Justice of all the measures which had been taken in implementation of the Order.

The United States further states that:

“[t]wo central factors constrained the United States ability to act. The first was the extraordinarily short time between issuance of the Court’s Order and the time set for the execution of Walter LaGrand...”

“...The second constraining factor was the character of the United States of America as a federal republic of divided powers.”

96. The United States also alleges that the “terms of the Court’s 3 March Order did not create legal obligations binding on [it]”. It argues in this respect that “[t]he language used by the Court in the key portions of its Order is not the language used to create binding legal obligations” and that

“the Court does not need here to decide the difficult and controversial legal question of whether its orders indicating provisional measures would be capable of creating international legal obligations if worded in mandatory... terms”.

It nevertheless maintains that those orders cannot have such effects and, in support of that view, develops arguments concerning “the language and history of Article 41 (1) of the Court’s Statute and Article 94 of the Charter of the United Nations”, the “Court’s and State practice under these provisions”, and the “weight of publicists’ commentary”.

Concerning Germany’s argument based on the “principle of effectiveness”, the United States contends that

“[i]n an arena where the concerns and sensitivities of States, and not abstract logic, have informed the drafting of the Court’s constitutive documents, it is perfectly understandable that the Court might have the power to issue binding final judgments, but a more circumscribed authority with respect to provisional measures”.

Referring to Germany’s argument that the United States “violated the obligation to refrain from any action which might interfere with the sub-

ject matter of a dispute while judicial proceedings are pending”, the United States further asserts that:

“The implications of the rule as presented by Germany are potentially quite dramatic, however. Germany appears to contend that by merely filing a case with the Court, an Applicant can force a Respondent to refrain from continuing any action that the Applicant deems to affect the subject of the dispute. If the law were as Germany contends, the entirety of the Court’s rules and practices relating to provisional measures would be surplusage. This is not the law, and this is not how States or this Court have acted in practice.”

97. Lastly, the United States states that in any case, “[b]ecause of the press of time stemming from Germany’s last-minute filing of the case, basic principles fundamental to the judicial process were not observed in connection with the Court’s 3 March Order” and that

“[t]hus, whatever one might conclude regarding a general rule for provisional measures, it would be anomalous — to say the least — for the Court to construe this Order as a source of binding legal obligations”.

98. Neither the Permanent Court of International Justice, nor the present Court to date, has been called upon to determine the legal effects of orders made under Article 41 of the Statute. As Germany’s third submission refers expressly to an international legal obligation “to comply with the Order on Provisional Measures issued by the Court on 3 March 1999”, and as the United States disputes the existence of such an obligation, the Court is now called upon to rule expressly on this question.

99. The dispute which exists between the Parties with regard to this point essentially concerns the interpretation of Article 41, which is worded in identical terms in the Statute of each Court (apart from the respective references to the Council of the League of Nations and the Security Council). This interpretation has been the subject of extensive controversy in the literature. The Court will therefore now proceed to the interpretation of Article 41 of the Statute. It will do so in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties. According to paragraph 1 of Article 31, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty’s object and purpose.

100. The French text of Article 41 reads as follows:

“1. La Cour a le pouvoir d’indiquer, si elle estime que les circons-

38
tances l’exigent, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire.

2. En attendant l’arrêt définitif, l’indication de ces mesures est immédiatement notifiée aux parties et au Conseil de sécurité.”

(Emphasis added.)

In this text, the terms “indiquer” and “l’indication” may be deemed to be neutral as to the mandatory character of the measure concerned; by contrast the words “doivent être prises” have an imperative character.

For its part, the English version of Article 41 reads as follows:

“1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.”

(Emphasis added.)

According to the United States, the use in the English version of “indicate” instead of “order”, of “ought” instead of “must” or “shall”, and of “suggested” instead of “ordered”, is to be understood as implying that decisions under Article 41 lack mandatory effect. It might however be argued, having regard to the fact that in 1920 the French text was the original version, that such terms as “indicate” and “ought” have a meaning equivalent to “order” and “must” or “shall”.

101. Finding itself faced with two texts which are not in total harmony, the Court will first of all note that according to Article 92 of the Charter, the Statute “forms an integral part of the present Charter”. Under Article 111 of the Charter, the French and English texts of the latter are “equally authentic”. The same is equally true of the Statute.

In cases of divergence between the equally authentic versions of the Statute, neither it nor the Charter indicates how to proceed. In the absence of agreement between the parties in this respect, it is appropriate to refer to paragraph 4 of Article 33 of the Vienna Convention on the Law of Treaties, which in the view of the Court again reflects customary international law. This provision reads “when 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”.

The Court will therefore now consider the object and purpose of the Statute together with the context of Article 41.

102. The object and purpose of the Statute is to enable the Court to fulfill the functions provided for therein, and, in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.

103. A related reason which points to the binding character of orders made under Article 41 and to which the Cour attaches importance is the existence of a principle which has already been recognized by the Permanent Court of International Justice when it spoke of

“the principle universally accepted by international tribunals and likewise laid down in many conventions... to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute” (Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J., Series A/II, No. 79, p. 199).


104. Given the conclusions reached by the Court above in interpreting the text of Article 41 of the Statute in the light of its object and purpose, it does not consider it necessary to resort to the preparatory work in order to determine the meaning of that Article. The Court would nevertheless point out that the preparatory work of the Statute
does not preclude the conclusion that orders under Article 41 have binding force.

105. The initial preliminary draft of the Statute of the Permanent Court of International Justice, as prepared by the Committee of Jurists established by the Council of the League of Nations, made no mention of provisional measures. A provision to this effect was inserted only at a later stage in the draft prepared by the Committee, following a proposal from the Brazilian jurist Raul Fernandes.

Basing himself on the Bryan Treaty of 13 October 1914 between the United States and Sweden, Raul Fernandes had submitted the following text:

“Dans le cas où la cause du différend consiste en actes déterminés déjà effectués ou sur le point de l’être, la Cour pourra ordonner, dans le plus bref délai, à titre provisoire, des mesures conservatoires adéquates, en attendant le jugement définitif.” (Comité consultatif de juristes, Procès-verbaux des séances du comité, 16 juin-24 juillet 1920 (avec annexes), La Haye, 1920, p. 609.)

In its English translation this text read as follows:

“In case the cause of the dispute should consist of certain acts already committed or about to be committed, the Court may, provisionally and with the least possible delay, order adequate protective measures to be taken, pending the final judgment of the Court.” (Advisory Committee of Jurists, Procès-verbaux of the Proceedings of the Committee, 16 June-24 July 1920 (with Annexes), The Hague, 1920, p. 609.)

The Drafting Committee prepared a new version of this text, to which two main amendments were made: on the one hand, the words “la Cour pourra ordonner” (“the Court may . . . order”) were replaced by “la Cour a le pouvoir d’indiquer” (“the Court shall have the power to suggest”), while, on the other, a second paragraph was added providing for notice to be given to the parties and to the Council of the “measures suggested” by the Court. The draft Article 2bis as submitted by the Drafting Committee thus read as follows:

“Dans le cas où la cause du différend consiste en un acte effectué ou sur le point de l’être, la Cour a le pouvoir d’indiquer, si elle estime que les circonstances l’exigent, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire.

En attendant son arrêt, cette suggestion de la Cour est immédiatement transmise aux parties et au Conseil.” (Comité consultatif de juristes, Procès-verbaux des séances du comité, 16 juin-24 juillet 1920 (avec annexes), La Haye, 1920, p. 567-568.)

The English version read:

“If the dispute arises out of an act which has already taken place or which is imminent, the Court shall have the power to suggest, if it considers that circumstances so require, the provisional measures that should be taken to preserve the respective rights of either party.

Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council.” (Advisory Committee of Jurists, Procès-verbaux of the Proceedings of the Committee, 16 June-24 July 1920 (with Annexes), The Hague, 1920, pp. 567-568.)

The Committee of Jurists eventually adopted a draft Article 39, which amended the former Article 2bis only in its French version: in the second paragraph, the words “cette suggestion” were replaced in French by the words “l’indication”.

106. When the draft Article 39 was examined by the Sub-Committee of the Third Committee of the first Assembly of the League of Nations, a number of amendments were considered. Raul Fernandes suggested again to use the word “ordonner” in the French version. The Sub-Committee decided to stay with the word “indiquer”, the Chairman of the Sub-Committee observing that the Court lacked the means to execute its decisions. The language of the first paragraph of the English version was then made to conform to the French text: thus the word “suggest” was replaced by “indicate”, and “should” by “ought to”. However, in the second paragraph of the English version, the phrase “measures suggested” remained unchanged.

The provision thus amended in French and in English by the Sub-Committee was adopted as Article 41 of the Statute of the Permanent Court of International Justice. It passed as such into the Statute of the present Court without any discussion in 1945.

107. The preparatory work of Article 41 shows that the preference given in the French text to “indiquer” over “ordonner” was motivated by the consideration that the Court did not have the means to assure the execution of its decisions. However, the lack of means of execution and the lack of binding force are two different matters. Hence, the fact that the Court does not itself have the means to assure the execution of orders made pursuant to Article 41 is not an argument against the binding nature of such orders.

108. The Court finally needs to consider whether Article 94 of the United Nations Charter precludes attributing binding effect to orders indicating provisional measures. That Article reads as follows:

“1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it
deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

The question arises as to the meaning to be attributed to the words "the decision of the International Court of Justice" in paragraph 1 of this Article. This wording could be understood as referring not merely to the Court's judgments but to any decision rendered by it, thus including orders indicating provisional measures. It could also be interpreted to mean only judgments rendered by the Court as provided in paragraph 2 of Article 94. In this regard, the fact that in Articles 56 to 60 of the Court's Statute both the word "decision" and the word "judgment" are used does little to clarify the matter.

Under the first interpretation of paragraph 1 of Article 94, the text of the paragraph would confirm the binding nature of provisional measures; whereas the second interpretation would in no way preclude their being accorded binding force under Article 41 of the Statute. The Court accordingly concludes that Article 94 of the Charter does not prevent orders made under Article 41 from having a binding character.

109. In short, it is clear that none of the sources of interpretation referred to in the relevant Articles of the Vienna Convention on the Law of Treaties, including the preparatory work, contradict the conclusions drawn from the terms of Article 41 read in their context and in the light of the object and purpose of the Statute. Thus, the Court has reached the conclusion that orders on provisional measures under Article 41 have binding effect.

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110. The Court will now consider the Order of 3 March 1999. This Order was not a mere exhortation. It had been adopted pursuant to Article 41 of the Statute. This Order was consequently binding in character and created a legal obligation for the United States.

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111. As regards the question whether the United States has complied with the obligation incumbent upon it as a result of the Order of 3 March 1999, the Court observes that the Order indicated two provisional measures, the first of which states that

"[t]he United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order".

The second measure required the Government of the United States to

113. It is also noteworthy that the Governor of Arizona, to whom the
Court’s Order had been transmitted, decided not to give effect to it, even though the Arizona Clemency Board had recommended a stay of execution for Walter LaGrand.

114. Finally, the United States Supreme Court rejected a separate application by Germany for a stay of execution. “Given the tardiness of the pleas and the jurisdictional barriers they implicate”, yet it would have been open to the Supreme Court, as one of its members urged, to grant a preliminary stay, which would have given it “time to consider, after briefing from all interested parties, the jurisdictional and international legal issues involved . . .” (Federal Republic of Germany et al. v. United States et al., United States Supreme Court, 3 March 1999).

115. The review of the above steps taken by the authorities of the United States with regard to the Order of the International Court of Justice of 3 March 1999 indicates that the various competent United States authorities failed to take all the steps they could have taken to give effect to the Court’s Order. The Order did not require the United States to exercise powers it did not have; but it did impose the obligation to “take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings . . .”. The Court finds that the United States did not discharge this obligation.

Under these circumstances, the Court concludes that the United States has not complied with the Order of 3 March 1999.

116. The Court observes finally that in the third submission, Germany requests the Court to adjudge and declare only that the United States violated its international legal obligation to comply with the Order of 3 March 1999; it contains no other request regarding that violation. Moreover, the Court points out that the United States was under great pressure in this case, due to the circumstances in which Germany had instituted the proceedings. The Court notes moreover that at the time when the United States authorities took their decision the question of the binding character of the orders indicating provisional measures had been extensively discussed in the literature, but had not been settled by its jurisprudence. The Court would have taken these factors into consideration had Germany’s submission included a claim for indemnification.

* * *

117. Finally, the Court will consider Germany’s fourth submission, in which it asks the Court to adjudge and declare

“that the United States shall provide Germany an assurance that it will not repeat its unlawful acts and that, in any future cases of detention of or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations. In particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36.”

118. Germany states that:

“Concerning the requested assurances and guarantees of non-repetition of the United States, they are appropriate because of the existence of a real risk of repetition and the seriousness of the injury suffered by Germany. Further, the choice of means by which full conformity of the future conduct of the United States with Article 36 of the Vienna Convention is to be ensured may be left to the United States.”

Germany explains that:

“the effective exercise of the right to consular notification embodied in [Article 36, paragraph 2, requires that, where it cannot be excluded that the judgment was impaired by the violation of the right to consular notification, appellate proceedings allow for a reversal of the judgment and for either a retrial or a re-sentencing”.

Finally, Germany points out that its fourth submission has been so worded “as to . . . leave the choice of means by which to implement the remedy [it seeks] to the United States.”

119. In reply, the United States argues as follows:

“Germany’s fourth submission is clearly of a wholly different nature than its first three submissions. Each of the first three submissions seeks a judgment and declaration by the Court that a violation of a stated international legal obligation has occurred. Such judgments are at the core of the Court’s function, as an aspect of reparation.

In contrast, however, to the character of the relief sought in the first three submissions, the requirement of assurances of non-repetition sought in the fourth submission has no precedent in the jurisprudence of this Court and would exceed the Court’s jurisdiction and authority in this case. It is exceptional even as a non-legal undertaking in State practice, and it would be entirely inappropriate for the Court to require such assurances with respect to the duty to inform undertaken in the Consular Convention in the circumstances of this case.”
It points out that “US authorities are working energetically to strengthen the regime of consular notification at the state and local level throughout the United States, in order to reduce the chances of cases such as this recurring” and adds that:

“the German request for an assurance as to the duty to inform foreign nationals without delay of their right to consular notification... seeks to have the Court require the United States to assure that it will never again fail to inform a German foreign national of his or her right to consular notification”.

and that “the Court is aware that the United States is not in a position to provide such an assurance”. The United States further contends that it “has already provided appropriate assurances to Germany on this point”. Finally, the United States recalls that:

“[w]ith respect to the alleged breach of Article 36, paragraph 2,... Germany seeks an assurance that, ‘in any future cases of detention of or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36’”.

According to the United States,  

“[such an assurance] is again absolute in character... [and] seeks to create obligations on the United States that exceed those that are contained in the Vienna Convention. For example, the requirement of consular notification under Article 36, paragraph 1(b), of the Convention applies when a foreign national is arrested, committed to prison or to custody pending trial or detained in any other manner. It does not apply, as the submission would have it, to any future criminal proceedings. That is a new obligation, and it does not arise out of the Vienna Convention.”

The United States further observes that:

“[e]ven if this Court were to agree that, as a result of the application of procedural default with respect to the claims of the LaGrands, the United States committed a second internationally wrongful act, it should limit that judgment to the application of that law in the particular case of the LaGrands. It should resist the invitation to require an absolute assurance as to the application of US domestic law in all such future cases. The imposition of such an additional obligation on the United States would... be unprecedented in international jurisprudence and would exceed the Court’s authority and jurisdiction.”

120. The Court observes that in its fourth submission Germany seeks several assurances. First it seeks a straightforward assurance that the United States will not repeat its unlawful acts. This request does not specify the means by which non-repetition is to be assured.

Additionally, Germany seeks from the United States that

“in any future cases of detention of or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations”.

This request goes further, for, by referring to the law of the United States, it appears to require specific measures as a means of preventing recurrences.

Germany finally requests that

“[i]n particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36”.

This request goes even further, since it is directed entirely towards securing specific measures in cases involving the death penalty.

121. Turning first to the general demand for an assurance of non-repetition, the Court observes that it has been informed by the United States of the “substantial measures [which it is taking] aimed at preventing any recurrence” of the breach of Article 36, paragraph 1(b). Throughout these proceedings, oral as well as written, the United States has insisted that it “keenly appreciates the importance of the Vienna Convention’s consular notification obligation for foreign citizens in the United States as well as for United States citizens travelling and living abroad”; that “effective compliance with the consular notification requirements of Article 36 of the Vienna Convention requires constant effort and attention”; and that

“the Department of State is working intensively to improve understanding of and compliance with consular notification and access requirements throughout the United States, so as to guard against future violations of these requirements”.

The United States points out that

“[t]his effort has included the January 1998 publication of a booklet entitled ‘Consular Notification and Access: Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding
Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them, and development of a small reference card designed to be carried by individual arresting officers”.

According to the United States, it is estimated that until now over 60,000 copies of the brochure as well as over 400,000 copies of the pocket card have been distributed to federal, state and local law enforcement and judicial officials throughout the United States. The United States is also conducting training programmes reaching out to all levels of government. In the Department of State a permanent office to focus on United States and foreign compliance with consular notification and access requirements has been created.

122. Germany has stated that it “does not consider the so-called ‘assurances’ offered by the Respondent as adequate”. It says

“[v]iolations of Article 36 followed by death sentences and executions cannot be remedied by apologies or the distribution of leaflets. An effective remedy requires certain changes in US law and practice”.

In order to illustrate its point, Germany has presented to the Court a “[l]ist of German nationals detained after January 1, 1998, who claim not to have been informed of their consular rights”. The United States has criticized this list as misleading and inaccurate.

123. The Court notes that the United States has acknowledged that, in the case of the LaGrand brothers, it did not comply with its obligations to give consular notification. The United States has presented an apology to Germany for this breach. The Court considers however that an apology is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under Article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties.

In this respect, the Court has taken note of the fact that the United States repeated in all phases of these proceedings that it is carrying out a vast and detailed programme in order to ensure compliance by its competent authorities at the federal as well as at the state and local levels with its obligation under Article 36 of the Vienna Convention.

124. The United States has provided the Court with information, which it considers important, on its programme. If a State, in proceedings before this Court, repeatedly refers to substantial activities which it is carrying out in order to achieve compliance with certain obligations under a treaty, then this expresses a commitment to follow through with the efforts in this regard. The programme in question certainly cannot provide an assurance that there will never again be a failure by the United States to observe the obligation of notification under Article 36 of the Vienna Convention. But no State could give such a guarantee and Germany does not seek it. The Court considers that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), must be regarded as meeting Germany’s request for a general assurance of non-repetition.

125. The Court will now examine the other assurances sought by Germany in its fourth submission. The Court observes in this regard that it can determine the existence of a violation of an international obligation. If necessary, it can also hold that a domestic law has been the cause of this violation. In the present case the Court has made its findings of violations of the obligations under Article 36 of the Vienna Convention when it dealt with the first and the second submission of Germany. But it has not found that a United States law, whether substantive or procedural in character, is inherently inconsistent with the obligations undertaken by the United States in the Vienna Convention. In the present case the violation of Article 36, paragraph 2, was caused by the circumstances in which the procedural default rule was applied, and not by the rule as such.

In the present proceedings the United States has apologized to Germany for the breach of Article 36, paragraph 1, and Germany has not requested material reparation for this injury to itself and to the LaGrand brothers. It does, however, seek assurances:

“that, in any future cases of detention or of criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations”.

and that

“[i]n particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by the violation of the rights under Article 36”.

The Court considers in this respect that if the United States, notwithstanding its commitment referred to in paragraph 124 above, should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and
sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States.

126. Given the foregoing ruling by the Court regarding the obligation of the United States under certain circumstances to review and reconsider convictions and sentences, the Court need not examine Germany's further argument which seeks to found a like obligation on the contention that the right of a detained person to be informed without delay pursuant to Article 36, paragraph 1, of the Vienna Convention is not only an individual right but has today assumed the character of a human right.

127. In reply to the fourth submission of Germany, the Court will therefore limit itself to taking note of the commitment undertaken by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), of the Vienna Convention, as well as the aforementioned duty of the United States to address violations of that Convention should they still occur in spite of its efforts to achieve compliance.

* * *

128. For these reasons,

THE COURT,

(1) By fourteen votes to one,

_Finds_ that it has jurisdiction, on the basis of Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations of 24 April 1963, to entertain the Application filed by the Federal Republic of Germany on 2 March 1999;

_IN FAVOUR:_ President Guillaume; Vice-President Shi; Judges Oda, Bedjaoui, Ranjeva, Hercezgh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

_AGAINST:_ Judge Parra-Aranguren;

(2) (a) By thirteen votes to two,

_Finds_ that the first submission of the Federal Republic of Germany is admissible;

_IN FAVOUR:_ President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Hercezgh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

_AGAINST:_ Judges Oda, Parra-Aranguren;

(b) By fourteen votes to one,

_Finds_ that the second submission of the Federal Republic of Germany is admissible;

_IN FAVOUR:_ President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Hercezgh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh;

_AGAINST:_ Judge Oda;

(c) By twelve votes to three,

_Finds_ that the third submission of the Federal Republic of Germany is admissible;

_IN FAVOUR:_ President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Hercezgh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh;

_AGAINST:_ Judges Oda, Parra-Aranguren, Buergenthal;

(d) By fourteen votes to one,

_Finds_ that the fourth submission of the Federal Republic of Germany is admissible;

_IN FAVOUR:_ President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Hercezgh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

_AGAINST:_ Judge Oda;

(3) By fourteen votes to one,

_Finds_ that, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36, paragraph 1 (b), of the Convention, and by thereby depriving the Federal Republic of Germany of the possibility, in a timely fashion, to render the assistance provided for by the Convention to the individuals concerned, the United States of America breached its obligations to the Federal Republic of Germany and to the LaGrand brothers under Article 36, paragraph 1;

_IN FAVOUR:_ President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Hercezgh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

_AGAINST:_ Judge Oda;

(4) By fourteen votes to one,

_Finds_ that, by not permitting the review and reconsideration, in the light of the rights set forth in the Convention, of the convictions and sentences of the LaGrand brothers after the violations referred to in paragraph (3) above had been established, the United States of America breached its obligation to the Federal Republic of Ger-
many and to the LaGrand brothers under Article 36, paragraph 2, of the Convention;

Favor: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetic, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

Against: Judge Oda;

(5) By thirteen votes to two,

Finds that, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice in the case, the United States of America breached the obligation incumbent upon it under the Order indicating provisional measures issued by the Court on 3 March 1999;

Favor: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetic, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

Against: Judges Oda, Parra-Aranguren;

(6) Unanimously,

Takes note of the commitment undertaken by the United States of America to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), of the Convention; and finds that this commitment must be regarded as meeting the Federal Republic of Germany’s request for a general assurance of non-repetition;

(7) By fourteen votes to one,

Finds that should nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 (b), of the Convention having been respected, the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention.

Favor: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetic, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

Against: Judge Oda.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-seventh day of June, two thousand and one, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Federal Republic of Germany and the Government of the United States of America, respectively.

(Signed) Gilbert Guillaume,
President.

(Signed) Philippe Couvreur,
Registrar.

President Guillaume makes the following declaration:

Subparagraph (7) of the operative part of the Court’s Judgment envisages a situation where, despite the commitment by the United States noted by the Court in subparagraph (6), a severe penalty is imposed upon a German national without his or her rights under Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations having been respected. The Court states that, in such a case, “the United States, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention”.

This subparagraph represents a response to certain submissions by Germany and hence rules only on the obligations of the United States in cases of severe penalties imposed upon German nationals.

Thus, subparagraph (7) does not address the position of nationals of other countries or that of individuals sentenced to penalties that are not of a severe nature. However, in order to avoid any ambiguity, it should be made clear that there can be no question of applying an a contrario interpretation to this paragraph.

(Signed) Gilbert Guillaume.

Vice-President Shi appends a separate opinion to the Judgment of the Court; Judge Oda appends a dissenting opinion to the Judgment of the Court; Judges Koroma and Parra-Aranguren append separate opinions to the Judgment of the Court; Judge Buergenthal appends a dissenting opinion to the Judgment of the Court.

(Initialled) G.G.
(Initialled) Ph.C.
The *ARA Libertad Arbitration* (Argentina/Ghana)

Notification of the Argentine Republic, 29 October 2012
Accra, October 29th 2012

Excellency,

1. Upon express instructions of my Government, I am writing to refer to the situation that led to the telephone conversation held on October 3rd 2012 between you and the Minister of Foreign Affairs and Worship of Argentina, Héctor Timerman, and the note that he sent you on October 4th 2012, regarding the detention by Ghana in the port of Tema, since October 2nd 2012, of the warship “ARA Fragata Libertad”, which belongs to the Argentine Navy.

2. In such communications, the Argentine Republic clearly stated that said measure is contrary to international law and, in particular, albeit not exclusively, is a violation of the immunities enjoyed by warships pursuant to Article 32 of the United Nations Convention on the Law of the Sea (hereinafter, “UNCLOS”) and other international law rules. Argentina requested your Government to urgently adopt the necessary measures to put an end to this situation.

3. With a view to resolving the dispute as urgently as required by this case and for the purpose of continuing without delay the exchange of views already initiated between the parties, pursuant to Article 283 of UNCLOS, my Government sent to Accra a high-level delegation comprised of the

To the Ministry of Foreign Affairs and Regional Integration of the Republic of Ghana

Alhaji Muhammad Mumuni

1 Annex 1.
Vice-Minister of Foreign Affairs, Ambassador Eduardo Zuján, and the Secretary of International Affairs of the Ministry of Defence, Couns. Alfredo Forti. On 16-19 October 2012, the delegation met three times with Your Excellency, twice with the Minister of Defence and once with the Minister of Interior, the Attorney General, the Deputy Attorney General and advisors to the President of the Republic of Ghana, in addition to other officials. The Argentine Republic deeply regrets that such exchanges of views and negotiations failed to resolve the dispute between our two States as well as the fact that the warship “ARA Fragata Libertad” remains unlawfully detained and subject to restraint measures in the port of Tema in flagrant violation of basic rules of international law.

4. Since both Argentina and Ghana are parties to UNCLOS, but have not accepted the same procedure for the settlement of the dispute, it must be submitted to the arbitral procedure provided for in UNCLOS Annex VII, by virtue of Article 287 of the said Convention. My Government hereby notifies to the Government of Ghana that this dispute is being submitted to the arbitral procedure, pursuant to Article 1 of Annex VII of UNCLOS (I). Argentina further requests Ghana to adopt the provisional measure of unconditionally enabling the warship “ARA Fragata Libertad” to be resupplied and to leave the Ghanaian jurisdictional waters. Otherwise, within 14 days as from the date of receipt hereof, Argentina shall demand that such measure be ordered by the International Tribunal for the Law of the Sea, as provided in Article 290, paragraph 5, of UNCLOS (II).

(I) SUBMISSION OF THE DISPUTE TO ARBITRATION

5. The Argentine Republic submits to arbitration as provided in Annex VII of UNCLOS the dispute that exists with the Republic of Ghana related
to the detention of and the court measures adopted against the warship “ARA Fragata Libertad” by the Government of Ghana.

(A) The Argentine Republic’s Statement of Claims and Grounds upon which it is based

(a) Statement of Claims

6. The Argentine Republic requests the arbitral tribunal to declare that the Republic of Ghana, by detaining the warship “ARA Fragata Libertad”, keeping it detained, not allowing it to refuel and adopting several judicial measures against it:

(1) Violates the international obligation of respecting the immunities from jurisdiction and execution enjoyed by such vessel pursuant to Article 32 of UNCLOS and Article 3 of the 1926 Convention for the Unification of Certain Rules concerning the Immunity of State-owned Vessels as well as pursuant to well-established general or customary international law rules in this regard;

(2) Prevents the exercise of the right to sail out of the waters subject to the jurisdiction of the coastal State and the right of freedom of navigation enjoyed by the said vessel and its crew, pursuant to Articles 18, paragraph 1 (b), 87, paragraph 1 (a), and 90 of UNCLOS.

7. Thus, Argentina requests the arbitral tribunal to assert the international responsibility of Ghana, whereby such State must:

(1) immediately cease the violation of its international obligations as described in the preceding paragraph;

(2) pay to the Argentine Republic adequate compensation for all material losses caused;
(3) offer a solemn salute to the Argentine flag as satisfaction for the moral damage caused by the unlawful detention of the flagship of the Argentine Navy, ARA Fragata Libertad, preventing it from accomplishing its planned activities and ordering it to hand over the documentation and the flag locker to the Port Authority of Tema, Republic of Ghana;

(4) impose disciplinary sanctions on the officials of the Republic of Ghana directly responsible for the decisions by which such State has engaged in the violations of its aforesaid international obligations.

(b) Grounds for Argentina's claims

8. ARA Fragata Libertad is a warship of the Argentine Navy within the scope defined by Art. 29 of UNCLOS. It is the flagship vessel of the Argentine Navy and, as such, represents the Argentine State, and has been sailing the world's seas for more than 50 years, conveying a message of peace and friendship with a view to consolidating relations between the Argentine Navy and its counterparts in third countries. ARA Fragata Libertad is used for navy cadet training trips. At the time of its detention by Ghana it was on its 43rd instruction voyage. The crew of the vessel detained included guest officers from the Navies of Bolivia, Brazil, Chile, Paraguay, Peru, South Africa, Suriname, Uruguay and Venezuela.

9. The Governments of Argentina and Ghana agreed on the visit of ARA Fragata Libertad to the port of Tema (Republic of Ghana). The Government of Ghana on June 4th 2012 authorized such visit and notified its decision to the Argentine Government through diplomatic channels, by means of notes exchanged between the respective representatives in Abuja,
Nigeria\(^2\). The notes exchanged clearly indicate that ARA Frigate Libertad is a warship, the official purpose of the visit and the relevant protocol arrangements between Argentina and Ghana. The final preparations for the visit by ARA Frigate Libertad to Ghana were agreed upon by Argentine diplomatic staff posted in Ghana since 26 September, which established contact with the naval authorities of that country as had been required by the local Government.

10. ARA Fragata Libertad arrived on the scheduled date (October 1\(^n\)) and, on that same day, a formal welcome ceremony was held on board the ship to which governmental authorities, representatives of the Ghanaian Armed Forces and representatives of the diplomatic corps accredited to that country attended, in full compliance with the instructions received from the local Government in previous communications.

11. At 8:00 pm on 2 October 2012, a person claiming to be an official for the Judicial Service of the Superior Court of Judicature of Ghana — Commercial Division— appeared at ARA Fragata Libertad with other persons, for the purpose of delivering an official letter bearing the same date which contained an order by that Court, rendered by Judge Richard Adjei-Frimpong, requiring that ARA Fragata Libertad be held in the Tema Port. The official left the ship without the officers in charge of it accepting such service of process.

12. On the following day, and even though the contacts between the Argentine and Ghanaian authorities had already begun, including talks

between their respective Ministers of Foreign Affairs, in which Argentina urged Ghana to desist from its conduct, which constituted a violation of international law, a person claiming to represent the Port Authority appeared at the ship, together with a Maritime Agent, and requested to meet with the Commander of ARA Fragata Libertad, for the purpose of taking the documents of the ship and the flag locker in pursuance of the aforementioned order issued by the Superior Court of Judicature of Ghana—Commercial Division. This request was also rejected by the officers in charge of the ship.

13. Despite my government's request, the Government of Ghana has not desisted from its unlawful conduct. In view of this attitude, the Argentine Government appeared before the judge that had ordered the interlocutory measure against ARA Fragata Libertad for the purpose of informing that he lacked jurisdiction and rejecting his attempt to take steps in connection with and against ARA Fragata Libertad, as this entailed a violation of such ship's immunity.

14. In spite of all the precedents and of the clear content of the applicable international rules giving rise to Ghana's international responsibility, the acting judge, Richard Adjai-Frimpong, on October 11th 2012 confirmed his previous order of seizure of ARA Fragata Libertad. The ship has thus remained stranded at the Tema port to this day even though it should have set sail—as previously agreed by both Governments—on 4 October 2012. This situation renders the ship unable to follow its program as agreed with the other States it was also going to visit (Angola, Namibia, South Africa,

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3 In the Superior Court of Judicature in the High Court of Justice (Commercial Division), Accra, Order for Interlocutory Injunction and Interim Preservation of the « ARA Libertad », 2 October 2012 (Annex 2).
4 In the Superior Court of Judicature, in the High Court of Justice Accra Commercial Division, held on Thursday the 11th day of October, 2012. Before His Lordship Justice Richard Adjai-Frimpong, Ruling (Annex 3).
Brazil and Uruguay), as well as with the States whose officers were on board of it.

15. Due to the interlocutory order by judge Adjei-Frimpong, enforced by the port authorities of Tema, ARA Fragata Libertad is unable to refuel. The ship depends on fuel for the maintenance of its two electricity generators and water distiller. As a result of this impossibility, the vessel will run out of fuel in the coming days. Faced with this situation, my government on October 24th 2012 had to repatriate at its own cost, on board a charter flight, most of the vessel’s crew and all of the officers of foreign States that were participating in the expedition, i.e., 281 individuals. At present, the captain of the ship and 44 crew members are still on board ARA Fragata Libertad. The Argentine Government is also bearing all the costs arising from this involuntary stay imposed on it and its crew. My government holds Ghana responsible for the security of the ship and of the crew remaining in it for as long as its unlawful detention lasts.

16. Judge Richard Adjei-Frimpong, in addition to claiming a jurisdiction he does not have, manifestly disregards international law by attempting to justify his decision by reference to the fact that Ghana legislation would not prohibit him from taking enforcement measures against a foreign warship. This judge interprets in a downright absurd and arbitrary manner the content of an Argentine bond issued in 1994, virtually holding that Argentina would be a State without any kind of immunity. The language of the clause itself states that Argentina has not waived the immunities to which warships are entitled under international law. Therefore, the Ghanaian judge’s decision ignores the fundamental and well-established international law fact that a waiver of immunity from enforcement of a government’s public property must be express, and the fact that Argentina
never waived the immunities protecting the warship ARA Fragata Libertad⁵.

17. Until today the government of Ghana has not taken any kind of measures aimed at putting an end to the unlawful act generated by the decision of its judiciary. This is in flagrant violation of applicable international law rules providing that the government of a State shall ensure that its courts determine on their own initiative that the immunity of other States is respected, as set forth in Article 6 of the United Nations Convention on Jurisdictional Immunities of States and Their Property⁶, which reflects a well-established rule of customary law.

18. The government of Ghana is not unaware of the fact that the State is responsible for the acts of all its organs, whether they exercise judicial or other functions, as established by general international law and as reflected in Article 4 of the Articles on Responsibility of States for Internationally Wrongful Acts elaborated by the International Law Commission⁷. Furthermore, it is the Tema Port Authority, an administrative organ of the State of Ghana that has enforced the unlawful decisions of judge Richard Adjei-Frimpong.

19. Despite Argentina's efforts to resolve the dispute, the various State organs of Ghana persist in their conduct, which violates international obligations recognized by UNCLOS and entails international responsibility on the part of Ghana, as arises from the Argentine arguments set out in (a).

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⁵ See International Court of Justice, Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), Judgment of 3 February 2012, paras. 313.
(B) Appointment of a Member of the Arbitral Tribunal

20. Pursuant to Article 3 (b), Annex VII of UNCLOS, the Argentine Republic notifies the appointment of Ms Elsa Kelly, member of the International Tribunal for the Law of the Sea, a biographical summary of whom is enclosed, as member of the Arbitral Tribunal.

21. Argentina invites Ghana to appoint a member of the Arbitral Tribunal within 30 days and to begin contacts to appoint the other members as soon as possible, in accordance with Article 3 (c), (d) and (e) of Annex VII.

II. REQUEST FOR PROVISIONAL MEASURE

22. Pending the constitution of the Arbitral Tribunal, as provided in Article 290, paragraph 5, of UNCLOS, Argentina requests Ghana to adopt a provisional measure to unconditionally enable the Argentine warship "ARA Fragata Libertad" to be resupplied and to leave the Tema port and the jurisdictional waters of Ghana. If such measure is not adopted within a term of 14 days, Argentina shall request the International Tribunal for the Law of the Sea to order such measure as set forth in the aforesaid provision.

23. The purpose of the provisional measure requested is to preserve the rights of Argentina arising from UNCLOS and referred to in I (a). Ghana's attempt to exercise jurisdiction over ARA Fragata Libertad prevents the exercise of such rights and may render them illusory for an indefinite period of time. If carried out, the threatened execution of the said warship arising from the court decisions of 2 and 11 October 2012— and in view of

"Annex 5."
the reluctance of the Government of Ghana to do anything to prevent it —, this could cause an irreversible and irreparable impairment of such rights.

24. The requested measure must be adopted urgently. The Argentine Navy will be unable to use its flagship vessel for as long as the ARA Frigate Libertad remains detained. Such detention is, in turn, a measure that disrupts the organization of the armed forces of a sovereign State and an offence to one of the symbols of the Argentine Nation that hurts the feelings of the Argentine people, the effects of which are only compounded by the passage of time. For the reasons stated in paragraph 15, most of the crew had to be evacuated. The limited number of crewmembers that are now on board makes it impossible to carry out all maintenance tasks, which normally require at least 145 crew members. In case of an emergency, such a small number of crewmembers would be unable to respond. If a fire were to occur, the crew now present would merely be able to cover only one of the three brigades needed on board. If the vessel is not immediately allowed to refuel and sail off, its activities and those of the crew will be seriously disrupted, even jeopardizing the security of the vessel and the health and integrity of the crew remaining on board. If this situation persists, the future functioning of ARA Fragata Libertad will also be in peril.

25. The United Nations Convention on the Law of the Sea has taken into account the fundamental need to guarantee the freedom of navigation of private vessels or vessels operated for commercial purposes, providing mechanisms for prompt release in this regard; and thus a warship has all the more reason to be able to exercise such right promptly and without any

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9 For example, Articles 27 and 28 of UNCLOS.
10 Article 222 of UNCLOS.
condition or restriction. This holds true to such an extent that even if a
warship does not comply with the laws and regulations of the coastal State,
all that this State can do is to require it to leave its territorial sea
immediately.\(^{11}\)

26. If the provisional measure is not adopted, the involuntary presence of
ARA Fragata Libertad and its crew in the Tema port will be left at the
mercy of the decision of a State that manifestly lacks any jurisdiction over
the detained warship. The attempt by the government and judiciary system
of Ghana to exercise jurisdiction over the warship and execute it not only
entails the impossibility of exercising such rights for a prolonged period,
but also the threat of irreparable loss.

27. Furthermore, the long time required for the constitution of the arbitral
tribunal, for the conduct of the relevant procedure and for the award to be
rendered makes it impossible to wait for the completion of the procedure
without seriously impairing the rights invoked by Argentina.

28. Should this unprecedented flagrant violation of these more than
plausible rights that arise from basic and long-standing rules regarding the
conduct of international relations be tolerated, not only would Argentina's
rights be in jeopardy. This would also set a precedent that would have
incalculable consequences for the warships of all States, if they would have
to remain stranded upon any lawsuit being brought against them and until a
final decision of the highest domestic judicial authorities is rendered.

I avail myself of this opportunity to reiterate to Your Excellency the
assurances of my highest consideration.

\(^{11}\) Article 30 of UNCLOS.
The *ARA Libertad Arbitration* (Argentina/Ghana)

Agreement between Argentina and Ghana, 27 September 2013

THE ARA LIBERTAD ARBITRATION (ARGENTINA v. GHANA)

The Agent of the Argentine Republic, Ambassador Susana Ruiz Cerutti, and the Agent of the Republic of Ghana Mrs. Marietta Brew Appiah-Opong have the honour to address the Honourable Arbitral Tribunal in order to transmit the following considerations:

1. As reported to the Honourable Arbitral Tribunal by the Ghanaian Delegation on May 21, 2013, at that moment there were ongoing judicial proceedings before the Ghanaian Supreme Court related to this case. The said proceedings had been instituted on December 19, 2012, following the provisional measure of the International Tribunal for the Law of the Sea adopted on December 15, 2012, by the Ghanaian Attorney General requesting the Supreme Court of Ghana to quash the orders of interlocutory injunction made on October 2, 2012, by Judge Frimpong against the Argentine warship—frigate “ARA Libertad” –, as well as the ruling delivered on October 11, 2012, by the same judge confirming such injunction order. In addition, the Attorney General requested the Supreme Court to issue an order of prohibition barring all Ghanaian lower Courts from entertaining any previous or further actions or proceedings in the suit in respect of which the orders sought to be quashed were made.

2. On June 20, 2013 the Supreme Court of Ghana delivered a judgment which sets out the Ghanaian law with regard to the arrest of warships and which upholds the customary international law position of immunity of warships.

3. The Republic of Ghana has committed to publicize at the international level the contents of the judgment of the Ghanaian Supreme Court mentioned above, in particular regarding the International Tribunal for the Law of the Sea, the Member States of United Nations and the States Parties of United Nations Convention on the Law of the Sea, as well as within the scope of the African Union and ECOWAS (Economic Community of West African States).

4. Notwithstanding its reservations regarding the interpretation by the Ghanaian courts of the rules applicable to this case, the Argentine Republic considers the above-mentioned judgment by the Supreme Court of Ghana, its dissemination at the international level and the considerations expressed by the Ghanaian government in the circular letters and the “Aide Memoire” attached to it, all documents to be distributed in the UN and other international organizations annexed to this Agreement, constitute sufficient satisfaction to discharge any injury occasioned by the injunction measure over the Argentine warship—frigate ARA Libertad – issued by a Ghanaian High Court in violation of the international obligation to respect the immunity that the said warship enjoys, according to Article 32 of the United Nations Convention on the Law of the Sea as well as the well-established general or customary international rules.

5. In light of the previous considerations, the Parties respectfully request the Honourable Arbitral Tribunal in the ARA Libertad Arbitration (Argentina v. Ghana) to issue an order for the termination of the arbitral proceedings pursuant to the Article 22 paragraph 1 of the Rules of Procedure.

The PCA certifies that the Spanish and English versions of this text and the attached Circular Letter and Aide Memoire are substantively identical.

Please accept the assurances of our highest consideration.

For the Argentine Republic:  

For the Republic of Ghana:  

By:  

By:
CIRCULAR LETTER

The Permanent Mission of Ghana to the United Nations in New York presents its compliments to all Permanent Missions accredited to the United Nations and States Parties to the 1982 United Nations Convention on the Law of the Sea and has the honor to refer to Case No. 20 the ARA Libertad case (Argentina vs. Ghana) which was circulated among Member States in January 2013 by the International Tribunal of the Law of the Sea and wish to inform them that on 20 June 2013 the Supreme Court of the Republic of Ghana delivered a ruling setting aside orders made by the High Court of Ghana in October 2012 detaining the frigate ARA Libertad, the Argentine warship arrested at the port of Tema following an action to recover debt initiated by NML Capital against the vessel while on a goodwill visit to Ghana.

The Supreme Court of Ghana decided, inter alia, that the High Court erred in law in ordering the arrest and detention of the ARA Libertad in execution of foreign judgment at the instance of a foreign commercial creditor in violation of the immunity the ARA Libertad enjoys as a warship under customary international law.

The 20 June 2013 Judgment of the Supreme Court of Ghana reversing the High Court decisions was the result of action initiated by the Attorney General of Ghana with the support of the Ministry of Foreign Affairs and Regional Integration on behalf of the Executive Branch of the Government of Ghana.

Attached, herewith, is an Aide Memoire issued by the Ministry of Foreign Affairs and Regional Integration on the Judgment of the Supreme Court of Ghana.

The full text of the Judgment of the Supreme Court of Ghana is available on the website of the Permanent Court of Arbitration (www.pca-cpa.org).


New York, ___ September 2013


AIDE MEMOIRE ON ARA LIBERTAD CASE (ARGENTINA VS. GHANA)

On 1st October 2012, the frigate ARA Libertad, a warship of the Argentine Republic, was warmly welcomed by the competent military authorities of Ghana upon her arrival at the port of Tema at the start of a friendly and goodwill visit to Ghana. Shortly upon its arrival, but unknown to the Government of Ghana, on 2 October 2012, NML Capital Limited of the Cayman Islands and a subsidiary of an American company based in New York, initiated an ex parte motion (meaning a legal action without notice to the affected party, Argentina) at the Commercial Division of the High Court of Ghana seeking an order of the High Court to seize the ARA Libertad in order for NML to recover from Argentina some Judgment Debts that the NML had previously obtained from various courts in the United States and the United Kingdom. The Order of the High Court was served on the port authorities of the Tema Port who carried out the order of the High Court.

1. Argentina immediately applied to the same Ghanaian High Court for an order to set aside the order of the High Court arguing that Argentina was not subject to the jurisdiction of the High Court and furthermore the ARA Libertad was entitled to immunity under the relevant rules of international law. During the hearing of Argentina’s application in the High Court, the Legal Adviser of the Foreign Ministry of Ghana, with the assistance of the Attorney General’s Department of Ghana, appeared as an amicus curiae on behalf of the Executive Branch of the Government of Ghana and argued in support of Argentina’s position that under international law, Argentina as a foreign state and the ARA Libertad as a military vessel were entitled to immunity from jurisdictional and execution or attachment in Ghana. The High Court refused to rescind its earlier order detaining the warship (ARA Libertad) of the Argentine Republic.

2. Argentina filed an appeal and while the appeal was pending also instituted Annex VII compulsory arbitral proceedings against Ghana under the 1982 United Nations Convention on the Law of the Sea. Argentina instituted Case No. 20 at the International Tribunal of the Law of the Sea against Ghana for provisional measures pending the Annex VII arbitral proceedings and obtained an order of the Tribunal (ITLOS) for the release of the ARA Libertad pending the Annex VII arbitration. The Order of ITLOS was read on 15 December 2012 and it prescribed the immediate release of the vessel based on the United Nations Law of the Sea Convention. The ARA Libertad sailed out of Ghana’s territorial waters on 19 December 2012.

4. In this context, the Government of Ghana, represented by the Attorney General, decided to initiate an action for a Writ of Certiorari at the Supreme Court of Ghana to quash the order of the High Court detaining the ARA Libertad on the grounds that the order of the High Court was a violation of the rules of customary international law concerning the immunity of warships in peace time.
5. In its ruling on 20 June 2013, the Supreme Court agreed with the Government of Ghana that the Commercial Division of the High Court committed a fundamental error of law on the face of the record and issued an order of certiorari quashing the decisions of the High Court as wrong for the following reasons, *inter alia*:

i. That under customary international law which forms part of the common law of Ghana warships are covered by sovereign immunity in foreign ports (citing *The Schooner Exchange v. McFadden* case).

ii. That the general principle of international law recognizes the sovereign immunity of states in the courts of other states (citing the recent case of the ICJ on Jurisdictional immunities (Germany v. Italy: Greece Intervening)). That notwithstanding that recent state practice has carved out an exception in relation to the commercial acts of sovereigns; other non-commercial acts of sovereigns remain immune.

iii. That Ghana’s common law subscribes to the position that ‘the property or a foreign state that is used or intended to be used in connection with a military activity and that is military in nature or under the control of a military authority or defence agency is immune from attachment and execution and from arrest, seizure and forfeiture’.

iv. That the waiver of immunity clause, contained in the bonds issued by Argentina to various creditors in New York were not effective to be enforced against military assets.

v. That the attachment of a foreign military asset in Ghana in execution of a foreign debt obtained is against the fundamental public policy of Ghana, since it imperils to a degree, the peace and security of Ghana. A State’s sovereign right to waive its sovereign immunity in relation to its military assets, through a contractual provision, would not be recognized in Ghanaian common law because of the public policy implications stated above.

vi. That the learned High Court Judge was in fundamental error in holding that, as a result of a contractual provision, he had jurisdiction, through a contractual waiver to arrest a warship. By this decision the Judge made new law which had the potential of endangering the peace and security of Ghana. The order to attach the ARA Libertad, a military vessel, was on its face palpably and fundamentally wrong in law and principle.

6. The full text of the Judgment of the Supreme Court of Ghana is available at the website of the Permanent Court of Arbitration (www.pca-cpa.org).

7. The Government of Ghana wishes to express its appreciation to the Government of Argentina for its cooperation in terminating the arbitral proceedings in favour of a diplomatic settlement and bringing an amicable closure to this matter.
Office of Legal Affairs, Codification Division

Handbook on the Peaceful Settlement of Disputes between States

United Nations Publication, 1992
Handbook on the Peaceful Settlement of Disputes between States
## CONTENTS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Paragraphs</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>INTRODUCTION</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>I. PRINCIPLE OF THE PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES</td>
<td>1-20</td>
<td>3</td>
</tr>
<tr>
<td>A. Charter of the United Nations</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>B. Declarations and resolutions of the General Assembly</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>C. Corollary and related principles</td>
<td>3-18</td>
<td>4</td>
</tr>
<tr>
<td>D. Free choice of means</td>
<td>19-20</td>
<td>7</td>
</tr>
<tr>
<td>II. MEANS OF SETTLEMENT</td>
<td>21-312</td>
<td>9</td>
</tr>
<tr>
<td>A. Negotiations and consultations</td>
<td>21-73</td>
<td>9</td>
</tr>
<tr>
<td>1. Main characteristics</td>
<td>22-26</td>
<td>9</td>
</tr>
<tr>
<td>2. Initial phase</td>
<td>27-36</td>
<td>10</td>
</tr>
<tr>
<td>3. Conduct of the negotiating process</td>
<td>37-67</td>
<td>13</td>
</tr>
<tr>
<td>(a) Framework of the negotiating process</td>
<td>37-43</td>
<td>13</td>
</tr>
<tr>
<td>(b) Place of negotiations</td>
<td>44-46</td>
<td>14</td>
</tr>
<tr>
<td>(c) Degree of publicity of the proceedings</td>
<td>47-49</td>
<td>15</td>
</tr>
<tr>
<td>(d) Duration of the negotiation process</td>
<td>50-51</td>
<td>15</td>
</tr>
<tr>
<td>(e) Attitude of the parties</td>
<td>52-58</td>
<td>16</td>
</tr>
<tr>
<td>(f) Steps aimed at facilitating the negotiating process through the involvement of a third party</td>
<td>59-64</td>
<td>18</td>
</tr>
<tr>
<td>(g) Question whether the existence of an ongoing negotiation process precludes resort to another peaceful settlement procedure</td>
<td>65-67</td>
<td>20</td>
</tr>
<tr>
<td>4. Outcome of the negotiations and possible subsequent steps</td>
<td>68-73</td>
<td>21</td>
</tr>
<tr>
<td>B. Inquiry</td>
<td>74-100</td>
<td>24</td>
</tr>
<tr>
<td>1. Functions and relation to other peaceful means under the Charter of the United Nations</td>
<td>74-82</td>
<td>24</td>
</tr>
<tr>
<td>2. Initiation and methods of work</td>
<td>83-86</td>
<td>27</td>
</tr>
<tr>
<td>3. Composition and other institutional aspects</td>
<td>87-98</td>
<td>29</td>
</tr>
<tr>
<td>4. Outcome of the process</td>
<td>99-100</td>
<td>32</td>
</tr>
<tr>
<td>C. Good offices</td>
<td>101-122</td>
<td>33</td>
</tr>
<tr>
<td>1. Main characteristics, legal framework and relation to other peaceful means under the Charter of the United Nations</td>
<td>101-104</td>
<td>33</td>
</tr>
<tr>
<td>2. Functions</td>
<td>105-110</td>
<td>34</td>
</tr>
<tr>
<td>3. Application of the method</td>
<td>111-115</td>
<td>36</td>
</tr>
<tr>
<td>4. Institutional and related aspects</td>
<td>116-120</td>
<td>39</td>
</tr>
<tr>
<td>(a) Initiation of the procedure</td>
<td>116-117</td>
<td>39</td>
</tr>
<tr>
<td>(b) Methods of work and venue</td>
<td>118-120</td>
<td>39</td>
</tr>
<tr>
<td>5. Termination and outcome of the process</td>
<td>121-122</td>
<td>40</td>
</tr>
<tr>
<td>D. Mediation</td>
<td>123-139</td>
<td>40</td>
</tr>
<tr>
<td>1. Main characteristics and legal framework</td>
<td>123-126</td>
<td>40</td>
</tr>
<tr>
<td>2. Functions</td>
<td>127-128</td>
<td>41</td>
</tr>
<tr>
<td>3. Procedural and institutional aspects</td>
<td>129-137</td>
<td>42</td>
</tr>
<tr>
<td>4. Outcome of the process</td>
<td>138-139</td>
<td>44</td>
</tr>
<tr>
<td>E. Conciliation</td>
<td>140-167</td>
<td>45</td>
</tr>
<tr>
<td>1. Main characteristics, legal framework and relation to other peaceful means under the Charter of the United Nations</td>
<td>140-143</td>
<td>45</td>
</tr>
<tr>
<td>2. Functions</td>
<td>144-146</td>
<td>46</td>
</tr>
<tr>
<td>3. Application of the method</td>
<td>147-149</td>
<td>48</td>
</tr>
<tr>
<td>4. Institutional and related aspects</td>
<td>150-163</td>
<td>49</td>
</tr>
<tr>
<td>(a) Composition</td>
<td>150-153</td>
<td>49</td>
</tr>
<tr>
<td>(b) Initiation of the process</td>
<td>154-155</td>
<td>51</td>
</tr>
<tr>
<td>(c) Rules of procedure and methods of work</td>
<td>156-158</td>
<td>51</td>
</tr>
<tr>
<td>(d) Duration and termination</td>
<td>159-160</td>
<td>52</td>
</tr>
<tr>
<td>(e) Expenses and other financial arrangements</td>
<td>161</td>
<td>53</td>
</tr>
<tr>
<td>(f) Venue and secretariat of the commission</td>
<td>162-163</td>
<td>53</td>
</tr>
<tr>
<td>5. Termination and outcome of the process</td>
<td>164-167</td>
<td>54</td>
</tr>
<tr>
<td>F. Arbitration</td>
<td>168-193</td>
<td>55</td>
</tr>
<tr>
<td>1. Main characteristics and legal framework</td>
<td>168-173</td>
<td>55</td>
</tr>
<tr>
<td>2. Institutional and related aspects</td>
<td>174-191</td>
<td>57</td>
</tr>
<tr>
<td>(a) Types of arbitration agreements</td>
<td>174-177</td>
<td>57</td>
</tr>
<tr>
<td>(b) Composition</td>
<td>178-179</td>
<td>59</td>
</tr>
<tr>
<td>(c) Rules of procedure</td>
<td>180</td>
<td>61</td>
</tr>
<tr>
<td>(d) Applicable law</td>
<td>181-182</td>
<td>62</td>
</tr>
<tr>
<td>(e) Methods of work and proceedings before the tribunal</td>
<td>183-186</td>
<td>62</td>
</tr>
</tbody>
</table>
Chapter Paragraphs Page
(f) Seat and administrative aspects of an arbitral tribunal ............................................ 187-189 63
(g) Expenses of an arbitral tribunal ................................................................. 190-191 64
3. Outcome of arbitration and related issues ......................................................... 192-195 65
G. Judicial settlement ......................................................................................... 196-229 66
1. Main characteristics, legal framework and functions ........................................... 196-199 66
2. Resort to judicial settlement ............................................................................. 200-201 68
3. Institutional and procedural aspects .................................................................. 202-228 70
   (a) Jurisdiction, competence and initiation of the process ........................................ 202-212 70
   (b) Access and third-party intervention ................................................................ 213-214 75
   (c) Composition .................................................................................................. 215-217 76
   (d) Rules of procedure .......................................................................................... 218-224 77
   (e) Seat and administrative aspects ...................................................................... 225-227 79
   (f) Expenses and other financial arrangements .................................................. 228 80
4. Outcome of judicial settlement .......................................................................... 229 80
H. Resort to regional agencies or arrangements .................................................... 230-287 81
1. Main characteristics, legal framework and relation to other means of peaceful settlement provided for by Article 33 of the Charter of the United Nations .................................................................................................................. 230-237 81
2. Institutional arrangements, competence and procedure ...................................... 238-271 83
   (a) League of Arab States ..................................................................................... 239-241 83
   (b) Organization of American States ..................................................................... 242-245 84
   (c) Organization of African Unity ......................................................................... 246-250 85
   (d) European Convention for the Peaceful Settlement of Disputes (Council of Europe) ........................................................................................................... 251-254 86
   (e) Conference on Security and Cooperation in Europe ...................................... 255-258 87
   (f) European and inter-American systems for the protection of human rights ........ 259-262 88
   (g) African Charter on Human and Peoples' Rights ............................................ 263 90
   (h) European Communities .................................................................................. 264-267 90
   (i) Economic Community of West Africa ............................................................ 268 91

(f) Agreements on shared management of resources ............................................. 269-271 91
3. Actual resort to regional agencies or arrangements in dispute settlement .......... 272-284 92
   (a) League of Arab States ..................................................................................... 273-276 92
   (b) Organization of American States ..................................................................... 277-281 93
   (c) Organization of African Unity ......................................................................... 282-283 95
   (d) European Convention for the Peaceful Settlement of Disputes (Council of Europe) ........................................................................................................... 284 95
4. Relations between regional agencies or arrangements and the United Nations in the field of the peaceful settlement of local disputes .................................................................................................................. 285-287 96
I. Other peaceful means ........................................................................................ 288-312 98
1. Main characteristics and legal framework .......................................................... 288 98
2. Resort to other peaceful means .......................................................................... 289-312 98
   (a) Novel means which do not consist in the adaptation or combination of familiar means ........................................................................................................... 290-295 99
   (b) Adaptations of familiar means ........................................................................ 296-305 101
   (c) Combination of two or more familiar means in the work of a single organ .......... 306-312 106

III. PROCEDURES ENVISAGED IN THE CHARTER OF THE UNITED NATIONS ...................................................................................................................... 313-381 111
A. Introduction ....................................................................................................... 313-315 111
B. The Security Council ........................................................................................ 316-351 111
   1. Role of the Security Council in the peaceful settlement of disputes ................. 316-335 111
      (a) Investigation of disputes and determination as to whether a situation is in fact likely to endanger international peace and security .............................................................. 319-321 112
      (b) Recommendation to States parties to a dispute to settle their disputes by peaceful means ........................................................................................................... 322-332 114
      (c) Relation to procedures under regional agencies or arrangements ............... 333-335 119
   2. Recent trends .................................................................................................... 336-351 119
C. The General Assembly ....................................................................................... 352-366 123
   1. Role of the General Assembly in the peaceful settlement of disputes ................. 352-362 123
<table>
<thead>
<tr>
<th>Chapter</th>
<th>Paragraphs</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Discussion of questions and making recommendations on matters relating to the peaceful settlement of disputes</td>
<td>353-360</td>
<td>123</td>
</tr>
<tr>
<td>(b) Recommendation of measures for the peaceful adjustment of situations</td>
<td>361-362</td>
<td>126</td>
</tr>
<tr>
<td>2. Recent trends</td>
<td>363-366</td>
<td>127</td>
</tr>
<tr>
<td>D. The Secretariat</td>
<td>367-381</td>
<td>128</td>
</tr>
<tr>
<td>1. Role of the Secretary-General</td>
<td>367-374</td>
<td>128</td>
</tr>
<tr>
<td>(a) Functions of the Secretary-General in the implementation of the resolutions of other principal organs in the field of the prevention or settlement of disputes</td>
<td>368-370</td>
<td>128</td>
</tr>
<tr>
<td>(b) Diplomatic functions</td>
<td>371</td>
<td>130</td>
</tr>
<tr>
<td>(c) Functions of the Secretary-General based on the powers expressly conferred upon him by the Charter</td>
<td>372-374</td>
<td>130</td>
</tr>
<tr>
<td>2. Recent trends</td>
<td>375-381</td>
<td>131</td>
</tr>
<tr>
<td>V. PROCEDURES ENVISAGED IN OTHER INTERNATIONAL INSTRUMENTS</td>
<td>382-430</td>
<td>135</td>
</tr>
<tr>
<td>A. Introduction</td>
<td>382-385</td>
<td>135</td>
</tr>
<tr>
<td>B. Procedures envisaged in the constituent instruments of international organizations of a universal character other than the United Nations</td>
<td>386-417</td>
<td>136</td>
</tr>
<tr>
<td>1. Procedures envisaged in economic and financial organizations</td>
<td>387-406</td>
<td>136</td>
</tr>
<tr>
<td>2. Procedures envisaged in the constitutions of other international organizations with specialized activities</td>
<td>407-417</td>
<td>142</td>
</tr>
<tr>
<td>C. Procedures envisaged in multilateral treaties creating no permanent institutions</td>
<td>418-430</td>
<td>146</td>
</tr>
<tr>
<td>1. Conventions containing optional procedures for dispute settlement</td>
<td>419-421</td>
<td>147</td>
</tr>
<tr>
<td>2. Conventions containing non-compulsory and compulsory procedures in which both the International Court of Justice and an arbitral tribunal are established as choices for judicial settlement</td>
<td>422</td>
<td>148</td>
</tr>
<tr>
<td>3. Conventions in which resort to the International Court of Justice is the only compulsory judicial settlement procedure</td>
<td>423-424</td>
<td>149</td>
</tr>
<tr>
<td>4. Conventions in which arbitration is the only compulsory procedure for judicial settlement</td>
<td>425</td>
<td>150</td>
</tr>
</tbody>
</table>

ANNEXES

I. Charter of the United Nations | 155 |
II. Statute of the International Court of Justice | 175 |
III. Rules of the International Court of Justice of 14 April 1978 | 186 |
BIBLIOGRAPHY | 211 |
INDEX | 223 |
INTRODUCTION

By its resolutions 39/79 and 39/88 of 13 December 1984, the General Assembly requested the Secretary-General to prepare, on the basis of the outline elaborated by the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization and in the light of the views expressed in the course of the discussions in the Sixth Committee and in the Special Committee, a draft handbook on the peaceful settlement of disputes between States.

In accordance with the conclusions reached by the Special Committee at its 1984 session with respect to the preparation of the draft handbook, the Secretary-General was instructed to consult periodically a representative group of competent individuals from among the members of the Permanent Missions of the States Members of the United Nations in order to obtain assistance in the performance of his task.¹ At the 1985 session, it was agreed that the "representative group of competent individuals from among the members of the Permanent Missions of the States Members of the United Nations" would be open to all members of the Special Committee and that the group would have purely consultative functions.²

The Secretary-General accordingly consulted the above-mentioned representative group in preparing the various chapters of the handbook. The handbook in its final form was approved by the Special Committee at its 1991 session.

The purpose of the handbook is to contribute to the peaceful settlement of disputes between States and to help to increase compliance with international law by providing States parties to a dispute, particularly those States which do not have the benefit of long-established and experienced legal departments, with the information they might need to select and apply procedures best suited to the settlement of particular disputes.

The handbook has been prepared in strict conformity with the Charter of the United Nations. It is descriptive in nature and is not a legal instrument. Although drawn up on consultation with Member States, it does not represent the views of Member States.

In conformity with the above-mentioned resolutions, the scope of the handbook was to be limited to disputes between States, excluding those disputes which although involving States fell under municipal law or were within the competence of domestic courts. However, at the request of the

²Ibid., Fortieth Session, Supplement No. 33 (A/40/33), para. 58 (a) and (c).

³A/AC.182/L.61, para. 6.
I. PRINCIPLE OF THE PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES

A. Charter of the United Nations

1. The Charter of the United Nations provides in its Chapter I (Purposes and principles) that the Purposes of the United Nations are:

   "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace." (Article 1, paragraph 1)

The Charter also provides in the same Chapter that the Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with, among others, the following principle: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered" (Article 2, paragraph 3). It furthermore, in Chapter VI (Pacific settlement of disputes), states that:

   "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." (Article 33, paragraph 1)

B. Declarations and resolutions of the General Assembly

2. The principle of the peaceful settlement of disputes has been reaffirmed in a number of General Assembly resolutions, including resolutions 2627 (XXV) of 24 October 1970, 2734 (XXV) of 16 December 1970 and 40/9 of 8 November 1985. It is dealt with comprehensively in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (resolution 2625 (XXV), annex), in the section entitled "The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered", as well as in the Manila Declaration on the Peaceful Settlement of International Disputes (resolution 37/10, annex), in the Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this field (resolution 43/51, annex) and in the Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security (resolution 46/59, annex).

C. Corollary and related principles

3. The principle of the peaceful settlement of international disputes is linked to various other principles of international law. It may be recalled in this connection that under the Declaration on Friendly Relations, the principles dealt with in the Declaration—namely, the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations; the principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered; the principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter; the duty of States to cooperate with one another in accordance with the Charter; the principle of equal rights and self-determination of peoples; the principle of sovereign equality of States; and the principle that States shall fulfill in good faith the obligations assumed by them in accordance with the Charter—are interrelated in their interpretation and application and each principle should be construed in the context of other principles.

4. The Final Act of the Conference on Security and Cooperation in Europe, adopted at Helsinki on 1 August 1975, states that all the principles set forth in the Declaration on Principles Guiding Relations between Participating States—i.e., Sovereign equality, respect for the rights inherent in sovereignty; refraining from the threat or use of force; inviolability of frontiers; territorial integrity of States; peaceful settlement of disputes; non-interference in internal affairs; respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief; equal rights and self-determination of peoples; cooperation among States; and fulfilment in good faith of obligations under international law—are of primary significance and, accordingly, they will be equally and unreservedly applied, each of them being interpreted taking into account the others.

5. The links between the principle of the peaceful settlement of disputes and other specific principles of international law are highlighted both in the Friendly Relations Declaration and in the Manila Declaration, as follows:

1. Principle of non-use of force in international relations

6. The interrelation between this principle and the principle of the peaceful settlement of disputes is highlighted in the fourth preambular paragraph of the Manila Declaration and is also referred to in section I, paragraph 13, thereof, under which neither the existence of a dispute nor the failure of a procedure of peaceful settlement of disputes shall permit the use of force or threat of force by any of the States parties to the dispute.

7. The links between the principle of peaceful settlement of disputes and the principle of non-use of force are also highlighted in a number of other
international instruments, including the 1945 Pact of the League of Arab States (art. 5), the 1948 American Treaty on Pacific Settlement (Pact of Bogotá) (art. 1), the 1947 Inter-American Treaty of Reciprocal Assistance (arts. 1 and 2) and the last paragraph of section II of the Declaration on Principles Guiding Relations between Participating States contained in the Final Act of the Conference on Security and Cooperation in Europe.

2. **Principle of non-intervention in the internal or external affairs of States**

8. The interrelation between this principle and the principle of the peaceful settlement of disputes is highlighted in the fifth preambular paragraph of the Manila Declaration.

9. The links between the principle of peaceful settlement of disputes and the principle of non-intervention are also highlighted in article V of the 1948 Pact of Bogotá.

3. **Principle of equal rights and self-determination of peoples**

10. The links between this principle and the principle of peaceful settlement of disputes are highlighted in the Manila Declaration which (1) reaffirms in its eighth preambular paragraph the principle of equal rights and self-determination as enshrined in the Charter and referred to in the Friendly Relations Declaration and in other relevant resolutions of the General Assembly; (2) stresses in its ninth preambular paragraph the need for all States to desist from any forcible action which deprives peoples, particularly peoples under colonial and racist regimes or other forms of alien domination, of their inalienable right to self-determination, freedom and independence; (3) refers in section I, paragraph 12, to the possibility for parties to a dispute to have recourse to the procedures mentioned in the Declaration “in order to facilitate the exercise by the peoples concerned of the right to self-determination”; and (4) declares in its penultimate paragraph that “nothing in the present Declaration could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial or racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration”.

4. **Principle of the sovereign equality of States**

11. The links between this principle and the principle of the peaceful settlement of disputes are highlighted in the fifth paragraph of the relevant section of the Friendly Relations Declaration which provides that “International disputes shall be settled on the basis of the sovereign equality of States” as well as in section I, paragraph 3, of the Manila Declaration.

5. **Principles of international law concerning the sovereignty, independence and territorial integrity of States**

12. Paragraph 4 of section I of the Manila Declaration enunciates the duty of States parties to a dispute to continue to observe in their mutual relations their obligations under the fundamental principles of international law concerning the sovereignty, independence and territorial integrity of States.

6. **Good faith in international relations**

13. The Manila Declaration enunciates in its section I, paragraph 1, the duty of States to “act in good faith”, with a view to avoiding disputes among themselves likely to affect friendly relations among States. Other references to good faith are to be found in paragraph 5, under which good faith and a spirit of cooperation are to guide States in their search for an early and equitable settlement of their disputes; in paragraph 11, which provides that States shall in accordance with international law implement in good faith all the provisions of agreements concluded by them for the settlement of their disputes; in paragraph 2 of section II, under which Member States shall fulfill in good faith the obligations assumed by them in accordance with the Charter of the United Nations; and in one of the concluding paragraphs of the Declaration, whereby the General Assembly urges all States to observe and promote in good faith the provisions of the Declaration in the peaceful settlement of their international disputes.

14. A provision similar to paragraph 5 of section I of the Manila Declaration is to be found in the third paragraph of section V of the Declaration on Principles Guiding Relations between Participating States contained in the Final Act of the Conference on Security and Cooperation in Europe.

7. **Principles of justice and international law**

15. The “principles of international law” are mentioned together with the principles of justice in Article 1, paragraph 1, of the Charter under which one of the purposes of the United Nations is “to bring about, by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace”. (emphasis added) The principles of international law are also mentioned jointly with the principles of justice in section I, paragraph 3, of the Manila Declaration under which “international disputes shall be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means in conformity with obligations under the Charter of the United Nations and with the principles of justice and international law.” (emphasis added)

16. Paragraph 4 of section I of the Manila Declaration provides that “States parties to a dispute shall continue to observe in their mutual relations generally recognized principles and rules of contemporary international law.” (emphasis added)

17. “Justice” is referred to in Article 2, paragraph 3, of the Charter and in the first paragraph of the relevant section of the Friendly Relations Declaration, both of which provide for the settlement of international disputes “by
peaceful means in such a manner that international peace and security and justice are not endangered.” (emphasis added)

8. Other corollary and related principles and rules

18. In its tenth preambular paragraph, the Manila Declaration singles out among “respective principles and rules concerning the peaceful settlement of international disputes”, “the exhaustion of local remedies whenever applicable”. Article VII of the 1948 Pact of Bogotá contains a similar provision.

D. Free choice of means

19. The principle of free choice of means is laid down in Article 33, paragraph 1, of the Charter of the United Nations and reiterated in the fifth paragraph of the relevant section of the Friendly Relations Declaration and in section I, paragraphs 3 and 10, of the Manila Declaration. As indicated above, both the Friendly Relations Declaration and the Manila Declaration make it clear that recourse to, or acceptance of, a settlement procedure freely agreed to with regard to existing or future disputes shall not be regarded as incompatible with the sovereign equality of States. The principle of free choice of means has also found expression in a number of other international instruments, including the Pact of Bogotá (art. III) and the Declaration on Principles Guiding Relations between Participating States, contained in the Final Act of the Conference on Security and Co-operation in Europe (third para. of sect. V).

20. The following means are listed in Article 33 of the Charter, in the second paragraph of the relevant section of the Friendly Relations Declaration and in paragraph 5 of section I of the Manila Declaration: negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional arrangements or agencies or other peaceful means of the parties’ own choice. Among those “other peaceful means”, the Manila Declaration singles out good offices. Under the Friendly Relations Declaration (second paragraph of the relevant section) and the Manila Declaration (para. 5 of sect. I), it is for the parties to agree on such peaceful means as may be appropriate to the circumstances and the nature of their dispute.
II. MEANS OF SETTLEMENT

A. Negotiations and consultations

21. Referring to negotiation, the International Court of Justice remarked that "there is no need to insist upon the fundamental character of this method of settlement".\(^1\) It observed in this connection,\(^2\) as did its predecessor, the Permanent Court of International Justice,\(^3\) that, unlike other means of settlement, negotiation which leads to "the direct and friendly settlement of . . . disputes between parties" is universally accepted. Furthermore, negotiations are usually a prerequisite to resort to other means of peaceful settlement of disputes. This was recognized as far as arbitrational or judicial proceedings were concerned by the Permanent Court in the following words: "Before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by diplomatic negotiations."\(^4\) It should be noted that the term "diplomacy" is used in some treaties, such as the 1949 Revised General Act for the Pacific Settlement of International Disputes, as a synonym of "negotiations", as is also the phrase "through the usual diplomatic channels" as it appears, for instance, in the 1948 Charter of the Organization of American States.

1. Main characteristics

Negotiations

22. The Manila Declaration on the Peaceful Settlement of International Disputes highlights flexibility as one of the characteristics of direct negotiations as a means of peaceful settlement of disputes (sect. 1, para. 10). Negotiation is a flexible means of peaceful settlement of disputes in several respects. It can be applied to all kinds of disputes, whether political, legal or technical. Because, unlike the other means listed in Article 33 of the Charter, it involves only the States parties to the dispute, those States can monitor all the phases of the process from its initiation to its conclusion and conduct it in the way they deem most appropriate.

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\(^1\) I.C.J. Reports 1969, p. 48, para. 86.
\(^2\) In its judgment in the North Sea Continental Shelf case, ibid.
\(^3\) In its Order of 19 April 1929 in the case of the Free Zones of Upper Savoy and the District of Gea (P.C.I.J., Series A, No. 22, p. 13).
\(^5\) The question of the place which negotiation occupies among other means of peaceful settlement of disputes was discussed, inter alia, in the framework of the United Nations Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation among States. For a summary of the arguments advanced on this question within the Special Committee, see Official Records of the General Assembly, Twenty-ninth Session, Annexes, agenda items 90 and 94, document A/5746, paras. 156, 158 and 161-163 and ibid., Twenty-first Session, Annexes, agenda item 87, document A/6230, paras. 193-200.

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23. Another characteristic of negotiation highlighted by the Manila Declaration is effectiveness (sect. 1, para. 10). Suffice it to say in this connection that in the reality of international life, negotiation, as one of the means of peaceful settlement of disputes, is most often resorted to by States for solving contentious issues and that, while it is not always successful, it does solve the majority of disputes.

Consultations

24. Consultations may be considered as a variety of negotiations. While they are not mentioned in Article 33 of the Charter, they are provided for in a growing number of treaties as a means of settling disputes arising from the interpretation or application of the treaty concerned. Mention may be made in this connection of article 84 of the 1975 Convention on the Representation of States in their Relations with International Organizations of a Universal Character, which provides for the holding of consultations at the request of any of the parties, as well as of article 41 of the 1978 Convention on Succession of States in Respect of Treaties and article 42 of the 1983 Convention on the Succession of State Property, Archives and Debts, both of which provide for "a process of consultation and negotiation".

25. In other treaties, consultations are provided for as a preliminary phase in the process of settlement of disputes. Reference is made in this connection to article XI of the 1959 Antarctic Treaty, article 17 of the 1979 Convention on the Physical Protection of Nuclear Material and article XXV of the 1980 Convention on the Conservation of Antarctic Marine Living Resources, which provide, in case of disputes, that the States parties shall consult among themselves with a view to the settlement of the dispute by peaceful means.

Exchanges of views

26. Exchanges of views may also be considered as a form of consultations. They play an important role in the system established by the 1982 United Nations Convention on the Law of the Sea for the peaceful settlement of disputes arising from the interpretation and application of the Convention. Reference is made in this connection to article 283 of the Convention, which reads as follows:

"1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

"2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement."

2. Initial phase

27. Normally, the negotiating process starts as the result of one State perceiving the existence of a dispute and inviting another State to enter into
negotiations for its settlement. The start of the negotiating process is conditional upon the acceptance by the other State of such an invitation. It may occur that a State invited to enter into negotiations has valid reasons to believe that there is no dispute to negotiate and that there is, therefore, no basis for the opening of negotiations. It may also occur that a State, while agreeing to enter into negotiations, subjects the opening of negotiations to conditions unacceptable to the first State. The discretion of States with respect to the initiation of the negotiating process is, however, subject to certain limitations.

28. A number of treaties place on the States Parties thereto an obligation to carry out "negotiations", "consultations", or "exchanges of views" whenever a controversy arises in connection with the treaty concerned. Examples of such treaties are the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (General Assembly resolution 34/68, annex, art. 15, para. 1), the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (art. 84), the 1982 United Nations Convention on the Law of the Sea (art. 283, para. 1) and the 1959 Antarctic Treaty (art. VIII, para. 2). Under some of these treaties, parties to a dispute arising from the interpretation or application of the treaty are under an obligation to start the consultation or negotiation process without delay (see art. 283, para. 1, of the United Nations Convention on the Law of the Sea; art. 15, para. 2, of the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies; and art. VIII, para. 2, of the Antarctic Treaty).

29. Furthermore, many treaties providing for peaceful settlement procedures make resort to the third party means of settlement envisaged in the treaty conditional upon failure of negotiations. This approach is to be found in some treaties specifically concluded for the settlement of all disputes which may arise among the States parties thereto, such as for example, the 1949 Revised General Act for the Pacific Settlement of International Disputes (art. 1).

30. This approach is also to be found in the dispute settlement clause of many multilateral treaties, such as article 4 of the 1948 Convention on the International Maritime Organization, and article VIII of the 1969 International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties.

31. It should furthermore be pointed out that the setting in motion of the negotiating process can be encouraged by international organizations. Aside from the fact that such organizations provide a meeting place where representatives of States parties to a dispute can get together and conduct formal or informal discussions with a view to settling the dispute, organs of an international organization may contribute to the opening of negotiations by addressing to the parties recommendations to that effect.

32. In the case of the United Nations, the General Assembly may, as is recalled in section II, paragraph 3 (a), of the Manila Declaration, "discuss any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations and, subject to Article 12 of the Charter, recommend measures for its peaceful settlement". The means of settlement which the General Assembly has most frequently recommended to the parties to a dispute is negotiation. Reference is made in this respect to resolution 40/9 of 8 November 1985, in which the Assembly addressed a solemn appeal to States in conflict to proceed to the settlement of their disputes by negotiations and other peaceful means.

33. In addressing such recommendations to the parties, the General Assembly has often asked them to take account in their negotiations of specific elements such as the purposes and principles of the Charter; the objectives of resolution 1514 (XV) of 14 December 1960 (Declaration on the Granting of Independence to Colonial Countries and Peoples); the interests of the people concerned; the right to self-determination and independence; and the principle of national unity and territorial integrity.

34. In accordance with its responsibilities under the Charter of the United Nations in the area of peaceful settlement of disputes or of any situation the continuance of which is likely to endanger the maintenance of international peace and security, the Security Council has on a number of occasions adopted resolutions calling upon States to enter into negotiations.

35. The furtherance of negotiations between the parties to a dispute is but a limited aspect of the role which the United Nations and other international organizations play in the peaceful settlement of disputes. This role is dealt with comprehensively in chapter III of the present handbook, as far as the United Nations is concerned, and in chapter IV, as regards other international organizations.

36. It should finally be noted that the parties may be directed to negotiate by a judicial decision binding upon them. Reference is made in this connection to the Fisheries Jurisdiction cases, in which the International Court of Justice stated the following:

"75. The obligation to negotiate thus flows from the very nature of the respective rights of the Parties; to direct them to negotiate is therefore a proper exercise of the judicial function in this case. This also corresponds to the Principles and provisions of the Charter of the United Nations concerning peaceful settlement of disputes. As the Court stated in the North Sea Continental Shelf cases:

'. . . the obligation merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes' " (I.C.J. Reports 1969, p. 47, para. 86)."
3. Conduct of the negotiating process

(a) Framework of the negotiating process

(i) Bilateral negotiations

37. Bilateral negotiations are traditionally conducted directly between duly appointed representatives or delegations or through written correspondence and have been greatly facilitated in modern times by the development of telecommunications and means of transportation. While the negotiators are often ministers of foreign affairs—or officials of the foreign ministries—of the parties, practice offers many instances of disputes settled by specialized negotiators. There are instances where Heads of State or Government are involved either at the initial stage of the negotiations—with the process being subsequently conducted at a lower level—or, conversely, at the concluding stage, after negotiations have been concluded at the expert level. The question of the respective ranks of the negotiators may be relevant to the extent that one side insists that the other side should be represented at the same level.

38. There are many examples of bilateral negotiations conducted in the framework of diplomatic joint commissions, particularly for the settlement of territorial or waterway disputes. It should be noted that disputes relating to international waterways are often dealt with in the framework of standing joint commissions established by treaties.7

39. Permanent diplomatic missions often play an important role in presenting the position of their respective Governments in negotiations with the foreign ministry of the State to which they are accredited. Furthermore, States parties to a dispute which do not maintain diplomatic relations may find it convenient to carry on negotiations for the settlement of the dispute through their respective diplomatic missions to a third country or their permanent missions to the United Nations. The eventuality of absence of diplomatic relations between States parties to a dispute is envisaged in article 15 of the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, paragraph 3 of which reads in part:

"A State Party which does not maintain diplomatic relations with another State Party concerned shall participate in such consultations, at its own choice, either itself or through another State Party or the Secretary-General as intermediary."

40. Individuals having no governmental position such as former ministers, university rectors, etc., may, in certain cases, be entrusted with the conduct of bilateral negotiations or with laying the ground for negotiations proper.

(ii) Plurilateral or multilateral negotiations

41. When several States are parties to a dispute, an international conference may provide the framework for the negotiating process. There are examples of conferences convened at the invitation of one of the parties and in which one or several of the other parties refrained from taking part. States having an interest in the settlement of a dispute but not parties to it may hold a conference without the participation of the parties to study the dispute and make proposals for its settlement. In the absence of one or several of the parties, no negotiation is possible but such conferences may, if their recommendations commend themselves to the parties, bring to the settlement of the dispute a contribution akin to good offices or mediation.

(iii) "Collective negotiations"

42. The framework of the negotiating process can also be an international organization. Reference is made in this connection to the judgment of the International Court of Justice in the South West Africa cases (Preliminary Objections) in which the Court stated the following in response to the contention, by the respondent, that collective negotiations in the United Nations were one thing and direct negotiations between it and the appellants were another:

"... diplomacy by conference or parliamentary diplomacy has come to be recognized in the past four or five decades as one of the established modes of international negotiation. In cases where the disputed questions are of common interest to a group of States on one side or the other in an organized body, parliamentary or conference diplomacy has often been found to be the most practical form of negotiation. The number of parties to one side or the other of a dispute is of no importance; it depends upon the nature of the question at issue. If it is one of mutual interest to many States, whether in an organized body or not, there is no reason why each of them should go through the formality and pretence of direct negotiations with the common adversary State after they have already fully participated in collective negotiations with the same State in opposition."8

43. Examples of "organized bodies" in the framework of which such "collective negotiations" can be carried out for the peaceful settlement of disputes will be found in chapters III and IV below.

(b) Place of negotiations

44. Bilateral or plurilateral negotiations usually take place in the capital city of one of the parties. They may also be held alternately in each of the capitals. In the case of neighboring States, a locality close to the common border may be selected.

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7For an analysis of the many waterway treaties providing for the establishment of standing joint commissions, see Yearbook of the International Law Commission, 1974, vol. II (Part II) (United Nations publications, Sales No. E.75.V.7 (Part II)), document A/5409, "Legal problems relating to the utilization and use of international rivers: report of the Secretary-General", and document A/CN.4/274, "Legal problems relating to the non-navigational uses of international watercourses: supplementary report of the Secretary-General". Those standing joint commissions in which each side is represented by an equal number of government-appointed representatives and which seek to settle disputes within their competence through negotiations—failing which the matter is referred to the States concerned for decision—are very similar to ad hoc diplomatic commissions.

45. A city, or a series of cities, outside the respective territories of the parties may provide the forum for negotiations, particularly if there are no diplomatic relations between the parties or if, as a result of the dispute, there is a state of tension between them.

46. While collective negotiations within an international organization usually take place at the seat of the organization, a specific organ having competence in the area of peaceful settlement of disputes may choose to meet at a venue away from the seat of the organization. Reference is made in this connection to Article 28, paragraph 3, of the Charter of the United Nations which reads as follows: “The Security Council may hold meetings at such places other than the seat of the Organization as in its judgement will best facilitate its work.”

(c) **Degree of publicity of the proceedings**

47. In the case of bilateral negotiations it is for the parties to determine jointly the degree of publicity they wish to give to their negotiations. They may opt for confidentiality, at least in the initial phase.

48. On occasion, as has been seen above, bilateral negotiations have been encouraged by international organizations. They may in such cases receive a certain degree of publicity. The General Assembly, for example, has sometimes recorded the fact that negotiations were taking place between the two parties concerned, further to an invitation which it had addressed to them to that effect. It has also, in more frequent cases, coupled its invitation to the parties to negotiate with an invitation to report to it on the course of the negotiations. There is an instance where a similar invitation contained in a General Assembly resolution resulted in the issuance by the two parties of a joint statement in the form of an exchange of notes recording the conclusions of the negotiating delegations as to measures to be adopted on the understanding that they might contribute to the process of a definitive solution to the dispute between the two Governments.

49. Negotiations within an organ of an international organization are, at least partly, carried on in public and recorded in official documents. But a growing amount of such “collective negotiations” is conducted privately and informally.

(d) **Duration of the negotiation process**

50. The time-frame for the negotiation process varies according to the circumstances. The process may be concluded in a few days or may extend over several decades. Practice offers many examples of intermittently conducted negotiations.

51. Under certain treaties a time-limit is set for the completion of the negotiation process, beyond which resort may be had to another means of peaceful settlement. Thus, article 14 of the 1981 Treaty establishing the Organization of Eastern Caribbean States reads in part as follows:

“1. Any dispute that may arise between two or more of the Member States regarding the interpretation and application of this Treaty shall, upon the request of any of them, be amicably resolved by direct agreement.

“2. If the dispute is not resolved within three months of the date on which the request referred to in the preceding paragraph has been made, any party to the dispute may submit it to the conciliation procedure provided for in Annex A . . .” (emphasis added).

Articles 84 and 85, paragraph 1, of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character read in part as follows:

“Article 84

“Consultations

“If a dispute between two or more States Parties arises out of the application or interpretation of the present Convention, consultations between them shall be held upon the request of any of them . . .”

“Article 85

“Conciliation

“1. If the dispute is not disposed of as a result of the consultations referred to in article 84 within one month from the date of their inception, any State participating in the consultations may bring the dispute before a conciliation commission . . .” (emphasis added)

Articles 41 and 42 of the 1978 Vienna Convention on Succession of States in respect of Treaties read as follows:

“Article 41. Consultation and negotiation

“If a dispute regarding the interpretation or application of the present Convention arises between two or more Parties to the Convention, they shall, upon the request of any of them, seek to resolve it by a process of consultation and negotiation.

“Article 42. Conciliation

“If the dispute is not resolved within six months of the date on which the request referred to in article 41 has been made, any party to the dispute may submit it to the conciliation procedure specified in the Annex to the present Convention . . .” (emphasis added)

Article 16, paragraph 1 of the 1965 Convention on the Transit Trade of Land-locked States reads in part as follows:

“1. Any dispute which may arise with respect to the interpretation or application of the provisions of this Convention which is not settled by negotiation or by other peaceful means of settlement within a period of nine months shall, at the request of either party, be settled by arbitration.” (emphasis added)

(e) **Attitude of the parties**

52. Under some treaties, States are under an explicit obligation to take a positive attitude in conducting consultations aimed at settling disputes
arising from the interpretation or application of the treaty. Thus under article XXII of the 1947 General Agreement on Tariffs and Trade:

"Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by any other contracting party with respect to all matters affecting the operation of this Agreement."

Article 57 of the 1983 International Coffee Agreement contains a similar provision.

53. Mention should further be made in this context of the treaty provisions referred to in paragraph 51 above, which place on parties an obligation of diligence in the initiation and conduct of the negotiation or consultation process.

54. The concerns reflected in the two preceding paragraphs have also found expression in the Manila Declaration, which provides in its section I, paragraph 10, that when States choose to resort to direct negotiations, they should "negotiate meaningfully, in order to arrive at an early settlement acceptable to the parties." This provision reiterates in the specific context of negotiation the general idea enunciated in section I, paragraph 5, of the Declaration, under which "States shall seek in good faith and in a spirit of cooperation an early and equitable settlement of their international disputes by the following means . . . ."

55. Resolutions of organs of international organizations calling upon States parties to a dispute to enter into negotiations have, on occasion, stressed the need for a positive attitude on the part of all concerned. Thus in one resolution the General Assembly expressed confidence in the good faith and willingness of the two Governments to pursue vigorously direct negotiations for an early delineation of the frontier. The Security Council in one resolution requested the Secretary-General to enter into immediate consultations with the parties concerned and interested and appealed to them to exercise restraint and moderation and to enable the mission of the Secretary-General to be undertaken in satisfactory conditions. In another resolution, the Security Council regretted a unilateral decision as, inter alia, tending to compromise the continuation of negotiations and called upon all the parties concerned to refrain from any action which might jeopardize the negotiations, and to take steps which would facilitate the creation of the climate necessary for the success of those negotiations. In other resolutions, the Council urged that negotiations be resumed as soon as possible meaningfully and constructively, on the basis of comprehensive and concrete proposals, and that talks be pursued in a continuing, sustained and result-oriented manner, avoiding any delay.

56. Also relevant in this context is the following extract from the judgment of ICJ in the South West Africa Cases (Preliminary Objections):

"... it is not so much the form of negotiation that matters as the attitude and views of the Parties on the substantive issues of the question involved. So long as both sides remain adamant... there is no reason to think that the dispute can be settled by further negotiations between the Parties."9

57. Similarly, the Court in its judgment in the North Sea Continental Shelf case stated:

"The Parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation of a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they 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."10 (emphasis added)

58. Mention should also be made in this context of the judgment of the Court in the Fisheries Jurisdiction case,11 in which the Court directed the parties "to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other", and of the award of 16 November 1957 in the Lake Llanoux case, in which the arbitral tribunal mentions as examples of "infringement of the rules of good faith" in the conduct of negotiations, "unjustified breaking off of conversations, unusual delays, disregard of established procedures, systematic refusal to give consideration to proposals or adverse interests".12

(f) Steps aimed at facilitating the negotiating process through the involvement of a third party13

59. The dividing line between, on the one hand, steps aimed at facilitating the negotiating process through third party involvement and, on the other hand, mediation or good offices may be difficult to draw. However, since such steps are intrinsically linked to the negotiating process itself, it is appropriate to deal with them briefly in the context of the present section of the handbook.

60. Some treaties contain certain provisions aimed at facilitating the opening of consultations or the conduct of the process. Thus, under article 15, paragraph 3, of the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies:

"If difficulties arise in connection with the opening of consultations or if consultations do not lead to a mutually acceptable settlement, any State Party may seek the assistance of the Secretary-General without seeking the consent of any other State Party concerned, in order to resolve the controversy."

10) C.J. Reports 1969, p. 32, para. 85 (e).
11) C.J. Reports 1974, p. 33, para. 78.
13) Steps aimed at facilitating the negotiating process may be taken jointly by the parties without any third party being involved. One such step is the establishment of standing joint commissions with negotiating powers, which is dealt with under subsection 3 (a) above.
The 1983 International Coffee Agreement provides in its article 57 that in the course of the consultation process, on request by either party and with the consent of the other, an independent panel shall be established which shall use its good offices with a view to conciliating the parties.

61. Within international organizations, a decision or a recommendation of a competent organ that parties to a dispute should undertake negotiations with a view to the settlement of their dispute may seek to facilitate the negotiating process by various means.

62. Within the United Nations, the General Assembly has, in one instance, recommended that the negotiating process be assisted, on the request of either party, by a third party to be selected by the parties or, failing their agreement, to be appointed by the Secretary-General. In another instance, the Assembly suggested that the parties concerned should designate a Government agency or person to facilitate contacts between them and assist them in settling the dispute and further decided that if, within six months, the parties had not reached agreement on the designation of such a Government agency or person, the Secretary-General would designate a person for this purpose. In still another case, the Assembly requested the Secretary-General to undertake a mission of good offices in order to assist the parties to resume negotiations in order to find as soon as possible a peaceful solution of their dispute.

63. The Security Council has also, in some of the cases where it called upon States to carry on negotiations, sought to facilitate the negotiation process by placing the services of a third party at the disposal of the parties. Thus, in one instance, the Council called upon the parties to seek such agreements forthwith by negotiations conducted either directly or through a Mediator. In another instance, it urged the Governments concerned to enter into immediate negotiations under the auspices of a United Nations representative. In still another case, it invited the Secretary-General to lend whatever assistance might be requested by both countries in connection with, \textit{inter alia}, an early resumption of conversations with a view to a comprehensive settlement of all bilateral issues. On yet another occasion the Council requested the Secretary-General to enter into immediate consultations with the parties concerned and interested. In a further case the Council, considering that new efforts should be undertaken to assist the resumption of negotiations, requested the Secretary-General to undertake a new mission of good offices and to that end to place himself personally at their disposal, so that the resumption, the intensification and the progress of comprehensive negotiations, carried out in a reciprocal spirit of understanding and of moderation under his personal auspices and with his direction as appropriate, might thereby be facilitated.

64. The steps which the organs of the United Nations or other international organizations may take with a view to facilitating the negotiating process are dealt with in detail in the relevant sections of the present chapter (in particular those relating to mediation and good offices) and are recapitulated, as far as the United Nations is concerned, in chapter III and, as regards other international organizations, in chapter IV.

(g) Question whether the existence of an ongoing negotiation process precludes resort to another peaceful settlement procedure

65. This question has been dealt with, as far as judicial settlement is concerned, by the International Court of Justice in a case which involved the alleged violation by one of the parties to the dispute of its international legal obligations to the other party as provided by, \textit{inter alia}, the 1961 Vienna Convention on Diplomatic Relations. As has been seen above, disputes arising from the interpretation or application of this Convention lie, under the relevant Optional Protocol to the Convention, within the compulsory jurisdiction of the International Court of Justice. Both parties to the dispute had acceded to the Protocol and were therefore bound by it. The Court examined the question whether efforts aimed at easing the situation of crisis existing between the two countries, which had been undertaken by the Secretary-General at the request of the Security Council, could be considered as incompatible with the continuance of parallel proceedings before the Court. The Court came to a negative conclusion and further stated the following:

"Negotiation, enquiry, mediation, conciliation, arbitration and judicial settlement are enumerated together in Article 33 of the Charter as means for the peaceful settlement of disputes. As was pointed out in the Aegean Sea Continental Shelf case, the jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement by the Court have been pursued \textit{pari passu.}" 17

66. In another case, the International Court of Justice has stated:

\footnote{15}{\textit{United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 3.}}
\footnote{16}{In this case, the Court declared itself unable to share the view that it ought not to proceed with the case while the parties continued to negotiate and that the existence of active negotiations in progress constituted an impediment to the Court's exercise of jurisdiction. The Court further stated:}

"Negotiation and judicial settlement are enumerated together with Article 33 of the Charter of the United Nations as means for the peaceful settlement of disputes. The jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement have been pursued \textit{pari passu}. Several cases, the most recent one being that concerning the Trial of Pakistani Prisoners of War (I.C.J. Reports 1973, p. 347), show that judicial proceedings may be discontinued when such negotiations result in the settlement of the dispute. Consequently, the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function." I.C.J. Reports 1978, p. 12, para. 29.

\footnote{17}{I.C.J. Reports 1980, p. 24, para. 43.}
"... the Court considers that even the existence of active negotiations in which both parties might be involved should not preclude the Security Council and the Court from exercising their separate functions under the Charter and the Statute of the Court."18

67. In connection with the reference to the Security Council in the above statement of the Court, it should be recalled that the Council is empowered, under Article 36 of the Charter of the United Nations, to recommend appropriate procedures or methods of adjustment "at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature", i.e., any dispute or situation the continuance of which is likely to endanger the maintenance of international peace and security. Under paragraph 2 of the same provision, however, "the Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties". In the latter connection, reference is made to a resolution of the Security Council in which the Council specified that it was acting without prejudice to negotiations that the parties concerned and interested might undertake under Article 33 of the Charter.

4. Outcome of the negotiations and possible subsequent steps

68. When negotiations are successful, they normally lead to the issuance by the parties of an instrument reflecting the terms of the agreement arrived at. This document may be a comprehensive agreement. It may be a joint statement or communiqué. A memorandum or declaration defining broad points of agreement may precede the issuance of a more detailed agreement.

69. If the negotiations are unsuccessful, the parties may choose to adjourn the negotiation process sine die or to issue a communiqué recording the failure of the negotiations. If the dispute relates to the interpretation or application of a treaty, the failure of the negotiations may result in denunciation of the treaty by one of the parties.

70. As has been seen above, the dispute settlement clauses of many multilateral treaties provide that disputes which cannot be settled by negotiation shall be submitted to another peaceful settlement procedure. Various patterns of successive steps can be found in practice, as further discussed in detail in the handbook, including the following:

(a) Consultation; conciliation (arts. 84 and 85 of the 1975 Convention on the Representation of States in Their Relations with International Organizations of a Universal Character);

(b) Consultation; other peaceful means of the parties' choice (art. 15 of the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies);

(c) Negotiation; other peaceful means of the parties' choice; conciliation; arbitration (art. VIII of the 1969 International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties);

(d) Exchanges of views; peaceful means of the parties' choice; conciliation; judicial or arbitral settlement (arts. 280, 283, 284, 286 and 287 of the 1982 United Nations Convention on the Law of the Sea. Under article 287 of the Convention, a State is free to choose, by means of a written declaration, one or more of four compulsory procedures entailing binding decisions);

(e) Negotiation; procedures provided by the treaty; resort to ICJ (art. 22 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination);

(f) Consultation and negotiation; conciliation; arbitration or resort to ICJ (arts. 41, 42 and 43 of the 1978 Vienna Convention on Succession of States in Respect of Treaties and Arts. 42, 43 and 44 of the 1983 Vienna Convention on Succession of States in respect of State property, archives and debts);

(g) Consultation; negotiation; resort to an organ of an international organization (art. 58 of the 1983 International Coffee Agreement);

(h) Negotiation; arbitration, failing agreement on another form of settlement (art. 10 of the 1973 International Convention for the Prevention of Pollution from Ships and Protocol II to the Convention and art. 16 of the 1985 Convention on the Transit Trade of Land-locked States);

(i) Negotiation; arbitration; resort to ICJ (art. 24 of the 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft; art. 29 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women; art. 30 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment; art. 13 of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; art. 16 of the 1979 International Convention against the Taking of Hostages; art. 12 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft; and art. 14 of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation);

(j) Negotiation; procedures provided by the treaty; resort to ICJ (arts. 28 to 44 of the 1966 International Covenant on Civil and Political Rights);


Privileges and Immunities of the Specialized Agencies; and art. 34 of the 1959 Agreement on the Privileges and Immunities of the International Atomic Energy Agency).

71. Underlying these clauses is the general principle reflected in section I, paragraph 7, of the Manila Declaration, which reads in part as follows:

"In the event of failure of the parties to a dispute to reach an early solution by any of the above means of settlement, they shall continue to seek a peaceful solution and shall consult forthwith on mutually agreed means to settle the dispute peacefully."

72. The same principle underlies several resolutions of the General Assembly which envisage possible alternative courses of action in case negotiations do not lead to the settlement of the dispute. Thus, in one instance, the General Assembly has recommended a three-step procedure: namely, negotiations, followed by resort, in order to resolve differences arising in the course of negotiations, to a procedure of mediation by a United Nations mediator to be appointed by the Secretary-General and, finally, resort to arbitration in the event of the inability of the parties to accept the recommendations of the mediator. In another instance, the Assembly has recommended that, in the event that negotiations do not lead to satisfactory results within a reasonable period of time, both parties should give favourable consideration to the possibility of seeking a solution of their differences by any of the means provided in the Charter, including recourse to ICJ or any other peaceful means of their own choice.

73. The concept of failure of negotiations has been touched upon both by the Permanent Court of International Justice and by the International Court of Justice. In its judgment in the Mavrommatis case, the Permanent Court stated:

"... the question of the importance and chances of success of diplomatic negotiations is essentially a relative one. Negotiations do not of necessity always presuppose a more or less lengthy series of notes and dispatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a deadlock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that the dispute cannot be settled by diplomatic negotiation." 19

In its judgment in the South West Africa Cases (Preliminary Objections), the International Court of Justice dealt with the matter in the following words:

"Now in the present cases, it is evident that a deadlock on the issues of the dispute was reached and has remained since, and that no modification of the respective contentions has taken place since the discussions and negotiations in the United Nations. It is equally evident that 'there can be no doubt', in the words of the Permanent Court, 'that the dispute cannot be settled by diplomatic negotiation', and that it would be 'superfluous' to undertake renewed discussions.

"... So long as both sides remain adamant, and this is obvious even from their oral presentations before the Court, there is no reason to think that the dispute can be settled by further negotiations between the Parties." 20

B. Inquiry

1. Functions and relation to other peaceful means under the Charter of the United Nations

74. In an international dispute involving in particular a difference of opinion on points of fact, the States concerned may agree to initiate an inquiry to investigate a disputed issue of fact, as well as other aspects of the dispute, to determine any violations of relevant treaties or other international commitments alleged by the parties and to suggest appropriate remedies and adjustments. Inquiry may also be resorted to when parties to a dispute agree on some other means of settlement (arbitration, conciliation, regional arrangements, etc.) and there arises a need for collecting all necessary information in order to ascertain or elucidate the facts giving rise to the dispute.

75. The function of inquiry—investigation or elucidation of a disputed issue of fact—was comprehensively dealt with in the 1899 and 1907 Hague Conventions 21 for the Pacific Settlement of International Disputes. Article 9 of the 1907 Convention reads as follows:

"In disputes of an international nature involving neither honour nor essential interests, and arising from a difference of opinion on points of fact, the Contracting Powers deem it expedient and desirable that the parties who have not been able to come to an agreement by means of diplomacy should, as far as circumstances allow, institute an international commission of inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation." 22

76. Inquiry as a means of settlement of disputes has been provided for in a number of bilateral and multilateral treaties, including the Covenant of the League of Nations, the Charter of the United Nations and the constituent instruments of certain specialized agencies and other international organizations within the United Nations system, and in various instruments by the regional bodies.

77. Inquiry, as an impartial third-party procedure for fact-finding and investigation, may indeed contribute to a reduction of tension and the prevention of an international dispute, as distinct from facilitating the settlement of such a dispute. The possibility of fact-finding (inquiry) contributing to the


prevention of an international dispute was recognized, for example, by the General Assembly in its resolution 1967 (XVIII) of 16 December 1963 on the "Question of methods of fact-finding." In the resolution, the Assembly stated its belief "that an important contribution to the peaceful settlement of disputes and to the prevention of such disputes could be made by providing for impartial fact-finding within the framework of international organizations and in bilateral and multinational conventions".

78. On 18 December 1967, the General Assembly adopted resolution 2329 (XXII), in which it requested the Secretary-General to prepare a register of experts in legal and other fields, whose services the States parties to a dispute might, by agreement, use for fact-finding in relation to a dispute. It also requested Member States to nominate up to five of their nationals to be included in such a register. As mentioned in paragraph 144 of the first report of the Secretary-General (A/5094), the role of such fact-finding bodies "as a stabilizing factor in themselves, in situations potentially endangering the maintenance of international peace and security, should not be overlooked, nor the part which they have on occasions played in providing a means of liaison and communication between conflicting parties".

79. To a great extent the task of such fact-finding bodies established in accordance with the above-mentioned resolution "in relation to a dispute" may be regarded as seeking the prevention of a dispute or the prevention of the aggravation of a dispute and the adjustment of situations the continuance of which is likely to give rise to a dispute.

80. Recognition that fuller use and further improvement of the means for fact-finding of the United Nations could contribute to the strengthening of the role of the Organization in the maintenance of international peace and security and promote the peaceful settlement of disputes as well as the prevention and removal of threats to the peace has developed slowly together with a new willingness on the part of Member States to enhance the role of the United Nations. The 1988 Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field called for full use of the fact-finding capabilities of the Security Council, the General Assembly and the Secretary-General in strengthening the role and effectiveness of the United Nations in maintaining international peace and security for all States. The Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization had developed further on fact-finding by the United Nations. The Committee elaborated a Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security, which was adopted by the General Assembly at its forty-sixth session. The Declaration aims at enhancing the use of and improving the fact-finding means available to the Security Council, the General Assembly and the Secretary-General in the fulfilment of their functions relating to the maintenance of international peace and security.

81. From the evidence in the above-mentioned treaties and other international instruments, it may be observed that the terms "inquiry" ("enquiry"), "fact-finding" and "investigation" have all been used (sometimes interchangeably) for this type of procedure under which parties to an international dispute may call for the establishment of an international commission of inquiry, an international fact-finding commission, or an international investigation commission, with varying degrees of competence. The competence conferred upon a commission of inquiry may vary depending on the subject-matter of the inquiry and also whether the machinery is established to serve the interest of States directly, as illustrated by a number of cases, both prior to and since the Hague Conventions. It may also depend on whether an inquiry is set in motion to assist an international organization, such as the United Nations, to fulfill its various obligations under the Charter in the area of the maintenance of international peace and security or whether an inquiry commission is instituted by any of the specialized agencies and the

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25General Assembly resolution 46/59, annex.

22See, e.g., article 9 of both the 1899 and 1907 Hague Conventions (supra, note 21).


24See, e.g., United Nations commission of investigation described in the two studies of the Secretary-General (supra, note 22).


26By its resolution 490 (1981) of 15 December 1981, the Security Council decided to send a commission of inquiry composed of three of its members in order to investigate the origin, background and financing of the mercenary aggression of 25 November 1981 against the Republic of Seychelles, as well as assess and evaluate economic damages, and to report to the Council with recommendations; and by its resolution 598 (1987) of 20 July 1987 requested the Secretary-General "to explore, in consultation with Iran and Iraq", the question of establishing an impartial body with inquiry into responsibility for the conflict and to report to the Security Council as soon as possible. In one recent instance, the General Assembly requested the Secretary-General to carry out preliminary investigations in response to reports that might be brought to his attention by any Member State concerning the possible use of chemical and bacteriological (biological) or toxin weapons in order to ascertain the facts of the matter and to report promptly the result of any such investigation to all Member States (resolution 44/115 B of 15 December 1989).
International Atomic Energy Agency to deal with an issue under their respective constitutions and statutes.  

82. By virtue of its mandate to investigate the facts and to clarify the questions in dispute under the functions outlined above, inquiry may thus involve the hearing of the parties, the examination of witnesses or visits on the spot. Although inquiry may thus employ the techniques of gathering evidence which are normally used in the arbitral or judicial process, this does not change its basic status and functions as outlined above. But it does underscore the fact that inquiry is thus capable of combining the benefits of diplomacy and legal techniques to obtain for the parties an impartial report on the issues in dispute, or of suggesting a solution of the problem. Because of this possibility of being given the mandate of recommending a solution, a commission of inquiry may thus tend to acquire a status which sometimes makes it difficult to distinguish its function from that of conciliation. This has resulted in the establishment of a machinery designated as a panel for inquiry and conciliation in the context of the United Nations.  

2. Initiation and methods of work  

83. Inquiry may be set in motion by mutual consent of the States concerned on an ad hoc basis, relying upon a treaty in force between them, creating a general obligation to settle disputes by peaceful means. It may also be initiated in accordance with the terms of an applicable treaty, specifically establishing inquiry as the mode of handling a category of disputes and indicating how the process may be initiated, including its method of work.  

84. Some treaties have thus provided for the establishment of a permanent commission of inquiry, fact-finding or investigation, whose jurisdiction is to be accepted in advance by the States parties to the treaty in question. The jurisdiction of such institutionalized commission of inquiry either may be invoked without further agreement between States parties to a dispute, or may be made subject to a special agreement between the parties to a dispute. A treaty may also indicate the conditions under which the jurisdiction of the established commission may be invoked by one party unilaterally and those under which the jurisdiction may only be invoked by mutual consent. A provision may also be made in a treaty requiring that parties, invoking the jurisdiction of the commission, draw up a protocol in which they state the question or questions which they desire the commission to elucidate. Alternatively, in another treaty, the commission of inquiry may itself define the facts to be examined.  

85. The methods of work of a commission of inquiry are those aimed at enabling the commission, in accordance with the competence conferred upon it, to acquire all necessary facts in order to become fully informed of the issues giving rise to a dispute. Thus, as mentioned in paragraph 82 above, a commission of inquiry may hear the parties to a dispute, examine witnesses and experts, carry out investigations on the spot with consent of the parties and receive and review documentary evidence. The parties are, both in practice and under the relevant treaties, entitled to be represented during the proceedings by agents and counsel. Such is the case, for example, within commissions of inquiry instituted under article 26 of the Constitution of the International Labour Organisation (ILO). Similarly, under article 14 of the 1907 Hague Convention, the parties are entitled to appoint special agents to attend the commission of inquiry, whose duty is to represent them and to act as intermediaries between them and the commission. They are further authorized to engage counsel or advocates, appointed by themselves, to state their case and uphold their interests before the commission. Under article 21 of the Convention, "every investigation, and every examination of a locality, must be made in the presence of the agents and counsel of the parties or after they have been duly summoned". Whether or not the commission is to hold such hearings in public is also another question. In this connection, it may be noted that article 31 of the 1907 Hague Convention stipulated that "the sittings of the commission [of inquiry] are not public, nor the minutes and documents connected with the inquiry published, except in virtue of a decision of the commission taken with the consent of the parties".  

86. The extent to which these techniques of acquiring evidence may be used by a commission of inquiry will depend upon the function assigned to it: whether merely to elucidate the facts in dispute and to submit a written report thereon for further use of the parties to a dispute, or to prepare a report in which it also recommends a solution to the dispute. In both instances, a written report is to be prepared and submitted by the commission either to the States parties to the dispute or to the organ of the international organization which initiated it.  

38See, e.g., articles 9 to 36 of the 1907 Hague Convention, which contain a more elaborate description of investigation procedure than those of the 1899 Convention.  

39The creation of a Panel for Inquiry and Conciliation was provided for in General Assembly resolution 266 D (III) of 28 April 1949. The list of persons designated by 15 Member States is contained in a note by the Secretary-General dated 20 January 1961 (A/4686-5/4632); The Panel has never been used.  

3See, e.g., article 9 of both the Hague Conventions.  

33See, e.g., the so-called Bryan treaties which the United States entered into with a number of European and Central and South American States commencing in 1913. As to details concerning these treaties see the report of the Secretary-General on methods of fact-finding, A/5694, paras. 62-78, the Treaty to Avoid or Prevent Conflicts between the American States ("Gondra Treaty"), signed at Santiago on 3 May 1923, the League of Nations Treaty Series, vol. XXXIII, p. 25, and American Treaty on Pacific Settlement (Pact of Bogotá), signed at Bogotá on 30 April 1948, United Nations, Treaty Series, vol. 30, p. 55.  

35See, e.g., the Pact of Bogotá, note 34, supra.  

36One of the so-called Bryan treaties, i.e., the Treaty between the United States of America and the United Kingdom of Great Britain of 15 September 1914 (see A/5604) (supra, note 22), para. 62, note 26.
3. Composition and other institutional aspects

87. Although reference has been made in the preceding paragraphs to inquiry mainly in the form of various commissions to be composed of a specified number of individuals, thus constituting a third-party procedure, there are certain important exceptions to that which may now be pointed out in connection with the institutional aspects of the procedure.

88. First, it should be noted that an inquiry must not necessarily be conducted by a group of people constituting a commission or a panel. An inquiry may indeed be undertaken by one person alone. Thus the States concerned may agree to approach, for example, the Secretary-General of the United Nations or the chief administrative officer of any of the specialized agencies or of bodies within the United Nations system to appoint a special representative or a mission to carry out an inquiry on the difficulties which have arisen between such States or to investigate the events giving rise to a complaint by one State against another, with the view to bringing about an amicable solution.37 Both the General Assembly and the Security Council are equally free to ask the Secretary-General of the United Nations to appoint a special representative to undertake an inquiry in connection with issues falling under their responsibilities and competence and have done so on several occasions.38

89. Secondly, it should be observed that an inquiry need not always be in the nature of a third-party procedure (the appointment of either a commission or an individual to undertake an independent investigation on behalf of the parties to the dispute). In some cases, especially those involving frontier disputes, provisions have been made for an inquiry to be conducted directly between the local frontier officials of the States parties to such a dispute without involving a third party. This practice of eliminating the third-party element in an inquiry procedure exists in a number of bilateral treaties.39

90. As for the third-party inquiry procedures, there are a number of questions concerning their institutional aspects, which are similar to those to be discussed in relation to the other ad hoc procedures such as conciliation commissions or arbitral tribunals. The questions include: the size of the inquiry commission; whether the commissioners are to be selected from a pre-constituted list, such as a register of experts;40 whether to specify a particular qualification (professional competence) for the individuals to be appointed to the inquiry commission; the procedures for appointment and for filling the vacancies that may occur in the commission; the rules of procedure to be applied by the commission taking into account its method of work discussed in the preceding paragraphs; the secretariat or seat of an inquiry commission; and the financial arrangements for covering the expenses relating to the procedure.

91. Without going into the details concerning each of the institutional questions raised above, the following examples may be noted with respect to the question of composition. The 1907 Hague Convention, for example, provides that, failing the direct agreement of the parties on the composition of the commission of inquiry in the manner established under the treaty, each party to the dispute appoints two members and the four members thus designated—or, failing agreement, a third State jointly agreed upon—select the fifth. Under Additional Protocol I to the 1949 Geneva Conventions, the States parties to the Protocol elect, from a list of persons to which each of them may nominate one person, the 15 members of the International Fact-Finding Commission; as to the seven-member Chamber to be set up—unless otherwise agreed by the Parties concerned—in case an inquiry is requested, it consists of five members appointed by the President of the Commission after consultations with the Parties and of two ad hoc members to be appointed by each side. Under the 1982 United Nations Convention on the Law of the Sea, there is a special third-party procedure constituted in accordance with article 3 of annex VIII thereto, which may be requested to carry out an inquiry and establish the facts giving rise to the dispute, and which consists of five members of which each party selects two, the fifth member being appointed by agreement by the parties to the dispute, preferably from a pre-constituted list of experts established under the Convention. While various such models exist, account should also be taken of the inquiry commissions appointed by a single authority, such as the Secretary-General of the United Nations,41 or by the various organs of the United Nations,42 as well as the commission of inquiry under article 26 of the ILO Constitution, which is to be appointed by the Governing Council on the proposal of the Director General.

92. As to the question of rules of procedure, it may be observed generally that commissions have enjoyed varying degrees of freedom in settling the details of such procedures. In one instance, the commission was instructed to "determine its own procedure and all questions affecting the conduct of the investigation", subject to the provisions of the agreement which instituted it.43 In another instance, the provisions of the Hague Conventions were made applicable to the commissions with respect to all points not specifically covered by the agreement on the setting up of the inquiry commission.44 In still another instance, an agreement on the inquiry regulated in detail the

37The Secretary-General announced on 21 July 1988 that he was sending a mission to Iran and Iraq to investigate the situation of prisoners of war at the request of these States (see document S/1982/47).


40See, e.g., the register of a Panel for Inquiry and Conciliation called for in General Assembly resolution 266 D (III), supra, note 32.


43See subparagraph c (i) of the Exchange of notes constituting an Agreement in the Red Crucifix case (supra, note 28).

44See, e.g., article 8 of the Agreement for inquiry in the Tavignano case, supra, note 28.
procedures to be applied by the commission and provided that the rules contained in the 1907 Hague Convention would be applicable in so far as they were not at variance with the provisions of the inquiry convention. A mission of inquiry dispatched by the Secretary-General of the United Nations would determine its procedures and methods of work.

93. With respect to the seat of inquiry, the following may be noted. Under the 1907 Hague Convention, it is for the parties to determine where the commission is to sit and whether it may be free to sit at another place. If the agreement to establish an inquiry pursuant to the Convention is silent on the matter, the inquiry commission would automatically sit at The Hague. The place of meeting, once fixed, cannot be altered by the commission except with the assent of the parties. According to other agreements for inquiry, the capital city of a third State as the place of the meeting of the commission was provided for or it was left open for the commission to determine the country wherein it would sit, taking into consideration the greater facilities for the investigation.

94. When the inquiry, investigation or fact-finding process is conducted under the auspices of an international organization, the competent body will usually assemble at the headquarters or at one of the regional offices of the organization concerned, unless an on-the-spot investigation is necessary with the consent of the parties.

95. The 1907 Hague Convention provides in its article 15 that "the International Bureau of the Permanent Court of Arbitration acts as registry for the commissions which sit at The Hague, and shall place its offices and staff at the disposal of the contracting Powers for the use of the commission of inquiry". It furthermore provides in its article 16 that if the commission meets elsewhere than at The Hague, it appoints a secretary general, whose office serves as registry. Under Additional Protocol I to the 1949 Geneva Conventions, the depositary (i.e., the Swiss Government) "shall make available to the Commission the necessary administrative facilities for the performance of its functions" (art. 90, para. 1 (f)).

96. As to groups appointed by the chief administrative officer of an international organization (such as the Secretary-General of the United Nations) or an organ of an international organization (such as the Governing Body of ILO), they will normally receive the required secretariat support from the organization itself.

97. As to the question of qualification, it is generally understood that the individuals to be appointed to a commission of inquiry should be specialists in the matters likely to come up in the investigation in question. Whether or not the investigation of a legal question has specifically been referred to the commission, it has proved useful to include legal experts apart from those knowledgeable in the specific subject of inquiry. It is very much up to the parties, in the final analysis, to appoint individuals possessing the qualifications necessary and relevant for each case.

98. With regard to financial arrangements, it may be noted that, under the relevant treaties and in practice, equal sharing of the expenses is usually the rule. Thus under the 1907 Hague Convention, each party pays its own expenses and an equal share of the expenses incurred by the commission. Provisions along the same lines are to be found in the 1982 United Nations Convention on the Law of the Sea and in bilateral agreements providing for the establishment of ad hoc commissions of inquiry. In the case of fact-finding or inquiry proceedings conducted under the aegis of an international organization, the costs of secretariat services are usually borne by the organization concerned.

4. Outcome of the process

99. The outcome of an inquiry is a report which is prepared and submitted to the parties or bodies that instituted it. The value of the report would however vary in accordance with the function and competence given to the particular inquiry. Thus, under article 35 of the 1907 Hague Convention establishing an inquiry only for elucidating the facts, the report of the inquiry limits itself to the statement of facts as established and the parties to the dispute retain their complete freedom of action with respect to the dispute.

The report is thus non-binding. In contrast, paragraph 27, article 5, of annex VIII to the 1982 United Nations Convention on the Law of the Sea recognizes an inquiry procedure whose results (findings of fact), unless the parties otherwise agree, are to be considered conclusive by the parties to the dispute, subject to the special procedure under the article.

100. With respect to the commissions given the competence to make recommendations on the settlement of the dispute, there are also variations of the value of the commission's report. Thus in one of the cases the parties to the dispute agreed in advance to accept the recommendations of the commission as binding. In another case, the acceptance by the parties of the legal conclusions reached in the commission's report also enabled the inquiry process to play a significant role in the settlement of that dispute. The Montevideo Agreement of 1915 between Chile and Uruguay, for example, provides in its article IV that "after receiving the report of the Commission the two Governments shall allow a period of six months in order to endeavour to obtain a new settlement of the dispute based on the conclusions of the Commission, and if during this fresh extension the two Governments shall not be able to arrive at a friendly solution, the dispute shall be referred to the

48See, e.g., article 8 of the Agreement for inquiry in the Tubantia case, supra, note 28.
49See, e.g., article 5 of the Agreement for inquiry in the Dogger Bank case, supra, note 28.
50See, e.g., subparagraph f (i) of the Exchange of notes constituting an Agreement in the Red Crusader case, supra, note 28.

48Because of the naval character of disputes investigated so far by commissions of inquiry established under the Hague Conventions, they were composed mainly of naval officers of high rank as well as jurists. In the Tubantia case the third State was explicitly requested to designate a jurist as chairman of the commission. There were also two jurists, including the Chairman, designated in the Red Crusader case.
49The Tiger case, see note 28, supra.
50The Red Crusader case, see note 28, supra.
Permanent Court of Arbitration at The Hague. Under article 29 of the ILO Constitution, each party has three months to inform the Director General of ILO whether it accepts the recommendations contained in the report of the commission.

C. Good offices

1. **Main characteristics, legal framework and relation to other peaceful means under the Charter of the United Nations**

101. When States parties to a dispute are unable to settle it directly between themselves, a third party may offer his good offices as a means of preventing further deterioration of the dispute and as a method of facilitating efforts toward a peaceful settlement of the dispute. Such an offer of good offices, whether upon the initiative of the third party in question or upon the request of one or more parties to the dispute, is subject to acceptance by all the parties to the dispute. In other words, the third party offering good offices, be it a single State or a group of States, an individual or an organ of a universal or regional international organization, must be found acceptable to all the parties to the dispute.

102. The third party exercising good offices normally seeks to encourage the parties to the dispute to resume negotiations, thus providing them with a channel of communication. However, there are cases in which the third party exercising good offices is authorized to do more than merely act as a go-between and is allowed to take active part in the dispute settlement process, by making proposals for its solution and holding meetings with the parties to the dispute to discuss such proposals. In such situations, the third party in question may be considered as not only contributing his good offices but also as undertaking mediation. Accordingly, good offices may be said to share a common characterization with mediation as a method of facilitating a dialogue between parties to an international dispute, aimed, as the case may be, at scaling down hostilities and tensions and designed to bring about an amicable solution of the dispute.

103. In the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes, containing specific provisions establishing good offices as one of the peaceful methods of settlement of disputes, good offices is indeed treated as if it were interchangeable with mediation, suggesting that the two methods, although explicitly treated as distinct in at least one regional treaty, are usually seen as performing functions which may sometimes not be distinguishable in practical terms. Good offices was construed in this manner because in a given dispute the role of the third party exercising good offices may change in accordance with the developments of the events relating to the dispute. Such developments, in turn, determine the nature and degree of involvement of such third party in the process of facilitating the efforts towards a peaceful settlement of the dispute, thus making it difficult to say when good offices ended and mediation began.

104. Although Article 33, paragraph 1, of the Charter of the United Nations does not specifically mention good offices among the peaceful means for the settlement of disputes between States, it has been mentioned in recent international instruments. Thus, the 1982 Manila Declaration on the Peaceful Settlement of International Disputes places good offices on an equal footing with the other peaceful methods enumerated in Article 33, paragraph 1, of the Charter by providing, in its paragraph 5, as follows:

"States shall seek in good faith and in a spirit of cooperation an early and equitable settlement of their international disputes by any of the following means: negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional arrangements or agencies or other peaceful means of their own choice, including good offices. In seeking such a settlement, the parties shall agree on such peaceful means as may be appropriate to the circumstances and the nature of their dispute."

Moreover, the 1988 Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field also provides, in its paragraph 12, that "the Security Council should consider sending, at an early stage, fact-finding or good offices missions or establishing appropriate forms of United Nations presence, including observers and peace-keeping operations, as a means of preventing the further deterioration of the dispute or situation in the areas concerned".

2. **Functions**

105. According to the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes, in which good offices and mediation were treated interchangeably, the methods were assigned the following functions: "in case of serious disagreement or dispute, before an appeal to arms, the contracting [signatory] Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers". The friendly Powers allowed to intervene in the dispute, as further provided in the conventions, "have the right to offer good offices or mediation even during the course of hostilities."

106. Under the Pact of Bogotá, where an attempt was made to distinguish good offices from mediation, the following specific provision was made: "The procedure of good offices consists in the attempt by one or more
American Governments not parties to the controversy, or by one or more eminent citizens of any American State which is not a party to the controversy to bring the parties together, so as to make it possible for them to reach an adequate solution between themselves." 58 The Pact further provided that "once the parties have been brought together and have resumed direct negotiations, no further action is to be taken by the State or citizens that have offered their good offices or accepted an invitation to offer them; they may, however, by agreement between the parties, be present at the negotiations." 59

107. In a statement describing his responsibilities under the Charter, the Secretary-General made the following cogent explanation of the functions of good offices:

"Furthermore, the Security Council and other organs of the United Nations have entrusted the Secretary-General with various tasks which broadly entail the exercise of good offices. This is a very flexible term as it may mean very little or very much. But, in an age in which negotiations have to replace confrontation, I feel that the Secretary-General's good offices can significantly help in encouraging Member States to bring their disputes to the negotiating table. Negotiations today have a character quite different from what they had in the past. Talleyrand called negotiations 'l'art de laisser les autres suivre votre propre voie'. That, however, was true of a world which no longer exists. Today, negotiations need to take account of the great political and economic changes in our world. In order to succeed, and if the vital interests of all concerned are taken sufficiently into consideration, no party will consider it a sign of weakness to listen to a cogent argument, and accept a demonstrably reasonable outcome. The parties may retain their different outlooks, but whatever they confront one another, life imposes upon them the obligation to seek all possible points of rapprochements and try to reduce the elements of contention and conflict. The task of the United Nations and the purpose of the good offices of the Secretary-General is to make the discharge of this obligation easier. In view of the complexity of the issues which arise in our dynamic world, traditional diplomacy can no longer suffice. New methods and devices have become important.

"The process involved contributes to the growth of international law, for every resolution of a dispute, every new agreement, adds a new building-stone to the edifice of law. More immediately, it answers the needs of peace-making. It is a very complex task, requiring great discretion. One of my predecessors rightly remarked that, 'while the Secretary-General is working privately with the parties in an attempt to resolve a delicate situation, he is criticized publicly for his inaction or even lack of interest'. In situations of confrontation, the parties to a dispute are extremely sensitive and this makes it important that they should have confidence in the impartiality or the objectivity of the United Nations and its Secretary-General. The only instrument I can use is persuasion. When successful, it is a more powerful weapon than constraint, for it makes the persuaded party an ally of the solution. But to be able to persuade, you must prove the virtues of a solution, demonstrate the need to compromise and convince the party concerned that an agreement today is much more advantageous for it than a doubtful victory tomorrow. It is here that inventiveness is essential. We have to stretch our imagination to discern points of potential agreement even where at first sight they look non-existent. Even more important is patience, the refusal to give up in the face of apparently hopeless odds. Patience is greatly helped by the realization that in so many areas some of the great problems of today reflect the accumulation of violations, mistakes and passivity stretching over long periods. Hence, the difficulty of reconciling different positions, and hence also, its acute urgency.

"As Secretary-General of the United Nations, I am encouraged when States respond positively to the offer of my services. If two parties are unable or unwilling to sit down at the same table, action from some third quarter—such as the United Nations—is indispensable. But, in such a situation, each party must feel that it will not incur a disadvantage by responding to my good offices. And, in making my good offices available, timing is of critical importance." 60

108. The above statement underscores the fact that the third party offering its good offices must earn and maintain the confidence of the parties to the dispute and that good offices is a method which should be invoked in a timely manner so as to enhance its chances of performing the function of preventing further deterioration of disputes, while at the same time encouraging the parties to the dispute to reach an amicable settlement.

109. Good offices may be offered and undertaken: by a single State or a group of States; within the framework of an international organization such as the United Nations, its specialized agencies or other international organizations, both global or regional; or by an individual acting alone, with the advice of an established committee or with the assistance of a special or personal representative.

110. In recent practice, good offices has been undertaken as a joint effort between the United Nations and regional organizations. Apart from the Secretaries General of the Organization of African Unity (OAU) and the Organization of American States (OAS), who have contributed their good offices individually or jointly with the Secretary-General of the United Nations, other prominent individuals such as heads of State in the respective regions have also tendered their good offices to bring about the peaceful settlement of regional disputes.

3. Application of the method

111. In certain cases States have offered their good offices directly in an effort to bring about a settlement of disputes between States before such disputes were referred to international or regional organizations. The few
examples include: the United States, which in 1946 exercised its good offices in connection with the territorial dispute between France and Thailand; Switzerland, which tendered its good offices in connection with the Franco-Algerian conflict in 1960-1962; the Union of Soviet Socialist Republics, which in 1965 used its good offices in order to assist in the peaceful settlement of the India-Pakistan question connected with the Kashmir problem; and France, which in the early 1970s exercised its good offices in relation to the Vietnam conflict.

112. Good offices have been more widely used recently by the United Nations, and has continued to gain prominence as one of the methods by which the prevention and removal of disputes and situations which may threaten international peace and security could be achieved through the Organization. Some of the early occasions in which good offices was used by the United Nations may therefore be mentioned briefly. They include the Indonesia question, in which the Security Council, in 1947, resolved to tender its good offices to the parties in order to assist in the pacific settlement of their dispute involving hostilities between the armed forces of the Netherlands and Indonesia. In 1956, the good offices of the United Nations (the Secretary-General on behalf of the Security Council) were also used in the Palestine question to secure compliance with the armistice agreement. In 1958, a good offices mission, constituted by the Security Council and composed of two Member States (the United States and the United Kingdom), assisted in the “Tunisian question” towards the settlement of several incidents between France and Tunisia.

113. The question of Cyprus, of which the Security Council has been seized since 1964 and with respect to which the Secretary-General has been conducting good offices missions, provides a recent example. Other recent examples of United Nations activities involving the use of good offices performed by the Secretary-General or by his special or personal representative include, for example, the good offices offered to deal with the situation in Kampuchea, and to deal with complaints such as that between the Libyan Arab Jamahiriya and Malta arising from their dispute relating to the delimitation of the continental shelf between them. The good offices of the Secretary-General have also been tendered to deal with disputes relating to Non-Self-Governing Territories or decolonization, such as those concerning the questions of East Timor, the Falkland Islands (Malvinas), Western Sahara, the Comorinan Island of Mayotte, and also in the efforts to bring about the decolonization of Namibia by attempting to secure the implementation of Security Council resolutions 385 (1976) of 30 January 1976 and 435 (1978) of 29 September 1978 embodying the United Nations plan for the independence of Namibia. The good offices of the Secretary-General were also called for in the context of the long-standing efforts to achieve the settlement of the Arab-Israeli conflict and to deal with the situation of armed conflict in Central America. The Secretary-General has also contributed his good offices in the course of the settlement of a dispute relating to aerial hijacking, i.e., the incident involving Pakistan and Syria, and in attempting to secure the release of the American diplomatic and consular personnel held hostage in Tehran.

114. The good offices of the Secretary-General were also used in the context of the situation relating to Afghanistan, and were provided for in the agreements regarding the settlement of that question concluded in Geneva on 14 April 1988. Thus, the Agreement on the Interrelationships for the Settlement of the Situation Relating to Afghanistan provides in its paragraph 7 as follows:

“A representative of the Secretary-General of the United Nations shall lend his good offices to the Parties and in that context he will assist in the organization of the meetings and participate in them. He may submit to the Parties for their consideration and approval suggestions and recommendations for prompt, faithful and complete observance of the provisions of the instruments.”

It may also be mentioned that, in its resolution 622 (1988) of 31 October 1988, the Security Council confirmed its agreement to the arrangement for the temporary dispatch to Afghanistan and Pakistan of military officers from

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64Annuaire français de droit international, 1972, vol. XVIII, pp. 995 and 996.
69See General Assembly resolution 44/22 of 16 November 1989.
D. Mediation

The concept of mediation involves the use of a neutral third party to facilitate communication and help resolve disputes between parties. The mediator's role is to listen to each party, understand their perspectives, and help them find common ground. Mediation is often used in situations where direct communication between parties is difficult or impossible.

1. Initial Meeting

During the initial meeting, the mediator meets with each party separately to understand their perspectives and concerns. This allows the mediator to gain a comprehensive understanding of the issues at hand and to develop strategies for resolving the conflict.

2. Joint Session

Once the mediator has a clear understanding of the situation, a joint session is held where both parties are present. The mediator facilitiates a discussion between the parties, encouraging them to express their views and listen to each other.

3. Negotiation

Throughout the negotiation process, the mediator acts as a facilitator, helping the parties identify areas of agreement and working towards a mutually acceptable solution. The mediator may offer suggestions, provide information, or propose alternative solutions to help the parties reach a consensus.

4. Conclusion

The mediation process concludes with a written agreement signed by both parties. This agreement outlines the terms of their agreement and serves as a binding commitment to the resolution of the conflict. The mediator plays a critical role in ensuring that the agreement is fair and equitable, and that both parties feel satisfied with the outcome.

In conclusion, mediation is a powerful tool for resolving conflicts. By facilitating open communication and encouraging parties to find common ground, mediators can help individuals and organizations achieve和谐 resolutions that satisfy all involved parties.

125. Of the international instruments mentioned above, only a few contain specific provisions on mediation procedures. The most elaborate provisions are found in part II of both the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes, in which mediation and good offices are treated largely as interchangeable procedures. In contrast, the 1936 Inter-American Treaty, the 1948 Pact of Bogotá and the 1964 OAU Protocol contain provisions which deal with mediation as a distinctive method, establishing its functions and its institutional aspects, without associating it with good offices.

126. Thus, mediation as a method of peaceful settlement is more than an adjunct to negotiations. As can be seen, for example, in the practice of the United Nations, it has emerged to become a distinctive method for facilitating a dialogue between parties to an international dispute, aimed at scaling down hostilities and tensions and for achieving, through a political process controlled by the parties, an amicable solution of an international dispute. A very important, perhaps crucial feature of mediation is that it facilitates for the disputing parties recourse to a peaceful approach to the dispute.

2. Functions

127. Mediation can be resorted to for the purposes of reducing the tension which may have developed in the course of an international dispute, thereby performing a preventive function the importance of which should not be overlooked. Thus, as provided in article 8 of the two 1899 and 1907 Hague Conventions, mediation may be initiated “with the object of preventing the rupture of pacific relations”. The procedure is also resorted to as a method of bringing about a settlement where a dispute has occurred. In such a situation, emphasis is placed on its function of reconciling the opposing claims of the parties and promoting a solution, which could command a measure of satisfaction for the parties. Accordingly, article 4 of the two Hague Conventions provides that “[t]he part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance”. This aspect of reconciling the views of the parties is also the main function of mediation as specified in article XX of the OAU Protocol. The informality with which a mediator is to perform his function was, however, emphasized in article XII of the Pact of Bogotá which provided, in part, as follows: “The functions of the mediator or mediators shall be to assist the parties in the settlement of controversies in the simplest and most direct manner, avoiding formalities and seeking an acceptable solution.”

128. The function of mediation under these circumstances may be aimed at achieving a provisional solution, such as bringing about a cease-fire when fighting has begun or to arrange a permanent solution, thus addressing the basic dispute. All this depends, however, on whether or not the dispute itself is one which is perceived by the parties as amenable to a political settlement, or one which involves legal claims and counter-claims, which can only be unravelled and solved through other peaceful means of settlement.

3. Procedural and institutional aspects

129. Mediation is a procedure which may be set in motion either upon the initiative of a third party whose offer to mediate is accepted by the parties to the dispute, or initiated by the parties to the dispute themselves agreeing to mediation. An offer of mediation may be accepted by a written agreement, for example. In an agreement signed at Montevideo on 8 January 1979, Chile and Argentina accepted the proposal to settle the dispute concerning the implementation of the 1977 Beagle Channel Award through the mediation of Cardinal Antonio Samoré. Mediation cannot be imposed upon the parties to an international dispute without their consent or their acceptance of the particular mediator. As stipulated in article III of the 1936 Inter-American Treaty on Good Offices and Mediation, article XII of the 1948 Pact of Bogotá and article XX of the 1964 OAU Protocol, the mediator or mediators are to be chosen by mutual consent of the parties.

130. Mediation is usually resorted to purely on an ad hoc basis, although it may be carried out in accordance with the provisions of an applicable treaty between the parties to the dispute. Components of the mediation technique, depending on the nature of the dispute, include the communication function, clarification of issues, drafting of proposals, search for areas of agreement between parties, elaboration of provisional arrangements to circumvent or minimize issues on which the parties remain divided as well as alternate solutions, etc., with the primary goal of an early and fundamental resolution of a dispute. It is important to demonstrate to the parties to a dispute that the prospective mediator understands their respective positions, is not biased against any of them and has the necessary skills to perform the function of mediator in the particular dispute.

131. The primary requirements of the procedure are informality and confidentiality (art. XII of the Pact of Bogotá, for example). It should be noted that the political sensitivity of the mediation as a process largely explains the fact that even post factum the parties to a dispute as well as the mediator are often reluctant to place on record except in fairly general terms all the details and nuances of the procedure they went through.

132. The role of a mediator can develop during the settlement process. In the transfer of New Guinea case of 1962, the original role of the
“moderator”, as requested by the then Secretary-General, Mr. U Thant, was that of facilitating and expediting “secret informal talks for the purpose of simply drafting an agenda for formal negotiations”. As time went on, however, the “moderator” realized that, in order to be effective, “it would have been necessary to hammer out the agreement itself at these secret, informal talks”.

133. With respect to composition, the procedure depends upon the type of mediator accepted by the parties to the dispute. Thus, mediation may be undertaken by a single State, by a group of States or within the framework of an international organization such as the United Nations, its specialized agencies, other international organizations, both global or regional, or national organizations and associations or by a prominent individual acting alone or with the advice of an established committee. Within the United Nations, for example, the Security Council (resolution 61 (1948) of 4 November 1948) appointed a committee of the Council to give such advice as the mediator might require with respect to his responsibilities under the resolution. In another instance (resolution 186 (1964) of 4 March 1964) the Security Council recommended that the Secretary-General designate an appropriate mediator to represent him, whereas in a different situation (resolution 123 (1957) of 21 February 1957) the Council requested its own president to examine, with the consent of the parties, any proposals which were likely to contribute towards the settlement of the dispute.

134. On various occasions, the United Nations has thus been involved in mediation efforts, namely: through the Secretary-General, undertaking mediation for the resolution of certain conflicts; or the General Assembly in certain cases recommending to the Security Council to continue the United Nations mediation work (General Assembly resolution 2077 (XX) of 18 December 1965); or the Security Council itself offering a mediation procedure. In one instance, the Security Council urged the parties concerned to accept any appropriate offer of “mediation or conciliation” (resolution 479 (1980) of 28 September 1980), then later urged that the mediation effort be continued in a coordinated manner through the Secretary-General with a view to achieving a comprehensive, just and honourable settlement, acceptable to both sides, of all the outstanding issues, on the basis of the principles of the Charter of the United Nations, including respect for sovereignty, independence, territorial integrity and non-interference in the internal affairs of States (resolution 514 (1982) of 12 July 1982) and further called upon the parties to cooperate with the Secretary-General in the mediation efforts with a view to achieving such settlement (resolution 398 (1987) of 20 July 1987).

135. With respect to duration and termination, it is important to note that mediation is considered as a mode of settlement which, having been tried unsuccessfully, should give way to other peaceful procedures accepted by the parties to an international dispute. In case of necessity, all procedural ques-

136. A time-limit has in some cases been established for the work of mediation. In this connection, article IV of the 1936 Inter-American Treaty provided the following:

“The mediator shall determine a period of time, not to exceed six nor be less than three months for the parties to arrive at some peaceful settlement. Should this period expire before the parties have reached some solution, the controversy shall be submitted to the procedure of conciliation provided for in existing inter-American agreements.”

Another time-limit for mediation was stipulated in article XIII of the 1948 Pact of Bogotá, which reads as follows:

“In the event that the High Contracting Parties have agreed to the procedure of mediation but are unable to reach an agreement within two months on the selection of the mediator or mediators, or no solution to the controversy has been reached within five months after mediation has begun, the parties shall have recourse without delay to any one of the other procedures of peaceful settlement established in the present Treaty.”

137. Apart from establishing the time-limit during which mediation may be undertaken, there are other provisions dealing with the determination as to when the process may be considered terminated. Thus, according to article 5 of the 1899 and 1907 Hague Conventions, “[t]he functions of the mediator are at an end when once it is declared, either by one of the parties to the dispute or by the mediator himself, that the means of reconciliation proposed by him are not accepted.”

4. Outcome of the process

138. It is generally understood that the proposals made by the mediator for a peaceful solution of a dispute are not binding upon the parties. As stipulated in article 6 of the two Hague Conventions, they “have exclusively the character of advice and never have binding force”. Final results of mediation may be embodied in such instruments as an agreement, a protocol, a declaration, a communiqué, an exchange of letters or a “gentleman’s agreement” signed or certified by a mediator or mediators. In the Chaco boundary dispute between Bolivia and Paraguay, for example, the first protocol of agreement of 1935 was witnessed by the mediatory group of Argentina, Brazil, Chile, Peru, Uruguay and the United States, under whose “auspices and moral guaranty” the treaty of peace, friendship and boundaries was signed in 1938. The acceptance by the parties of the “moral guaranty” given by the mediators may result in a further incentive to continue negotiations. As provided in article XXI, paragraph 3, of the OAU Protocol, “[i]f the means of


reconciliation proposed by the mediator are accepted, they shall become the basis of a protocol of arrangement between the parties." Thus the outcome of mediation, though non-binding as such, may be used by the parties to arrive successfully at the settlement of the dispute. Unless otherwise agreed upon, generally no legal obligations arise for the mediator from the solution arrived at by way of mediation. However, there are instances when mediators take on themselves the rendering of further assistance, including that of a financial character, for the implementation of the findings of the mediation, or the guaranteeing of such implementation.

139. In the Indus Basin dispute case between India and Pakistan, for instance, it was first agreed in 1952, through the mediation of the International Bank for Reconstruction and Development, that particular engineering measures should be worked out to increase the water supply in the region. In 1960, then, after intensive negotiations undertaken by the Bank, a treaty was signed by the parties which specifically provided for such a plan, while another agreement concerning the financing of the project was signed by a group of countries and the Bank.89

E. Conciliation

1. Main characteristics, legal framework and relation to other peaceful means under the Charter of the United Nations

140. Parties to an international dispute may agree to submit it to a peaceful settlement procedure which would, on the one hand, provide them with a better understanding of each other’s case by undertaking objective investigation and evaluation of all aspects of the dispute and, on the other hand, provide them with an informal third-party machinery for the negotiation and non-judicial appraisal of each other’s legal and other claims, including the opportunity for defining the terms for a solution susceptible of being accepted by them. They would thus submit the dispute to conciliation, the peaceful settlement procedure which combines the elements of both inquiry and mediation.

141. As a method of peaceful settlement of international dispute between States, conciliation evolved from a series of bilateral treaties concluded in the first decades of the twentieth century. Of considerable importance was the adoption in 1922 by the League of Nations of a resolution encouraging States to submit their disputes to conciliation commissions. Subsequently, a number of multilateral treaties established conciliation as one of the third-party procedures for the settlement of disputes under the treaty, the earliest of which was the 1928 Geneva General Act for the Pacific Settlement of International Disputes (later revised in 1949). On the other hand, in the light of the increasing and successful resort to conciliation after the Second World War, the Institute of International Law recommended that States "wishing either to conclude a bilateral conciliation convention or to submit a dispute which has already arisen to conciliation procedures before an ad hoc Commission" should adopt the rules for the solution of the questions entrusted to the conciliation commissions to be created and to that end, adopted on 11 September 1961 the Regulations on the Procedure of International Conciliation.90

142. The Charter of the United Nations, in its Article 33, paragraph 1, mentions conciliation among the peaceful means for the settlement of disputes to which Member States shall resort. It should also be noted that both the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations and the 1982 Manila Declaration on the Peaceful Settlement of International Disputes refer to conciliation as one of the means that States should use when seeking an early and equitable settlement of their international disputes.


2. Functions

144. Reflecting the trend started by the bilateral treaties and demonstrated in the 1922 resolution of the League of Nations, the 1949 Revised Geneva General Act for the Pacific Settlement of International Disputes included a specific provision on the functions of the conciliation, reading as follows:


“The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of enquiry or otherwise, and to endeavour to bring the parties to an agreement. It may, after the case has been examined, inform the parties of the terms of settlement which seem suitable to it, and lay down the period within which they are to make their decision.” (art. 15, para. 1)

145. A provision dealing specifically with the functions of a conciliation commission in the same terms as above is contained in article 15 of the 1957 European Convention for the Peaceful Settlement of Disputes. Variations of the provision are found in article XXII of the 1948 Pact of Bogotá, in article XXIV of the 1964 OAU Protocol, in paragraphs 4 and 5 of the 1969 Vienna Convention on the Law of Treaties which became a model for subsequent multilateral treaties as reflected in articles 5 and 6 of annex V of the 1982 United Nations Convention on the Law of the Sea. In sum, these treaties give conciliation two basic functions: to investigate and clarify the facts in dispute and to endeavour to bring together the parties to the dispute in order to reach an agreement by suggesting mutually acceptable solutions to the problem.

146. The conciliation procedure, as envisaged under some of the above treaties, is also linked to negotiations by provisions specifically requiring failure of negotiations or consultations to be a precondition for initiating conciliation.93 There is also a series of treaties which specifically provide that, before a dispute may be submitted to any of the adjudicatory procedures (arbitration or judicial settlement by pre-established international courts), the parties to the dispute may first submit it to conciliation.94 In this context, conciliation is stipulated as a condition precedent to the judicial procedures, thus establishing the link between conciliation on the one hand and arbitration and judicial procedures on the other. An exception to such a link may, however, be noted in a treaty where it was equally specified that the parties to a dispute “may agree to submit it to an arbitration without prior recourse to the procedure of conciliation”.95

93 See, e.g., the Geneva General Acts of 1928 and 1949, article 1, both referring to “diplomacy”, the Pact of Bogotá, article II, referring to “negotiation”, the 1975 Vienna Convention on the Representation of States in their relations with International Organizations of a Universal Character, article 85, mentioning “consultations”, the 1978 Vienna Convention on Succession of States in respect of Treaties, articles 41 and 42, mentioning both “consultation and negotiation”.

94 The provisions making submission of an international dispute to a conciliation a precondition to its submission to the International Court of Justice include: article IV of the Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes, Done at Geneva on 29 April 1958, article III of Optional Protocol Concerning the Compulsory Settlement of Disputes, Done at Vienna, on 18 April 1961, article III of Optional Protocol Concerning the Compulsory Settlement of Disputes, Done at Vienna, on 24 April 1963, and article III of Optional Protocol Concerning the Compulsory Settlement of Disputes, General Assembly resolution 2530 (XXIV), annex United Nations registration No. A.23431.

95 See the 1957 European Convention for the Peaceful Settlement of Disputes, article 4, paragraph 2, United Nations, Treaty Series, vol. 520, p. 102, at p. 246.

3. Application of the method

147. A number of conciliation commissions were established to deal with certain cases pursuant to the bilateral treaties since 1922 and also under the 1928 Geneva General Act. Among these are, for example, the 1929 Chaco Commission, set up under the Inter-American General Convention of Conciliation; the 1947 Franco-Siamese Commission, set up in accordance with the 1928 Geneva General Act; the 1952 Belgian-Danish Commission established under the 1927 bilateral treaty between the parties; the 1955 Franco-Swiss Commission established under the 1925 bilateral treaty between the parties; and the 1956 Italo-Swiss Commission pursuant to the 1924 bilateral treaty between them. Other conciliation commissions established on an ad hoc basis by parties to a dispute include, for example, the 1958 Franco-Moroccan Commission and, more recently, the 1981 conciliation commission between Norway and Iceland in the Jan Mayen dispute.

148. The use of conciliation has also been encouraged in the United Nations. Thus, outside the framework of the multilateral treaties concluded under its auspices, by its resolution 194 (III) of 11 December 1948, the General Assembly established a Conciliation Commission for Palestine. On 28 April 1949 the General Assembly adopted resolution 268 D (III), by which it provided for the creation of a panel for inquiry and conciliation as an instrument to facilitate the compliance by Member States with the obligation under Article 33 of the Charter of the United Nations. It should also be mentioned that, within the framework of the United Nations operation in the Congo, the General Assembly, in its resolution 1474 (ES-IV) of 20 September 1960, requested the Advisory Committee on the Congo to appoint, in consultation with the Secretary-General, a conciliation commission for the Congo.

The commission, which was composed of representatives of some African and Asian countries,94 carried out its mission from 1960 to 1961. Again in 1961, the General Assembly, by its resolution 1600 (XV) of 15 April 1961, decided to establish a Commission of Conciliation for the Congo, and therefore the President of the General Assembly appointed the members of the commission.95 However, the Government of the Congo never called on the commission to perform the function for which it was created. The Assembly also recommended in its resolution 35/52 of 4 December 1980 the use of the Conciliation Rules of the United Nations Commission on International Trade Law in cases where a dispute arose in the context of international commercial relations and the parties sought an amicable settlement of that dispute by recourse to conciliation.

149. As is shown in the above-mentioned international instruments and as follows from practice and as a result of recent improvements on aspects of its institutional arrangements, it may be observed that conciliation has evolved into a method which now has two distinctive characters. There is first of all the traditional conciliation procedure, reflected in the earlier treaties,
which leaves conciliation as an optional, third-party procedure, and then there is the newer conciliation procedure which emerged in the 1969 Vienna Convention on the Law of Treaties and was further refined in the 1982 United Nations Convention on the Law of the Sea; both Conventions seek to make the resort to the conciliation procedure itself compulsory.

4. Institutional and related aspects

(a) Composition

150. In the various multilateral treaties establishing a conciliation commission, provisions are made for the appointment generally of an odd number of conciliators: usually a five-member commission but sometimes a three-member commission. Each party to the dispute has then the right to appoint either one of the three conciliators or two of the five conciliators, as the case may be. The third or the fifth conciliator, who is also often designated chairman, is normally appointed by a joint decision of the two parties to the dispute and, in some cases, by a joint decision of either the two or the four conciliators already appointed by the parties. Where difficulties arise in the appointment of either the third or the fifth member, thus preventing the completion of the composition of a commission, the parties may assign the right of making the necessary appointment in such a case to a third party, usually a prominent individual. All these provisions take into account the requirement that the parties to the dispute may not have more than one, or a designated number, of their respective nationals appointed to the commission.

151. There are also certain variations in the actual composition and procedure for the appointment of a conciliation commission on the basis of a list of conciliators established and maintained, pursuant to a treaty provision creating permanent conciliation commissions. As mentioned in paragraph 148 above, the usefulness of such a list was endorsed by the General Assembly in its resolution 268 D (III) of 28 April 1949. Both the 1948 Pact of Bogotá and the 1964 OAU Protocol established such a list. The process of establishing and maintaining a permanent list would then ensure that only individuals possessing the necessary qualifications for dealing with the types of disputes likely to arise under a particular treaty are included.

152. Of the multilateral treaties, the 1969 Vienna Convention on the Law of Treaties included an annex on conciliation whose paragraphs 1 and 2 are relevant to the question of the composition of a conciliation commission on the basis of a pre-constituted list of specified types of experts. The two paragraphs read as follows: 97

96 But see article 7 of the European Convention which provides that, in such a case, appointment should be tried first by a third State, failing which it should be made by the President of the International Court of Justice.

97 Compare in this connection a more elaborate provision on conciliation in section 2 of annex V of the 1982 United Nations Convention on the Law of the Sea, articles 1-3, based on the above model. (The Convention is not yet in force; reference to it throughout the present handbook recognizes its current status.)

“1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

“2. When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

“(a) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

“(b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

“The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

“The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

“If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to that dispute.

“Any vacancy shall be filled in the manner prescribed for the initial appointment.”

153. The above text established the trend in which attempts are made to avoid the institutional problems of the traditional conciliation whose composition is largely left in the hands of the parties to the dispute through direct appointment of the conciliators. The traditional conciliation thus remains a process which may be brought to an end or prevented from being set in motion, for example, simply by one of the parties to the dispute declining to respond to the invitation of the other party to constitute a conciliation commission. In contrast, the trend contained in the above text permits the constitution of the commission to be undertaken by a third party, namely, the Secretary-General of the United Nations using the list of conciliators he is required to maintain.
(b) Initiation of the process

154. A conciliation procedure may be set in motion in two ways: either by mutual consent of the States parties to an international dispute, on an ad hoc basis, relying upon a treaty in force between them and creating an obligation to settle such dispute by peaceful means; or in accordance with the terms of an applicable treaty which either specifies the details of how an ad hoc conciliation may be constituted thereunder or establishes a permanent conciliation commission within the treaty itself.

155. The treaties addressing the details of the conciliation procedure will invariably make the important choice as to whether the initiation of the process and the establishment of a conciliation commission should only be by mutual consent of the parties to the dispute or whether the procedures of the conciliation commission may be invoked by an action of only one of the parties to the dispute. The first choice is reflected in the traditional mode of conciliation, which is completely optional. The second choice, which is aimed at setting in motion a conciliation procedure through an independent compulsory process relying upon the request of only one party, reflects the newer trend started in the 1969 Vienna Convention on the Law of Treaties. The trend was refined in the 1982 United Nations Convention on the Law of the Sea, in which the traditional conciliation in article 284 and section 1 of annex V to the Convention is clearly distinguished from section 2 of the annex, specifically providing that any party to a dispute invited to submit to the conciliation procedure, as established under the relevant part of the Convention, "shall be obliged to submit to such proceedings" and that "failure of a party or parties to the dispute to reply to notification of institution of proceedings or to submit to such proceedings shall not constitute a bar to the proceedings". Attention must however be drawn to the fact that, under this approach, it is the resort to the procedure which is compulsory. The outcome of the conciliation itself remains non-binding, as in the traditional approach. The Law of the Sea Convention accordingly provides the parties with option to use the traditional conciliation or the new "compulsory" conciliation.

(c) Rules of procedure and methods of work

156. With respect to the question of rules of procedure, most of the treaties simply provide that the commission "shall decide its own procedure" or that the commission shall, "unless the parties otherwise agree, determine its own procedure". While the treaties do not thus include detailed rules of procedure for the commission, most of them address the question of decision-making. They provide that the decision of the commission on procedural matters and on other matters such as its report and recommendations shall be made by a majority vote of its members.

157. The Regulations on the Procedure of International Conciliation,98 referred to in paragraph 141 above, provide that the Commission will name its Secretary at its first meeting and will determine the rules of procedure, in particular the question of the submission by the parties of written pleadings as well as the question of the time and the place where the agents and counsel of the parties, as the case may be, should be heard.

158. As to the method of work, it should be recalled that conciliation combines elements of fact-finding and that it would accordingly rely upon certain techniques for gathering and evaluating the facts giving rise to the dispute. Thus in all treaties establishing conciliation as a third-party procedure there are provisions giving the commission the right to hear the parties, to examine their claims and objections and make proposals for an amicable solution or to draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement. In carrying out its functions, the commission may also summon and hear witnesses and experts and visit, with the consent of the parties, the localities in question. Other provisions provide also the right of the parties to the dispute to be represented before the commission by agents, counsel and experts appointed by them, while also being required to supply the commission with the necessary documents and information which would facilitate its work. Some treaties provide that, unless the parties otherwise agree, the work of the commission is not to be conducted in public.99 If a commission is able to conclude its work, it would prepare and submit a formal report containing its recommendations. Where it has not been able to reach a settlement, the commission is still expected, under certain treaties to prepare the minutes of its proceedings or proces-verbaux in which no mention shall be made as to whether the commission's decisions were taken unanimously or by a majority vote.100 In certain treaties, there are provisions allowing conciliators to submit separate opinions if necessary.

(d) Duration and termination

159. Consistent with its function as a method capable of bringing about an amicable settlement of the dispute referred to it or with its function of providing the necessary link between the non-judicial and the judicial procedures where so required, conciliation should be expected to reach its desired result within a reasonable time. Thus, as to duration, various time-limits within which a conciliation commission is expected to conclude its work have been stipulated. A six-month duration is common in earlier multilateral treaties; 12 months is now the duration of conciliation found in recent multilateral treaties influenced by the 1969 Vienna Convention on the Law of Treaties, annex, paragraph 6.

160. Since a conciliation commission may indeed conclude its work before the fixed time-limit or may, with the consent of the parties, extend its

98See Regulations on the Procedure of International Conciliation of 1961, supra, note 90, article 4.

99Apart from the Geneva General Acts, article 10, and the 1957 European Convention, article 11, neither the 1948 Pact of Bogota, the 1964 OAU Protocol nor most of the recent multilateral conventions modelled after the conciliation procedure of the 1969 Vienna Convention on the Law of Treaties address this aspect of the commission’s method of work.

100Geneva General Acts of 1928 and 1949, article 15, paragraph 2; and the 1957 European Convention, article 15, paragraph 2. See also the 1948 Pact of Bogota, article XXVII, calling for the preparation of a summary of the work of the commission in case it receives no settlement.
work beyond the fixed time-limit, it is important to establish when the process may be said to have been terminated, thus opening the way, if a settlement has not been reached, for the other means for the settlement of the dispute under a treaty. While the earlier multilateral treaties and those modelled after the annex to the 1969 Vienna Convention on the Law of Treaties do not address the question of termination of conciliation, the issue was taken up in the 1982 United Nations Convention on the Law of the Sea, which contains in its annex V, article 8, the following provision:

“The conciliation proceedings are terminated when a settlement has been reached, when the parties have accepted or one party has rejected the recommendations of the report by written notification addressed to the Secretary-General of the United Nations, or when a period of three months has expired from the date of transmission of the report to the parties.”

(e) Expenses and other financial arrangements

161. Taking into account the administrative expenses that may be provided free by virtue of using existing secretariats, all the other expenses connected with the functioning of conciliation commissions are to be borne by the parties to the dispute. In most of the treaties, it is stipulated that such expenses shall be divided equally, while in others the manner in which the expenses are to be borne by the parties is left open. Since the 1969 Vienna Convention on the Law of Treaties is silent on this point, it is important to note that the Secretary-General of the United Nations has since addressed the question in connection with conciliation under the treaty. He has indicated that no honorariums could be paid by the United Nations to members of commissions unless the General Assembly specifically so decided and that he interpreted the expression “expenses of the Commission” to mean “the expenses involved in the functioning of the conciliation commission as a body”, which would include travel and subsistence costs of members, the provision of a meeting place and of the necessary secretariat services for the meetings, but would not include expenses before a commission is constituted or after it has finished its work, or the individual expenses of the parties (travel, subsistence and honorariums of their agents and counsel and of witnesses called by them, cost of preparation of written pleadings in the language of submission, etc.).

(f) Venue and secretariat of the commission

162. Unless a conciliation commission is permanently created under a treaty in which its seat or secretariat is also established, an ad hoc commission may meet at the place selected by the parties to the dispute or by its chairman, as may be agreed. In such cases, the venue of the commission could be the alternate capitals of the parties to the dispute or other places within their alternate territories, or perhaps in some neutral place in a third State. All these possibilities would take into account, among other things, the need to have available the necessary facilities which would enable the commission to perform its task with minimum difficulties.

163. While the permanent commissions may normally use their designated seats, they are also free, for reasons of practicality, to decide to meet at another place in connection with a given case. In making their choices, account should be taken of the fact that the lack of an efficient administrative secretariat, i.e., an administrative machinery on which a commission could rely, may hamper its work. The question of a secretariat may thus loom large in the case of ad hoc commissions. However, those created under the auspices of global or regional international organizations would normally avail themselves of secretariat arrangements which the organization may provide.

5. Termination and outcome of the process

164. It is well established that the results of a conciliation process are normally in the form of non-binding recommendations to the parties to the dispute. Thus the 1969 Vienna Convention on the Law of Treaties codified the practice in paragraph 6 of its annex establishing conciliation which reads, in part, as follows:

“The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.”

165. Certain treaties have, however, subsequently departed from the above practice by either introducing variations to it or by giving the outcome of conciliation a binding character. Thus, the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character has the following provision in its article 85, paragraph 7, on the outcome of the conciliation procedure:

“The recommendations in the report of the Commission shall not be binding on the parties to the dispute unless all the parties to the dispute have accepted them. Nevertheless, any party to the dispute may declare unilaterally that it will abide by the recommendations in the report so far as it is concerned.” (emphasis added)

166. Another variation is found in the 1985 Vienna Convention for the Protection of the Ozone Layer, providing that: “The Commission shall render a final and recommendatory award, which the parties shall consider in good faith” (emphasis added). Thus, the results of the commission may be seen as having some legal effects since they are in the form of recommendations which the parties are required to consider in good faith.

167. A complete departure from the model provided for in the Vienna Convention on the Law of Treaties is, however, found in the 1981 Treaty establishing the Organization of Eastern Caribbean States, which created a conciliation procedure whose recommendations are compulsory and binding. Thus, paragraph 3 of article 14 of the Treaty provides that “Member States undertake to accept the conciliation procedure referred to in the preceding
paragraph as compulsory. Any decisions or recommendations of the Conciliation Commission in resolution of the dispute shall be final and binding on the Member States". Moreover, in the annex establishing conciliation as the procedure for settlement of dispute under the treaty, paragraph 6 reads, in part, that "[t]he report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall be binding upon the parties".

F. Arbitration

1. Main characteristics and legal framework

168. The 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes described the object of international arbitration as the settlement of disputes between States by judges chosen by the parties themselves and on the basis of respect for law. They further provided that recourse to the procedure implied submission in good faith to the award of the tribunal. Accordingly, one of the basic characteristics of arbitration is that it is a procedure which results in binding decisions upon the parties to the dispute.

169. The power to render binding decisions is, therefore, a characteristic which arbitration shares with the method of judicial settlement by international courts whose judgements are not only binding but also, as in the case of the International Court of Justice, final and without appeal, as indicated in article 60 of the I.C.J. Statute. For this reason, arbitration and judicial settlement are both usually referred to as compulsory means of settlement of disputes.

170. However, while both arbitration and judicial settlement are similar in that respect, the two methods of settlement are nevertheless structurally different from each other. Arbitration, in general, is constituted by mutual consent of the States parties to a specific dispute where such parties retain considerable control over the process through the power of appointing arbitrators of their own choice. By contrast, judicial settlement relies upon pre-constituted international courts or tribunals, the composition of which is not to the same extent subject to control by the parties to the dispute.

171. For the purposes of the present handbook, the study of arbitration has been limited to the study of such institutions established between States, in which States plead directly; and between States and international organizations.104

172. Apart from the 1899 and 1907 Hague Conventions, arbitration, as a means of peaceful settlement of disputes between States, is provided in a number of multilateral treaties of global or regional character and also in a number of bilateral treaties.105 Arbitration has thus emerged as one of the third-party procedures most frequently chosen for settling, for example, territorial and boundary disputes,106 disputes concerning interpretation of bilateral or multilateral treaties,107 and those relating to claims of violation of international law.108 It may be observed in this connection that both the 1899

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104There are other types of arbitration tribunals to which States as well as their nationals have access to, and in which they are allowed to submit claims. These tribunals were in general referred to as Mixed Arbitration Tribunals. An early and perhaps the most important example of this type of tribunal is the Mixed Arbitral Tribunals set up after the First World War by the Treaty of Versailles, Article 304, see Recueil des décisions des Tribunaux arbitraux mixtes 1922-1930, 10 vols.


105See generally provisions of treaties summarized in United Nations, Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1925-1948 (United Nations publication, Sales No. 49.V3) and A Survey of Treaties for the Settlement of International Disputes, 1949-1962 (United Nations publication, Sales No. 66.V3) (1968). Other provisions on arbitration are found in, for example, the series of treaties contained in the International Law Commission, 4th ed., (United Nations publication, Sales No. E.88.V1).

106See, e.g., the Rann of Kutch arbitration (India v. Pakistan) in Reports of International Arbitral Awards, vol. XVII (United Nations publication, Sales No. E.P80.V2) (hereinafter referred to as UNIAAA), Argentina-Chile frontier case, UNIAAA, vol. XVI, pp. 109-181; the case concerning the delimitation of the continental shelf between the United Kingdom and France, ibid., vol. XVIII, pp. 3-129; the Beagle Channel arbitration between Chile and Argentina, in International Law Reports, vol. 52, p. 93; Lake Llanquihue arbitration, ibid., vol. 52, p. 101; Venezuela-British Guiana Boundary Arbitration (Venezuela v. Great Britain), in British and Foreign State Papers, vol. 92, 1899-1900, p. 16, the Alaska Boundary case (Great Britain v. United States), ibid., vol. XV, pp. 481-540; the Wolfish Bay Boundary case (Germany v. Great Britain), ibid., vol. XI, pp. 263-308; the Boundary case between Costa Rica and Panama, ibid., pp. 519-547; Andrés Boundary case (Argentina v. Chile), ibid., vol. IX, pp. 29-49.


108See, for example, The Alabama claims (United States v. United Kingdom), Moore, History and Digest of the International Arbitration to which the United States has been a party (1898), vol. I, p. 653; the Trail Smelter arbitration (United States v. Canada), UNIAAA, vol. III, pp. 1907-1982; Lake Llanquihue arbitration (France v. Spain), ibid., vol. XII, pp. 281-317. See also, generally, the cases contained in UNIAAA, vols. I-IX.
and the 1907 Hague Conventions established the Permanent Court of Arbitration to facilitate the settlement of disputes which diplomacy had failed to settle,109 while the American Treaty on Pacific Settlement (Pact of Bogotá) of 30 April 1948 provided that States parties might, if they so agree, submit to arbitration "differences of any kind, whether judicial or not."110

173. There are, however, types of disputes which States have excluded from arbitration constituted under a particular treaty, such as disputes arising from facts or events which occurred prior to the treaty establishing the arbitral procedure in question,111 disputes relating to questions which are within the exclusive jurisdiction of a State,112 disputes which concern the territorial integrity of a State,113 disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service,114 and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it in the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by another peaceful procedure.115

2. Institutional and related aspects

(a) Types of arbitration agreements

174. Consent of the parties to arbitration may be expressed prior to or after the occurrence of a dispute. Parties may agree to submit all or special categories of future disputes to arbitration. Such commitment may be made in multilateral or bilateral treaties entirely devoted to the peaceful settlement of disputes.116 A more common method is by inclusion of a compromisary clause in a treaty, by which parties agree to submit all or part of their future disputes regarding that treaty to arbitration. Parties may also agree to go to arbitration by a special agreement or a compromis after the occurrence of a dispute.

175. A compromisary clause is a provision in a treaty which provides for the settlement by arbitration of all or part of the disputes which may arise in regard to the interpretation or application of that treaty. Many compromisary clauses are drafted in general terms.117 The compromisary clauses, while expressing the consent of the parties to submit all or certain types of disputes to arbitration, generally lack specificity as to the rules of establishment and operation of the tribunal. To submit a dispute to arbitration under a compromisary clause, the parties usually need to conclude a special agreement (compris).

176. The special agreements (compris) are however more comprehensive because they deal with the constitutional aspects of the arbitral tribunal being set up. Thus in a compromis the parties to the dispute may deal with the following issues:118 the composition of the tribunal, including the size and the manner of appointments and the filling of vacancies; the appointment of agents of the parties to the dispute; the questions to be decided by the tribunal; the rules of procedure and method of work of the tribunal including, where applicable, the languages to be used; the applicable law; the seat and administrative aspects of the tribunal, the financial arrangements for the expenses of the tribunal and the binding nature of the award of the tribunal and obligations and rights of the parties relating thereto.

177. While the above is only illustrative of the issues to be covered by a compromis as a minimum, the degree of their incorporation in a compromis differs in each case as decided by the parties to a dispute. Thus, some compromis are silent on the question of applicable law,119 while others include provisions concerning privileges and immunities of the members of the arbitral tribunal,120 and yet others address the question of interim arrangements.

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109Article 38 of the 1907 Hague Convention. The 1899 and the 1907 Conventions established the Permanent Court of Arbitration, which still exists and has its seat at The Hague. It has an International Bureau serving as a Registry for the Court. As provided in articles 21 and 42 of the two Hague Conventions, respectively, "The Permanent Court is competent for all arbitration cases, unless the parties agree to institute a special tribunal". Membership of the Court is constituted by a general list to which each Contracting Party to the Conventions has the right to nominate four individuals as arbitrators.

110See article XXXVIII of the Pact of Bogotá, supra, note 34, at p. 96.

111See, e.g., the relevant provisions of the treaties in Systematic Survey, supra, note 105, pp. 23 and 24.

112Ibid., pp. 32-34.

113Ibid., p. 34.


116One of the well-known multilateral general dispute settlement agreements is the Hague Convention for the Pacific Settlement of International Disputes of 18 October 1907. It was one of the more successful first attempts to design a multilateral convention aimed specifically at proposing a variety of means and procedures for the peaceful settlement of disputes. The Convention established a system of arbitration for which new agencies were created. The most important part of the Convention was devoted to the organization and the operation of the Permanent Court of Arbitration. The Permanent Court was created with the object of facilitating an immediate recourse to arbitration of international disputes which could not be settled by diplomacy.

117The Revised General Act for the Pacific Settlement of International Disputes of 1949 is another important multilateral general dispute settlement agreement. Chapter III is devoted to arbitration. The chapter provides a system for the establishment of the tribunal, including the mode of appointment and number of arbitrators, the cases of vacancies and so forth. Under article 21 of the Revised General Act the parties may agree to a different mode of establishing the tribunal. See United Nations, Treaty Series, vol. 71, p. 101.

118An example of a bilateral treaty wholly devoted to the peaceful settlement of disputes is the Treaty for Conciliation, Judicial Settlement and Arbitration (with annexes) between the United Kingdom of Great Britain and Northern Ireland and Switzerland, signed at London on 7 July 1965. Chapter IV of the Treaty is devoted to arbitration. It sets out the number of arbitrators, their nationality and their appointment. It also deals with the question of vacancy and the scope of the competence of the arbitral tribunal. The annex to this Treaty contains recommended rules of procedure for the arbitration tribunal that the parties may wish to choose. Under article 15 of the Treaty the parties may agree to a different mode of establishment of the arbitral tribunal. See ibid., vol. 605, p. 205.

119For some examples of compromisary clauses, see Systematic Survey, supra, note 105.


118See also paragraphs 178-195 below.

for preserving the respective rights of the parties to the dispute, pending the conclusion of the work of the arbitral tribunal in question.\textsuperscript{121} Some \textit{comprisom} are brief and contain only essential elements without dealing with administrative and financial aspects of the tribunal, its method of work or rules of procedure.\textsuperscript{122} However, there are recent examples of more elaborate ones, such as the \textit{Comprisom} of 10 July 1975 between France and the United Kingdom concerning the delimitation of the continental shelf\textsuperscript{122} and the Compromis of arbitration of 11 July 1978 between the United States and France concerning an Air Service Agreement.\textsuperscript{124}

(b) \textbf{Composition}

178. Arbitration as a third-party procedure may be performed by one individual, appointed by the parties to the dispute, as a sole arbitrator or umpire,\textsuperscript{125} or by a group of individuals appointed to form an arbitral tribunal.\textsuperscript{126} In most cases establishing an arbitration tribunal, an odd number of arbitrators is usually provided: some require five arbitrators\textsuperscript{127} while the most common practice has been arbitral tribunals of three members.\textsuperscript{128} Each party to the dispute has then the right to appoint either one of the three arbitrators, or two of the five arbitrators as the case may be. The third or the fifth arbitrator, who is also often designated chairman, is normally appointed by a joint decision of the parties to the dispute and, in some cases, by a joint decision of the respective arbitrators already appointed by the parties. Where difficulties arise in the appointment of either the third or the fifth member, thus preventing the completion of the composition of the tribunal, the parties to the dispute may assign the right of making the necessary appointment in such a case to a third State, or a prominent individual.\textsuperscript{129} The provisions on the composition of the tribunal that stipulate the period within which the individuals assigned the duty to make such necessary appointments have to discharge the duty (e.g., within 60 days from the date of reference of the dispute to arbitration)\textsuperscript{130} and also the time period within which the parties to the dispute are required to make their respective initial appointments to the tribunal (e.g., 30 days from the same date of reference of the dispute to arbitration)\textsuperscript{131} in accordance with terms of the applicable treaty. The provisions also address the questions of filling any vacancy which may occur in the tribunal and usually stipulate that such vacancies are to be filled in the same manner as the initial appointment.\textsuperscript{132}

\textsuperscript{121}See, e.g., the \textit{Compromis} of 16 July 1930 regarding the boundary dispute between Guatemala and Honduras, article 16, in UNIRAA, vol. II, p. 1312; the \textit{Compromis} of 1 July 1978 between the United States and France in the case concerning the air service agreement, paragraph 3, in ibid., vol. XVIII, p. 421, at p. 422.\textsuperscript{122}See, e.g., the \textit{Compromis} of 20 March 1899 relating to the arbitration between Guatemala and Mexico, UNIRAA, vol. XV, p. 27. Others were designated as protocol. See, e.g., ibid., pp. 51 and 52.\textsuperscript{123}See, ibid., vol. XVIII, p. 3, at pp. 5-7.\textsuperscript{124}Ibid., p. 417, at pp. 421-423.\textsuperscript{125}See, e.g., the appointment of the King of Italy as the sole arbitrator under the treaty of 6 November 1901 between the United Kingdom and Brazil regarding the boundary dispute between British Guiana and Brazil, in ibid., vol. XII, p. 17; and \textit{The Island of Palmas} in ibid., vol. II, p. 830. Some multilateral conventions have also provided for a single arbitrator, e.g., the Convention on the International Hydrographic Organization of 3 May 1957, article XVII, in United Nations, \textit{Treaty Series}, vol. 751, p. 41; the European Agreement concerning an Aeronautical Satellite Programme of 9 December 1971, article 13, in ibid., vol. 906, p. 3 and the Agreement for the establishment of the Caribbean Meteorological Organization of 19 October 1973, article 23, in ibid., vol. 946, p. 453.\textsuperscript{126}There is no limit on the number of arbitrators. The parties may agree on as many arbitrators as they wish.\textsuperscript{127}See, e.g., Geneva General Act for the Pacific Settlement of International Disputes, article 22, League of Nations, \textit{Treaty Series}, vol. 93, p. 345. See also, e.g., the agreement between the United Kingdom and France of 10 July 1975 regarding the establishment of an arbitration tribunal for the resolution of the Continental Shelf boundary disputes in the English Channel providing for a court of arbitration consisting of five members: one member appointed each by France and the United Kingdom, and three neutral members, UNIRAA, vol. XVIII, p. 5, article 1 of the \textit{compromis}. The \textit{compromis} of 11 September 1986 between Egypt and Israel regarding their boundary dispute in the Taba beachfront established a five-member tribunal. Each party appointed one member and the three other members, one of which was the president, were appointed by the parties jointly. See article 1 of the \textit{compromis}, \textit{International Law Materials}, vol. 11, p. 1. See also Agreement on Safeguards under the Non-Proliferation Treaty on 5 April 1973, article 22, United Nations, \textit{Treaty Series}, vol. 1008, p. 1; the 1982 United Nations Convention on the Law of the Sea, annex VII, article 3, and annex VIII, article 3, \textit{ibid.}, note 114, pp. 150 and 153 respectively.\textsuperscript{128}See, e.g., \textit{International Convention for the Protection of New Varieties of Plants} of 2 December 1961, article 36, \textit{ibid.}, vol. 815, p. 89; Protocol on Privileges and Immunities of the European Space Research Organization of 31 October 1963, article 27, \textit{ibid.}, vol. 805, p. 279; the International Convention for the Prevention of Pollution from Ships of 2 November 1973, Protocol 2, article 3, \textit{International Law Materials}, vol. 11, p. 1441; and the first two Lomé Conventions between the European Economic Community and the African, Caribbean and Pacific Countries: article 81 of the First Lomé Convention of 28 February 1971, \textit{ibid.}, vol. 14, p. 604, and article 176 of the Second Lomé Convention of 1 October 1979, \textit{ibid.}, vol. 19, p. 376.\textsuperscript{129}See, e.g., article 45 of the 1907 Hague Convention for the Pacific Settlement of International Disputes, in which the task is assigned to a third State, and article 23 of the 1949 Revised General Act for the Pacific Settlement of International Disputes, in which that appointment task is first assigned to a third State and then to the President of the International Court of Justice. The President of IJC is alone provided in article 21 of the 1957 European Convention for the Peaceful Settlement of Disputes. Under the 1982 United Nations Convention on the Law of the Sea, annex VIII, article 3 (e), the appointment is to be made by a third State first and then by the Secretary-General of the United Nations.

There may be cases where one party to a dispute refuses to appoint its arbitrator and therefore prevents the composition of the tribunal. See the analysis of such a situation and the opinion of the International Court of Justice in the second phase of the \textit{Interpretation of Peace Treaties, I.C.J. Reports 1950}, pp. 228 and 229; and the advisory opinion of the International Court of Justice in the \textit{Applicability of the Obligation to Arbitrate under section 21 of the United Nations Headquarters Agreement of 26 June 1947, I.C.J. Reports 1988}, p. 12. To remedy this impasse, an alternative appointing authority may be chosen. This would allow the appointment to be made by the appointing authority if one party fails to appoint its member within a specified period of time.\textsuperscript{130}United Nations Convention on the Law of the Sea, annex VII, article 3, and annex VIII, article 3.\textsuperscript{131}Ibid.\textsuperscript{132}Ibid.\textsuperscript{133}See articles 15 and 37 respectively of the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes. See also the 1982 United Nations Convention on the Law of the Sea, annex VII, article 2, and annex VIII, article 2. The list referred to in annex VII is for the arbitral tribunal composed of judges or prominent international lawyers, while that in annex VIII is for a special arbitral tribunal composed of individuals who are not necessarily lawyers but experts in the subject-matter of the law of the sea dispute.
stituted list. In both types of arbitrations, however, the question of nationality and the qualifications of arbitrators are usually addressed. In some cases, the parties stipulate in the arbitration agreement specific qualifications of the individuals appointed as arbitrators.

(c) Rules of procedure

180. Some compromis, after specifying certain rules of procedure, leave the determination of the remaining procedural questions entirely to the arbitration tribunal. For example, one compromis provided that “the Tribunal shall, subject to the provisions of this compromis, determine its own procedure and all questions affecting the conduct of the arbitration.” Another compromis granted a broad competence to the arbitrator in the determination of its own rules of procedure. It provided that “the arbitrator shall decide any questions of procedure which may arise during the course of the arbitration.” Similarly, a broad competence was provided for another tribunal. The compromis of that tribunal stated that “the Court shall, subject to the provisions of this Agreement, determine its own rules of procedure and all questions affecting the conduct of the arbitration.” Another formulation of a broad language is found in a compromis which read: “The arbitrator shall have the necessary jurisdiction to establish procedure and to dictate without any restriction whatsoever other resolutions which may arise as a consequence of the question formulated, and which, in conformity with his judgement, may be necessary to expedite to fulfill in a just and honourable manner the purposes of this Convention.” Some compromis, on the other hand, have used a more restrictive language in granting full competence to the tribunal to set rules of procedure. For example, one compromis, after specifying rules of procedure for the arbitration tribunal, provided that “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.” Another agreement instructs the tribunal to ascertain the views of the parties before determining a particular rule of procedure.

(d) Applicable law

181. Parties to an arbitration may agree on the law that the tribunal should apply to their disputes. Some arbitration agreements require that specific rules be applied and some only make a general reference to the applicable law. Many arbitration agreements specifically stipulate international law as the applicable law, and some call for the application of the principles of international law. Some arbitration agreements have remained silent on this issue. In such cases, a solution has been recommended in article 28 of the 1949 Revised General Act. Accordingly, if nothing is laid down in the arbitration agreement on the law applicable to the merits of the dispute, the tribunal should apply the substantive rules enumerated in article 38 of the Statute of the International Court of Justice.

182. Still other arbitration agreements have chosen principles of equity, justice, equitable solution, etc., as applicable to the dispute. The application of these principles is recommended by article 28 of the 1949 Revised General Act as the last resort, where there is no applicable law as enumerated in Article 38 of the Statute of the Court. Article 28 of the Revised General Act reads:

“If nothing is laid down in the special agreement or no special agreement has been made, the Tribunal shall apply the rules in regard to the substance of the dispute enumerated in Article 38 of the Statute of the International Court of Justice. In so far as there exists no such rule applicable to the dispute, the Tribunal shall decide ex aequo et bono.”

(e) Methods of work and proceedings before the tribunal

183. Parties to a dispute submitted to an arbitral tribunal are represented by agents whose appointment and powers may be stipulated in the compromis indicating the time-period within which they are to be appointed.

134See, e.g., article 22 of the 1928 Geneva General Act for the Pacific Settlement of International Disputes.

135Compare article 2 (1) of annex VII and article 2 (3) of Annex VIII of the 1982 United Nations Convention on the Law of the Sea and articles 23 and 44 of the 1899 and 1907 Hague Conventions respectively.


137Article 5 of the Compromis of 23 January 1925 between the United States and the Netherlands regarding the Island of Palmas case, ibid., vol. II, p. 829.

138See article 3 of the Compromis of 10 July 1975 between France and the United Kingdom regarding the delimitation of their continental shelf, ibid., vol. XVIII, p. 5.


agents are usually entitled to nominate an assistant agent as occasion may require, and may be further assisted by such advisers, counsel and staff as the agent deems necessary.

184. The agents of the parties to the dispute file written pleadings which may be limited to memorials and counter-memorials and which may be submitted in the order and within the time-limits determined by the Tribunal. Such determination may also be made by the tribunal with respect to the oral proceedings and relevant documentary evidence. Thus, in the compromis relating to the arbitration of a boundary dispute, the following was stipulated:

"The Court of arbitration shall, subject to the provisions of the present Agreement (Compromiso), after consultation with the Parties, determine the order and dates of the delivery of written pleadings and maps and all other questions of procedure, written and oral, that may arise. The fixing of the order in which these documents shall be delivered shall be without prejudice to any question or of burden of proof." 152

185. With respect to the question of documentary evidence, article 75 of the 1907 Hague Convention provided that "the parties undertake to supply the tribunal, as fully as they consider possible, with all the information required for deciding the dispute." 153

186. As appropriate, arbitral tribunals have also heard witnesses on behalf of parties to the dispute and have also made use of expert witnesses providing expert opinion to the tribunal in a given issue, as may be explicitly stated in a compromis. 154 The arbitrators as well as the parties to the dispute have the right to cross-examine such witnesses in the manner stipulated in a compromis. 155 These methods of work are usually employed in boundary disputes with respect to which arbitral tribunals also exercise the right to conduct their own investigations and, with the consent of the parties, visit the localities of the dispute.

(f) Seat and administrative aspects of an arbitral tribunal

187. The seat of the arbitral tribunal is usually specified in the compromis. Where there is no such specification, the Tribunal itself may, as recommended by its president, determine where to conduct its business.

188. The arbitration agreement can also specify the place where the tribunal shall hold its first meeting and leave the choice of the place for subsequent meetings to the tribunal. The choice of the seat of the tribunal is made on the basis of administrative convenience and financial considerations. For example, when the tribunal is required to work in two languages, it would be easier to hold its meetings in a place where there was easy access to interpreters and translators as well as clerks who could work in both languages. There are other administrative and technical considerations which would come into consideration in choosing the place of the tribunal.

189. Arbitral tribunals are usually assisted by a secretariat or a registry. The function of the registry is to act as a channel for communication between the parties and the tribunal, to arrange for the custody of papers and documents submitted to the tribunal, to provide interpreters and translators and to conduct all administrative matters of the tribunal. Standing tribunals, which deal with a number of disputes over a long period of time, normally have an organized secretariat established in accordance with the compromis. For ad hoc tribunals, the parties may agree to empower the tribunal or its president to appoint a secretary or a registrar and such supporting staff as may be necessary. The parties may also agree to appoint jointly a secretary or a registrar, and each appoints supporting staff in equal numbers.

(g) Expenses of an arbitral tribunal

190. Two kinds of expenses are involved in an arbitration proceeding. One relates to the preparation of each party's case and its presentation to the arbitral tribunal. Such expenses include, for example, counsel's fees, experts' fees, expenses for gathering of evidence, translation of documents, travel and so forth which are borne by the parties themselves. Other expenses include the common expense of the arbitral tribunal, such as the arbitrators' fees, the salary of the registrar and the staff of the arbitral tribunal, interpreters, clerical facilities and so forth.

191. Parties to the disputes bear their own expenses and share the administrative costs of the tribunal. In common practice the arbitrators' fees are borne equally by both parties. Occasionally, however, some compromis provide that each party pay the fees of their appointed arbitrator. 157 If the parties provide technical assistance to the arbitral tribunal, each party is responsible for the remuneration of its own expert.

152See, e.g., article 5 in the Ambatoelos arbitration, ibid.

153See, e.g., article 5 in the Ambatoelos arbitration, ibid.

154Some compromis do not provide for oral proceedings, while others leave it to the determination of the tribunal as appropriate.

155Ibid., vol. XVI, p. 119. A similar provision was stipulated in the 22 July 1971 compromise between Argentina and Chile concerning the Beagle Channel arbitration. See Cmd. 4781.


3. Outcome of arbitration and related issues

192. The outcome of an arbitration is an award which is binding upon the parties to the dispute. Invariably, in all the compromis, parties to the dispute further stipulate that they undertake to abide by the decision of the arbitral tribunal in question.

193. The arbitral awards are usually in writing, signed and dated. Depending upon the rules of procedure adopted by a particular tribunal, certain compromis specifically provide that the decision of the tribunal would be adopted by a majority vote of its members, while others also give arbitrators the right to file a separate or dissenting opinion.

194. After an award has been rendered, it may be subject to correction or revision in connection with obvious errors such as clerical, typographical or arithmetical errors especially as suggested in the ILC Model Rules. An award may also be subject to interpretation. Article 82 of the 1907 Hague Convention provides for a general competence for the arbitral tribunal which rendered the award to interpret it. Some arbitration agreements have contemplated the possibility of the interpretation of the award. The compromis may also indicate that the award as rendered should be made public on the date agreed by the parties.

195. The last stage of arbitration is the execution of the arbitral award. Depending upon the nature of the dispute in question, parties may include in the compromis the necessary steps to be taken towards the execution of the award. For example, in a boundary dispute, the parties may agree to establish another commission or appoint experts to designate the boundary once the award is rendered. According to the 1907 Hague Convention, any dispute that may arise between the parties concerning the interpretation or execution of the award shall, in the absence of an agreement to the contrary, be submitted to the arbitral tribunal which pronounced it.

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189See, e.g., article VI of the 22 January 1963 Compromis between the United States and France in the case concerning the Interpretation of their mutual Air Transport Services Agreement, ibid., vol. XVI, p. 9.

190See, e.g., article 9 of the 10 July 1975 Compromis between the United Kingdom and France in the case concerning the delimitation of the continental shelf, supra, note 156, p. 5, at p. 6.


192This competence is limited only to an agreement contrary to such review procedure between the parties.

193See, for example, the Treaty for Conciliation, Judicial Settlement and Arbitration (with annexes) between the United Kingdom and Switzerland, United Nations, Treaty Series, vol. 605, p. 205, article 34. See also the compromis of 1963 and 1977 between France and the United States, UNIRAA, vol. XVI, p. 7, and vol. XVIII, p. 3, respectively.

194See, e.g., article VI (b) of the France–United States compromis cited supra, note 158.

195See article 82 of the 1907 Hague Convention for the Pacific Settlement of International Disputes, supra, note 21.

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G. Judicial settlement

1. Main characteristics, legal framework and functions

196. States parties to a dispute may seek a solution by submitting the dispute to a pre-constituted international court or tribunal composed of independent judges whose tasks are to settle claims on the basis of international law and render decisions which are binding upon the parties. This method is generally referred to as judicial settlement, which constitutes one of the means of the peaceful settlement of international disputes set out in Article 33 of the Charter of the United Nations.

197. The first international court of a world-wide scale was the Permanent Court of International Justice, which was created by the Covenant of the League of Nations in 1922. It was succeeded by the International Court of Justice, established in 1946 as a principal organ of the United Nations. Under Article 36 of its Statute, the International Court of Justice has general jurisdiction in "all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." Another international institution for judicial settlement is the International Tribunal for the Law of the Sea, provided for under the 1982 United Nations Convention on the Law of the Sea, with jurisdiction over law of the sea disputes.

198. Both judicial settlement and arbitration make recourse to an independent judicial body to obtain binding decisions, as pointed out in the previous section. Arbitral tribunals, however, are essentially of an ad hoc nature, and are composed of judges selected on the basis of parity by the parties to a dispute who also determine the procedural rules and the law applicable to the case concerned. International courts and tribunals, by contrast, are pre-constituted inasmuch as they are permanent judicial organs whose composition, jurisdictional competence and procedural rules are predetermined by their constitutive treaties. Furthermore, judicial settlement may be distinguished from arbitration in that the decisions of international courts and tribunals are, as a rule, not appealable. The Statute of the International Court of Justice provides in its Article 60 that "the judgment [of the Court] is final and without appeal". The only exceptions to the rule concern questions of scope or execution of the judgment, which may be subject to further decisions, though of the same court. Thus, Article 60 of the ICI Statute provides further that "in the event of dispute as to the meaning or scope of the
judgment, the Court shall construe it upon the request of any party." The degree of finality of decisions of arbitral tribunals, on the other hand, depends on what is specifically agreed upon in a *compromis*, which may provide for the possibility of decisions being subject to an appeal before international courts.

199. It may also be pointed out that because international courts or tribunals are pre-constituted institutions, they are *ipso facto* better suited than ad hoc arbitral tribunals—which take longer to constitute—to deal with urgent matters such as requests for interim (provisional) measures of protection. Moreover, owing to the same characteristic as permanent institution, an international court such as the International Court of Justice appears to be better suited for developing uniform jurisprudence of international law than ad hoc arbitral tribunals. Such jurisprudence is developed by the courts while exercising jurisdiction on contentious cases between States, or advisory jurisdiction on legal questions referred to it by an international organization and relating to disputes between States, between States and international organizations and those between international organizations. As the principal judicial organ of the United Nations, the International Court of Justice has also a supra-judicial appellate jurisdiction for the decisions of administrative tribunals established within the

United Nations system. These pre-constituted forums, whether of a regional or world-wide scale, appear also better suited than arbitral tribunals to rule on questions of international law raised in cases before domestic courts, thereby exercising secondary jurisdiction, where such jurisdiction is conferred.

2. Resort to judicial settlement

200. A brief analysis of both the Permanent Court of International Justice and the International Court of Justice indicates that, of the cases referred to those courts for judicial settlement, many involve questions of interpretation or application of treaties, or concern specific problems such as (a) those relating to sovereignty over certain territories and frontier disputes; (b) those concerning maritime delimitations and other law of the

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170 See para. 200 below.

sea disputes;\textsuperscript{176} (c) those arising from the law of diplomatic protection of nationals abroad;\textsuperscript{177} (d) those arising from circumstances relating to the use of force;\textsuperscript{178} and (e) cases involving enforcement of contracts and violation of certain principles of customary international law.\textsuperscript{179}

201. Further examples of the type of cases for which resort to judicial settlement is envisaged are also found in a number of regional treaties which established courts for the settlement of certain disputes. Thus, the European Court of Human Rights and the Inter-American Court of Human Rights, created respectively by the European Convention on Human Rights of 4 November 1950, and the American Convention on Human Rights of 22 November 1969, have jurisdiction in matters relating to human rights violations in connection with the provisions of these agreements.\textsuperscript{180} In the area of regional economic integration, the Convention of 25 March 1957 relating to Certain Institutions Common to the European Communities\textsuperscript{181} created the Court of Justice of the European Communities to exercise jurisdiction in matters concerning the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community. The Treaty concerning the Creation and the Statute of a Benelux Court of Justice of 31 March 1965\textsuperscript{182} confers upon the Court jurisdiction over questions of interpretation regarding rules of law common to the Benelux countries (e.g., treaty provisions or decisions of the Committee of Ministers) for the purpose of ensuring uniform application of these rules by their national courts or by the Benelux Arbitral College. The Treaty Creating the Court of Justice of the Cartagena Agreement of 28 May 1976\textsuperscript{183} confers upon the Court jurisdiction in matters relating to the interpretation and application of the Agreement of Sub-regional Integration of the Andean Group of 21 May 1969\textsuperscript{184} concluded by five members of the Latin American Free Trade Association (LAFTA). As regards the matters concerning the peaceful use of nuclear energy, the Convention on the Establishment of a Security Control in the Field of Nuclear Energy of 20 December 1957\textsuperscript{185} established the European Nuclear Energy Tribunal before which decisions of the European Nuclear Energy Agency concerning the scope of security controls can be appealed by States parties to the Convention or by affected enterprises. On the question of State immunities, the Additional Protocol to the European Convention on State Immunity of 16 May 1972\textsuperscript{186} created the European Tribunal for the purpose of determining cases concerning alleged breach of the rules of State immunity contained in the Convention.

3. Institutional and procedural aspects

(a) Jurisdiction, competence and initiation of the process

202. Settlement of international disputes by international courts is subject to the recognition by the States concerned of the jurisdiction of the courts over such disputes.\textsuperscript{187} The recognition may be expressed by way of a special agreement between the States parties to a dispute (compromis) conferring jurisdiction upon a court in a particular dispute, or by a conventional rule of law providing for agreed or unilateral reference of a dispute to a court, or by other means. In the event of a dispute as to whether a court has jurisdiction, the matter is settled by the decision of the court.\textsuperscript{188} For example, the court may rule on questions of competence or other substantive preliminary objections that can be raised by a respondent.


\textsuperscript{179} S. Lotsis (France v. Turkey), P.C.I.J. Series A, No. 10, p. 4—dispute on the question of jurisdiction over an incident aboard a ship on the high seas; Payment of various Serbian loans issued in France (France v. United Kingdom of Serbs, Croats and Slovenes), P.C.I.J. Series A, No. 20/21, p. 5; Payment in gold of Brazilian federal loans contracted in France (France v. Brazil), P.C.I.J. Series A, No. 20/21, p. 92—disputes over form of repayment; Lighthouse Case between France and Greece (France v. Greece), P.C.I.J. Series A/B, No. 71—succession to a contract and concession; Corfu Channel Case (Albania v. United Kingdom), I.C.J. Reports 1949, p. 244—assessment of compensation; Right of Passage over Indian Territory (Portugal v. India), I.C.J. Reports 1960, p. 6—establishment of the existence of a customary law; Appeal relating to the jurisdiction of the ICAO Council (India v. Pakistan), I.C.J. Reports 1972, p. 46—appeal to an ICAO decision.

\textsuperscript{180} Cases dealt with by the European Court of Human Rights have been concerned, for example, with (a) physical integrity; (b) prohibition of forced labour; (c) right to liberty and security of person; (d) right to a fair trial; (e) right to respect for private and family life, home and correspondence; (f) freedom of expression; (g) right of peaceful assembly; (h) trade union freedom; (i) right of property; (j) right of education; and (k) right to free elections. Cases dealt with by the Inter-American Court of Human Rights included those referring to: (a) violation of the right to life; (b) violation of personal security through the practice of torture; (c) lack of due process; and (d) arbitrary detention.

\textsuperscript{181} Treaties Establishing the European Communities (1973).

\textsuperscript{182} Mémorial du Grand-Duché de Luxembourg, Recueil de Législation 1973, II, A, p. 984.

\textsuperscript{183} International Legal Materials, vol. XVII, p. 1203.

\textsuperscript{184} Ibid., vol. VIII, p. 910.

\textsuperscript{185} Karin Oellers and others, Disputes Settlement in Public International Law, p. 620.


\textsuperscript{187} For cases in which the International Court of Justice found that it could not accept jurisdiction because the opposing party did not recognize its jurisdiction, see I.C.J. Yearbook 1987-1988, p. 51, note 1.

\textsuperscript{188} I.C.J. Statute, Article 36, paragraph 6.
State, and also those relating to procedural preliminary objections under the rule of exhaustion of local remedies.

(i) Special agreement

203. Article 36, paragraph 1, of the Statute of the International Court of Justice provides that the "jurisdiction of the Court comprises all cases which the parties refer to it", which is done normally by way of notification to the Registry of a special agreement (Compromis) concluded by the parties for that purpose. The Special Agreement of 23 May 1976 concerning the Delimitation of the Continental Shelf (Libya/Malta), for example, provides:

"The Government of the Republic of Malta and the Government of the Libyan Arab Republic agree to recourse to the International Court of Justice as follows:

"Article 1,"

"The Court is requested to decide the following questions:

"What principles and rules of international law are applicable to the delimitation of the area of the continental shelf which appertains to the Republic of Malta and the area of continental shelf which appertains to the Libyan Arab Republic and how in practice such principles and rules can be applied by the two parties in this particular case in order that they may without difficulty delimited such areas by an agreement ..."

204. By asking the Court to indicate also how, in practice, such principles and rules can be applied in the case, the Libya/Malta Compromis went further than what had been requested in a special agreement on another delimitation case referred to the Court. In the North Sea Continental Shelf cases the special agreement of 2 February 1967 between Denmark and the Federal Republic of Germany, like the special agreement of the same date between the Netherlands and the Federal Republic of Germany, contained the provision set out below, requesting the Court to do no more than to rule on the principles applicable to the delimitation as between the Parties:

"(1) The International Court of Justice is requested to decide the following question: What principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the above-mentioned Convention of 9 June 1965.

Objections to jurisdiction have been taken in the International Court of Justice on several grounds, such as: (a) that the instrument conferring jurisdiction is no longer in force; see, e.g., Temple of Preah Vihear (Cambodia v. Thailand), I.C.J. Reports 1961, p. 17; or not applicable (e.g., Aerial Incident of 10 March 1953 (United States v. Czechoslovakia), I.C.J. Reports 1956, p. 6); or the dispute is excluded by virtue of a reservation to the instrument (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), I.C.J. Reports 1984, p. 392); or (b) that the dispute is not admissible for reasons of jus cogens (e.g., South West Africa v. Ethiopia v. South Africa, Liberia v. South Africa), I.C.J. Reports 1962, p. 319); or non-exhaustion of local remedies (e.g., Interhandel (Switzerland v. United States), I.C.J. Reports 1957, p. 105); or non-existence of dispute (e.g., Rights of Passage over Indian territory (Portugal v. India), I.C.J. Reports 1957, p. 125).

(ii) Compromisory clause in treaties

205. Article 36, paragraph 1, of the Statute of the Court provides also that the jurisdiction of the Court comprises "all matters specially provided for in treaties and conventions in force". There are numerous treaties containing such a compromisatory clause, some of which provide for unilateral reference of all or certain categories of disputes to the International Court of Justice. At the global level, for example, under the General Act for the Pacific Settlement of International Disputes of 26 September 1928 and 28 April 1949 all legal disputes are subject to compulsory adjudication by the Court, unless the parties agree to submit them to arbitration or conciliation. The Optional Protocol of Signature concerning the Compulsory Settlement of Disputes adopted by the 1958 United Nations Conference on the Law of the Sea provides that disputes arising from the interpretation or application of any 1958 Convention on the Law of the Sea shall lie within the compulsory jurisdiction of the International Court of Justice. The Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes of 18 April 1961 also provides for the jurisdiction of the Court over disputes arising from the interpretation or application of the Convention, unless the parties within a specified period of time agree to submit them to arbitration. Similarly, the Vienna Convention on the Law of Treaties of 23 May 1969 confers jurisdiction upon the Court for disputes concerning the application or interpretation of articles 53 and 64 relating to conflicts of treaties with jus cogens, unless they are submitted to an ad hoc arbitration by common agreement of the parties.

206. At the regional level, of special interest is the European Convention for the Peaceful Settlement of Disputes of 29 April 1957, which provides for the submission of all international legal disputes to the International Court of Justice. Similar provisions are found also in the American Treaty on Pacific Settlement (Pact of Bogotá) of 30 April 1948.

(iii) Other means of conferring jurisdiction

207. With respect to the International Court of Justice, States parties to the Statute of the Court have the option of making a declaration under Article 36, paragraph 2, of the Statute by which they accept in advance the jurisdiction of the Court in matters falling within the general jurisdiction of the Court. A list of such treaties is found in I.C.J. Yearbook 1987-1988, pp. 98-114.

The revised General Act was adopted by the General Assembly of the United Nations by its resolution 268 A (III) of 28 April 1949 in order to adapt its provisions to the new international situation.


Ibid., vol. 500, p. 95, articles 1 and 2.

Ibid., vol. 1155, p. 331, articles 53 and 64.

Ibid., vol. 320, p. 243, article 1.

Ibid., vol. 30, p. 55, article XXXI.
tion of the Court "in all legal disputes concerning (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation". States are bound by this declaration only with respect to States which have also made such a declaration. The declaration may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time. Optional clauses of compulsory jurisdiction also exist with respect to the European Court of Human Rights and the Inter-American Court of Human Rights.

208. By contrast, other treaties establishing an international court automatically confer jurisdiction to that court with respect to its scope of activities. The States parties do not need and do not have the option to make a declaration of acceptance of the compulsory jurisdiction of that court. Thus, by becoming a party to the Treaties establishing the European Communities, member States automatically subject themselves to the jurisdiction of the Court of Justice of the European Communities for disputes connected with the application and interpretation of the Treaties. States parties to the 1982 United Nations Convention on the Law of the Sea ipso facto accept the compulsory jurisdiction of various forums for the settlement of law of the sea disputes. However, under the Convention, States parties have to make a declaration on the choice of the forum for judicial settlement established thereunder.

(iv) Initiation of process

209. Contentious proceedings before international courts are instituted either unilaterally by one of the parties to a dispute or jointly by the parties, depending upon the terms of the relevant agreement in force between them. Thus, if under the agreement the parties have accepted the compulsory jurisdiction of the International Court of Justice in respect of the dispute, then proceedings may be instituted unilaterally by the applicant State. In the absence of such a prior acceptance, however, proceedings can only be brought before international courts on the basis of the mutual consent of the parties.

210. The procedure for instituting contentious proceedings is defined in the basic statute of the respective international courts. The Statute of the International Court of Justice provides under Article 40 as follows:

"1. Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated.

"2. The Registrar shall forthwith communicate the application to all concerned.

"3. He shall also notify the Members of the United Nations through the Secretary-General, and also any other States entitled to appear before the Court."

211. A special agreement may be concluded ad hoc, after the dispute has arisen, or it may be reached in accordance with provisions relating to the settlement of disputes in existing international treaties in force between the parties. In filing an application the parties may request, in accordance with the terms of the relevant agreement, that the case be brought to a special or ad hoc chamber consisting of a limited number of the members of the court concerned. Examples of these include the chamber of summary procedure and ad hoc chambers of the International Court of Justice and the Specialized Court for the Law of the Sea. Resort to an ad hoc chamber of the International Court of Justice is a fairly recent phenomenon, as the provisions of Article 26, paragraph 2, of the Statute of the Court were not invoked until 1981. Since then, however, three out of eight contentious cases have been referred to ad hoc chambers.

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202These forums are: (a) the International Tribunal for the Law of the Sea; (b) the International Court of Justice; (c) an arbitral tribunal constituted under the relevant provisions (annex VII) of the 1982 Convention; (d) a special arbitral tribunal constituted under the relevant provisions (annex VIII) of the 1982 Convention.
203Articles 286 and 287.
204In some regional courts, cases may be brought to them by entities other than States (e.g., the European Commission of Human Rights with respect to the European Court of Human Rights; the Council or the Commission with respect to the Court of Justice of the European Communities; the Inter-American Commission on Human Rights with respect to the Inter-American Court of Human Rights) or even by individuals (e.g., the Court of Justice of the European Communities). However, as far as disputes between States are concerned, access to the court is generally confined to the States concerned.

205An example of special agreements concluded on the basis of a compulsory clause in existing international treaties is the Special Agreement concerning the North Sea Continental Shelf, the preamble of which reads, inter alia: "... Bearing in mind the obligation assumed by [the parties] under Articles 1 and 28 of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957 to submit to the judgment of the International Court all international controversies to the extent that no special arrangement has been or will be made..."
206See para. 217 below.
207ICJ Statute, Article 29.
208Ibid., Article 26, paragraph 2.
210Ibid., article 188.
211The delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States) was referred to an ad hoc chamber in November 1981 and an ad hoc chamber was established in January 1982, I.C.J. Reports 1984, p. 246.
(v) Advisory opinions

212. International courts may be empowered to give an advisory opinion on a legal question relating to an existing international dispute between States referred to them by an international entity. The opinion does not bind the requesting entity, or any other body, or any State. Nevertheless, procedure in advisory cases, as in contentious cases, involves elaborate written and oral proceedings in accordance with the predetermined rules of the court in question, and such advisory opinions could assume the character of judicial pronouncements which, while not binding, might entail practical consequences for the bodies concerned.

(b) Access and third-party intervention

213. A State not party to a legal instrument establishing an international court is normally denied access to it. In the case of the International Court of Justice, however, States not party to the Charter of the United Nations may, by virtue of Article 93, paragraph 2, of the Charter, become party to the Statute of the Court on conditions to be determined by the General Assembly upon the recommendation of the Security Council. The Statute of the Court further provides under its Article 35, paragraph 2, that other States may have access to the Court in compliance with the conditions laid down by the Security Council and subject to the special provisions contained in treaties in force.

214. A third State may submit a request to be permitted to intervene in the proceedings if it considers that it has an interest of a legal nature which may be affected by the decision in the case. Provisions for such proceedings are found in the respective statutes and rules of international courts or tribunals, such as the International Court of Justice, the International Tribunal for the Law of the Sea and the Court of Justice of the European Communities.

215. In the various multilateral treaties establishing international courts, provisions are made for the composition of the court in question and the selection of judges. The size of the actual body varies in accordance with the terms of each instrument—for example, from 21 members constituting the International Tribunal for the Law of the Sea, to 15 members in the case of the International Court of Justice, to 9 members in respect of the Benelux Court of Justice. In the case of the Court of Justice of the European Communities, each Member State of the European Communities is attributed a seat on the bench, whereas both the International Court of Justice and the International Tribunal for the Law of the Sea are composed of “independent judges, elected regardless of their nationality”, which as a whole should represent “the main forms of civilization and of the principal legal systems of the world”. The composition of all other international courts is based on either of these two basic alternatives.

216. The selection procedure is generally provided in the statute of the court concerned. The judges may be appointed by common agreement of member States, as provided for the Court of Justice of the European Communities, or elected by one or more political organs, e.g., the General Assembly and the Security Council of the United Nations in the case of the International Court of Justice, or the Consultative Assembly of the Council of Europe for the European Court of Human Rights. In addition, a party to a dispute may appoint an ad hoc judge of its nationality if the court concerned does not include upon the bench a judge of that nationality. The judges are selected in their individual capacities strictly on the basis of legal qualifications. The terms of the judges are, for example, nine years as regards the International Court of Justice, with one third of the bench elected every three years. No more than one national of any State may be a member of the Court.

220. ICJ Statute, Articles 2 and 9; Statute of the International Tribunal for the Law of the Sea, article 2 (2).
223. See, e.g., the ICJ Statute, Article 31; the Statute of the International Tribunal for the Law of the Sea (Convention, annex VI), article 17; the 1950 European Convention on Human Rights, article 16; and the Statute of the Inter-American Court of Human Rights, article 10.
224. ICJ Statute, Article 13, paragraph 1.
225. Ibid., Article 3.
217. The composition of an international court and the selection of its judges thus are not, except for ad hoc judges, dependent upon the wishes of the parties to a dispute. Possibilities exist, however, for the views of the litigant States to be reflected in this matter with respect to the disputes concerning sea-bed activities in the Area. The 1982 United Nations Convention on the Law of the Sea provides in its annex VI, article 15, paragraph 2, that such disputes may be submitted to a special chamber of the International Tribunal for the Law of the Sea to be established at the request of the parties, the composition of which is to be determined by the Tribunal with the approval of the parties. In the case of an ad hoc chamber of the International Court of Justice constituted under Article 26, paragraph 2, of the Statute of the Court, while the number of the judges of the chamber is determined with the approval of the parties, the selection itself is left to the decision of the Court.227 However, the parties to a dispute, by way of special agreement, may request to be consulted on the selection. Furthermore, judges of the nationality of each of the parties may, under Article 31 of the Statute, retain their right to sit in the case before the Court or the chamber.228 Article I of the Special Agreement of 29 March 1979229 concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area thus stipulated as follows:

"1. The Parties shall submit the question posed in Article II to a Chamber of the International Court of Justice constituted pursuant to Article 26 (2) and Article 31 of the Statute of the Court and in accordance with this Special Agreement.

"2. The Chamber shall be composed of five persons, three of whom shall be appointed by and from the Members of the Court, after consultation with the Parties, and two of whom shall be judges ad hoc, who shall not be nationals of either Party, chosen by the Parties."230

(d) Rules of procedure

218. Rules of procedure governing the proceedings for the judicial settlement of international disputes are found in the basic statute of the international court or tribunal concerned, and by the supplementary rules adopted by it, which determine such technical requirements as the official languages, the structure and phases of the proceedings and the contents and delivery of the decision. The official languages of the International Court of Justice are English and French.231 All communications and documents relating to cases submitted to the Court are channelled through the Registrar.232

219. In contentious cases, the party at the time of filing a document instituting proceedings informs the competent court of the name of the agent who will be its representative in the proceedings; the other party then appoints its agent as soon as possible.233 The proceedings in contentious cases are usually divided into a written and an oral phase. The written phase normally comprises the filing of pleadings with a time-limit fixed by the court, the pleadings are generally confined to a statement of the case (memorial) and a defence (counter-memorial) and, if necessary, a reply and a rejoinder.234 Together with papers and documents in support.235 Depending upon the procedure agreed upon by the parties or regulated by the rules of the court, these pleadings may be filed simultaneously by both parties or, alternatively, each party replying to the other.236 The number and the order of filing of the pleadings are determined in the orders of the court237 or on the basis of a special agreement. Written pleadings should contain a full statement of the facts considered relevant by the party and of its arguments as to the law.238

220. The oral phase begins at the closure of the written proceedings. In principle, oral proceedings are held in public, unless it is otherwise decided under specific circumstances. The parties may address the court only through their agents, counsel or advocates. In the course of the oral proceedings, witness and experts may be called upon by the parties or by the court to give evidence or clarify any aspects of the matters in issue. If a party fails to appear before the court in the oral proceedings or fails to defend its case, the opposing party may request a decision in favour of its final claims.240 In the Statute of the International Tribunal for the Law of the Sea, the opposing party may request the Tribunal only to continue the proceedings and to make its decision.241

221. Subsequent to the closure of the oral proceedings, the court examines the factual and legal foundations of the claim. Specific instructions as to the applicable law are contained in its statute or in a special agreement for the claim. Because of the nature of international disputes, the primary source of law is to be found in international law. Article 38, paragraph 1, of the Statute of the International Court of Justice provides:

"The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:\n
227ICJ Rules, Article 17, paragraph 3.
228See also the 1950 European Convention on Human Rights, article 43.
230In the Gulf of Maine case, a Canadian judge ad hoc was appointed, since Canada did not have a national on the bench of the International Court of Justice.
231ICJ Statute, Article 39.
232ICJ Rules, Article 26, paragraph 1 (a).
233ICJ Statute, Article 42; ICJ Rules, Article 40.
234ICJ Rules, Article 45.
235Ibid., Article 50.
236In the recent practice of special agreements, simultaneous submission is a preferred method as it alleviates the question of which party should bear the burden of proof or of which party should be given the last word.
237ICJ Rules, Article 44, paragraph 1.
238Ibid., Article 49.
239ICJ Statute, Article 46; Revised Rules of Court of the European Court of Human Rights of 24 November 1982, article 18; Rules of Procedure of the Inter-American Court of Human Rights of 1980, article 14 (1).
240ICJ Statute, Article 53. In practice, however, a number of judgments and orders were delivered in the absence of one of the parties: Corfu Channel; Anglo-Iranian Oil Co.; Nootedam; Fisheries Jurisdiction (United Kingdom v. Iceland); Nuclear Tests (Australia v. France) (New Zealand v. France); United States Diplomatic and Consular Staff in Tehran; and Military and Paramilitary Activities in and against Nicaragua.
a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

However, the deciding of the case according to other legal norms or on the basis of ex aequo et bono is not precluded, if the parties agree to such a solution.242 The deliberations of the court are kept private and secret.243

222. The rules governing the procedure for reaching a decision are fixed by the court. Its decision is made by a majority of the votes of the judges present, with a casting vote to be given by the president or by the judge acting in his place, in the event of equality of votes for and against.244 The decision should state the reasons on which it is based and should be framed within the scope of the claims made by the parties. A judge whose views on the matter differ either in whole or in part may deliver an individual opinion along with the judgement, which could be expressed in the form of a "separate opinion", if disagreement of the judge is concerned with the reasons on which a judgement is based, or in the form of a "dissenting opinion", if disagreement is with the holding in the judgement itself.

223. As regards advisory proceedings, the rules governing the procedure of contentious proceedings generally apply,245 subject to special rules provided for them.246

224. The basic statutes and procedural rules of international courts or tribunals do not provide for any specific duration within which a case should be decided, though certain dates and time-limits are determined as orders by the court seized with the case with regard to the filing of pleadings, the submission by the parties of memorials, counter-memorials and, as the case may be, replies as well as the papers and documents in support, and the time in which each party must conclude its arguments.

(e) Seat and administrative aspects

225. The seat of international courts and tribunals is established in accordance with their basic statutes and procedural rules. In the case of the International Court of Justice, its seat is established at The Hague. This, however, does not prevent the Court from acting and exercising its functions elsewhere whenever the Court considers it desirable to do so.247

226. The judges comprising international courts or tribunals elect from their members a president,248 a vice-president249 and presidents of chambers250 for a specified term of office. The president directs the judicial business and the administration of the court and presides at all meetings of the court.251

227. The administrative functions of international courts are carried out by a secretariat established for this purpose generally known as the registry.252 The executive head of the registry, the registrar, is appointed by the competent court for a specified term of office, e.g., seven years in the case of the International Court of Justice.253 The functions of the registrar are defined by the rules of court,254 which include, as its main function relating to cases before the court, the execution of all communications, notifications and transmission of documents to the court and to the disputants.

(f) Expenses and other financial arrangements

228. The basic statutes and procedural rules of international courts or tribunals determine the means for covering the expenses involved in the settling of claims. In principle, the expenses of the functioning of these courts or tribunals are borne by their member States on a regular basis. It is thus provided that the expenses of the International Court of Justice, including amounts payable to witnesses or experts appearing at the insistence of the Court, are borne out of the United Nations budget.255 If a party to a case does not contribute to the United Nations budget, the Court itself fixes the amount payable by that party as a contribution towards the expenses of the Court for the case. Each party bears its own costs of the preparation and presentation of its claims, such as counsel's fees, printing costs and travel expenses,256 unless the Court makes an order in favour of a party for the payment of the costs by the other party257 or unless a party qualifies to receive financial assistance from the Trust Fund established by the Secretary-General of the United Nations in 1989 to assist States in the settlement of disputes through the International Court of Justice.

4. Outcome of judicial settlement

229. The outcomes of contentious proceedings involving international disputes are decisions which are final and binding on the parties. In

242ICJ Statute, Article 38, paragraph 2.
243Ibid., Article 54, paragraph 3.
244Ibid., Article 55.
245Ibid., Article 68.
247ICJ Statute, Article 22, paragraph 1; ICJ Rules, Article 55.
248ICJ Statute, Article 21, paragraph 1; 1950 European Convention on Human Rights, article 41; 1982 Rules of Procedure of the Court of Justice of the European Communities, article 7.
249ICJ Statute, Article 21, paragraph 1; 1950 European Convention on Human Rights, article 41; 1982 Rules of Procedure of the Court of Justice of the European Communities, article 10.
250ICJ Rules, Article 12; 1982 Rules of Procedure of the Court of Justice of the European Communities, article 8.
252ICJ Statute, Article 22.
254ICJ Statute, Article 33.
255Ibid., Article 64.
256ICJ Rules, Article 97.
a majority of cases, the judgements are those requiring performance, but as
has been done in some of the judgments of the International Court of Justice,
a court may be requested to render declaratory judgements in which the court
determines the guiding legal principles to be followed in dealing with a
particular dispute, without giving a definitive decision on the dispute.258 or
establishes that the violation of the principle of international law in ques-
tion has no practical remedy.259 The judgements pertaining to interim pro-
cedings, such as those for provisional measures of protection, preliminary
rulings or objections, and intervention by a third-party State, are also binding
upon the parties.

H. Resort to regional agencies or arrangements

1. Main characteristics, legal framework and relation to other means of
peaceful settlement provided for by Article 33 of the Charter of the
United Nations

230. Article 33 of the Charter of the United Nations mentions “resort
to regional agencies or arrangements” among the peaceful means by which
States parties to a dispute, the continuation of which is likely to endanger
the maintenance of international peace and security, shall seek a solution
to the dispute.

231. Further to their being mentioned in Article 33 of the Charter of
the United Nations, regional agencies or arrangements are dealt with in Chap-
ter VIII of the Charter, and, more specifically, as regards peaceful settlement
of disputes, in Article 52 thereof.

232. Article 52 refers to both “regional arrangements” and “regional
agencies”. The term “regional arrangements” denotes agreements (regional
multilateral treaties) under which States of a region undertake to regulate
their relations with respect to the question of the settlement of disputes,
without creating thereunder a permanent institution or a regional interna-
tional organization with international legal personality.260 The term “regional
agencies”, by contrast, refers to regional international organizations created
by regional multilateral treaties under a permanent institution with interna-
tional legal personality to perform broader functions in the field of the
maintenance of peace and security, including the settlement of disputes.261

258 See paragraph 204 above.
259 See, e.g., Corfu Channel Case, supra, note 178.
260 See, e.g., the 1957 European Convention for the Peaceful Settlement of Disputes, United
(the Pact of Bogota), ibid., vol. 30, p. 55, at p. 84.
261 See, e.g., the League of Arab States created under the Pact, signed at Cairo on 22 March 1945,
United Nations, Treaty Series, vol. 70, p. 237; the Organization of American States (OAS) established
under the Charter, signed at Bogota on 30 April 1948 (the Bogota Charter), ibid., 119, p. 3, as
amended by the Protocol of Buenos Aires, signed on 27 February 1967, ibid., vol. 721, p. 264, at
p. 324, and by the Protocol of Cartagena de Indias signed on 5 December 1985, O.A.S. Treaty Series,
No. 66; the Organization of African Unity (OAU), established under the Charter, signed at Addis
Ababa on 25 May 1963, United Nations, Treaty Series, vol. 479, p. 39; and the Council of Europe,
established under the treaty, signed at London on 5 May 1949, ibid., vol. 87, p. 103.

233. The words “regional agencies or arrangements” may also be
applied, in an extensive manner, to agreements of a more specific subject-
matter, namely, systems created by some regions of the world for the develop-
ment of some very specific areas of international law such as the
protection of human rights,262 economic integration263 and shared resources
management.264 These regional agreements may provide for specific means
of peaceful settlement of disputes arising between States parties to those
agreements, disputes which concern the interpretation and/or application of,
or compliance with, their provisions.

234. Regional agencies or arrangements deal with most of the means
of peaceful settlement of disputes under Article 33 of the Charter of the United
Nations and provide for the technical aspects of the resort to such means.

235. Those regional agencies aimed at performing wide functions in the
field of the maintenance of international peace and security265 have their own
mechanisms for the peaceful settlement of disputes, either by reference to nego-
tiation, inquiry, mediation, conciliation, judicial settlement and arbitration or by
endowing permanent organs with specific functions for this purpose.266

236. As far as regional agencies devoted to performing functions in
specific areas are concerned,267 it should be mentioned that their constituent
instruments also include provisions concerning the peaceful settlement of
disputes arising in connection with the interpretation or application of
their provisions. Moreover, some of these regional agencies, particularly those
created for the protection of human rights268 and those intended to achieve
economic integration,269 have set up bodies of third-party settlement, such as
judicial tribunals.

262 See, e.g., the 1950 European Convention for the Protection of Human Rights and Funda-
mental Freedoms, ibid., vol. 213, p. 221; the 1969 American Convention on Human Rights (Pact
of San Jose), ibid., vol. 1144, p. 123; and the 1981 African Charter on Human and Peoples’ Rights,
263 See, e.g., the European Coal and Steel Community, created under the treaty, signed at
Energy Community (EURATOM), created under the treaty, signed at Rome on 25 March 1957,
ibid., vol. 294, p. 261; the European Economic Community, created under the treaty, signed at
Rome on 25 March 1957, ibid., vol. 294, p. 3; and the Economic Community of West African
States (ECOWAS), created under the treaty, signed at Lagos on 28 May 1975, ibid., vol. 1010,
p. 17.
264 See, e.g., the 1963 Act regarding Navigation and Economic Co-operation between
the States of the Niger Basin, ibid., vol. 387, p. 9; the Protocol concerning the Establishment of an
International Commission to Protect the Messe against Pollution, signed at Paris on 20 December
1961, ibid., vol. 940, p. 211, and the 1959 Agreement concerning the regulation of Lake Inari,
265 See supra, note 261.
266 See article 5 of the Pact of the League of Arab States, article 23 of the OAS Charter and
article XIX of the OAU Charter, all referred to in note 261 supra.
267 See supra, notes 262, 263 and 264.
268 See article 19 of the Convention for the Protection of Human Rights and Fundamental
Freedoms and article 33 of the American Convention on Human Rights (Pact of San Jose), both
referred to in note 262.
269 See, e.g., article 3 of the 1957 Convention relating to certain institutions common to
the European Communities, signed at Rome on 25 March 1957, United Nations, Treaty Series,
vol. 294, p. 411.
237. The inclusion of resort to regional agencies or arrangements among the means of peaceful settlement of disputes under Article 33 of the Charter of the United Nations was to give the Member States the option to apply any of the enumerated peaceful means in a regional setting or forum. Thus, the settlement of disputes through regional agencies or arrangements relies upon the free choice of those specific means (negotiation, inquiry, good offices, mediation, conciliation, arbitration, and judicial settlement) by the parties to a local dispute, invoking first the settlement procedures as established under the regional instrument in question, as envisaged in Article 52 of the Charter.

2. Institutional arrangements, competence and procedure

238. Paragraphs 239-271, below, provide examples and a brief description of procedures involved in the peaceful settlement of disputes in various regional arrangements or agencies, particularly as regards the competence of the organs concerned and the initiation of process. Section 3 which follows, on the other hand, concentrates on some examples of dispute settlement in which various regional arrangements or agencies have been involved. To the extent that some institutional aspects contained in the present section may be illustrated by means of the examples of dispute settlement described in section 3, the appropriate cross-references are also made.

(a) League of Arab States

239. Article 5 of the League Pact provides for an arbitral role for the Council of the League, which is composed of representatives of all member States. If a dispute between two contending members of the League does not involve the independence, sovereignty or territorial integrity of a State and those members apply to the League Council for the settlement of their dispute, the decisions of the League Council shall be effective and obligatory. The exercise of the Council’s functions as an organ of arbitration is therefore subject to two conditions: (a) party submission and (b) subject-matter limitations. When the Council acts in its arbitral capacity, the States among which the dispute has arisen shall not participate in the deliberations and decisions of the Council. The League Pact also provides that the Council shall mediate, in a dispute which may lead to war between two member States or between a member State and another State, in order to conciliate them. The exercise of these functions of good offices, mediation and conciliation does not depend upon the submission of the dispute by the parties.

240. In practice, the Council has applied the modes of good offices, mediation and conciliation to all disputes, whether peace-threatening or not.

While in some cases it has done so directly, in other cases it has set up subsidiary bodies to carry out these functions.

241. It is also to be noted that while the Pact of the League does not expressly provide for the participation of its Secretary-General in the process of the peaceful settlement of disputes, the Council, through internal regulations, has developed an active role for the Secretary-General in this connection. Often the Council has included the Secretary-General of the League in the special bodies it has created for its mediation and fact-finding missions.

(b) Organization of American States

242. Chapter VI (arts. 23 to 26) of the OAS Charter deals specifically with the peaceful settlement of disputes. Article 23, as amended by the 1985 Protocol of Cartagena de Indias, provides that international disputes which may arise between American States shall be submitted to the peaceful procedures set forth in the OAS Charter, although that should not be interpreted as an impairment of the rights and obligations of the member States under Articles 34 and 35 of the Charter of the United Nations. Specific mention is made in the Bogotá Charter of direct negotiation, good offices, mediation, investigation and conciliation, judicial settlement and arbitration as well as other means of the choice of the parties to the dispute. Article 26 contains an express reference to a special treaty establishing adequate procedures for the peaceful settlement of disputes and the means for their application. This is the American Treaty on Pacific Settlement ("Pact of Bogotá") of 30 April 1948, which contains a detailed provision of the above-mentioned procedures in addition to certain general principles regarding the peaceful settlement of disputes between American States.

243. It is also to be noted that, as amended in 1970, and again in 1985, the OAS Charter endows the Permanent Council of the organization, composed of one representative of each member State, with functions in the field of peaceful settlement. The exercise of these functions may be initiated by any party to a dispute in which none of the peaceful procedures provided for in the OAS Charter is under way. If any or all of the parties to a dispute request the good offices of the Council the latter shall assist the parties and recommend the procedures it considers suitable for the peaceful settlement of the dispute. In the exercise of these functions the Council, with the consent of the Governments concerned, may resort to fact-finding activities in the territory of one or more parties to the dispute. It also may, with the consent of the parties to the dispute, establish ad hoc committees with a membership and mandate also to be agreed to by the parties.

274 See paragraphs 274-276 below.
275 See paragraphs 275 and 276 below.
276 See articles 24 and 26 of the OAS Charter as well as notes 34 and 260 above. See also paragraph 277 below on the application of the Pact of Bogotá.
277 Articles 82 to 90 of the OAS Charter. See also paragraph 273 below for an example of Council involvement in peaceful settlement.
278 For an example of such ad hoc committees, see paragraph 273 below.
244. Furthermore, article 87 of the OAS Charter, as amended in 1985, provides that if the procedure for the peaceful settlement of disputes recommended by the Permanent Council or suggested by the pertinent ad hoc committee under the terms of its mandate is not accepted by one of the parties, or one of the parties declares that the procedure has not settled the dispute, the Permanent Council shall so inform the General Assembly, without prejudice to its taking steps to secure agreement between the parties or to restore relations between them.

245. As for the role of the OAS Secretary-General himself, the adoption in 1985 of the Protocol of Amendment to the OAS Charter which gives him powers similar to those conferred on the Secretary-General of the United Nations by Article 99 of the Charter of the United Nations seems to have paved the way towards the expansion of his powers in the area of peaceful settlement.

(c) Organization of African Unity

246. Article XIX of the OAU Charter lays down the principle of peaceful settlement of disputes and provides for the establishment of a commission of mediation, conciliation and arbitration, whose composition and conditions of service shall be defined by a separate protocol to be regarded as an integral part of the Charter. The said Protocol was signed at Cairo on 21 July 1964 and contains detailed provisions on the establishment and organization of the Commission, on general principles and on the procedures to be followed in cases of mediation, conciliation and arbitration.

247. A dispute may be referred to the Commission jointly by the parties concerned, by a party to the dispute, by the Council of Ministers or by the Assembly of Heads of State and Government. If a dispute has been referred to the Commission and one or more of the parties have refused to submit to the jurisdiction of the Commission, the Bureau refers the matter to the Council of Ministers for consideration. On the other hand, the consent of the party may be expressed by a prior agreement, by an ad hoc submission of the dispute or by the acceptance of the other party's or the Council's or Assembly's submission of the dispute to the Commission's jurisdiction. The Commission is endowed with powers of investigation or inquiry with regard to disputes submitted to it.

248. In accordance with the Protocol, the parties to a dispute may agree to resort to any one of the following modes of settlement: mediation, conciliation or arbitration. These three modes are alternative—and not necessarily successive—procedures, and parties are free to use any one or all three in respect of a dispute.

(d) European Convention for the Peaceful Settlement of Disputes (Council of Europe)

249. In 1977, the Assembly of Heads of State and Government of the Organization of African Unity, with a view to rendering the Commission more flexible and more apt to respond to the urgency of intra-African disputes, decided to suspend the election of the Commission's members and provisionally appoint an ad hoc Committee composed of nine States plus three other possible members to be appointed by the OAU Chairman.

250. While the possibility always exists for OAU to reactivate the Commission or the ad hoc Committee discussed above, in practice OAU has had recourse to other procedures in a number of peaceful settlement of disputes issues in which it has been involved. It has done so through the Council of Ministers and the Assembly of Heads of State and Government and through the creation of special or ad hoc committees other than the one mentioned in paragraph 249 above. It has also used the good offices of some African statesmen.


261. See also paragraphs 278 and 279 below.

262. See note 260, supra.


264. Ibid., article 2 (2).

265. Ibid., article 4.

266. Ibid., article 19.
concerning both arbitration and conciliation. Some States have chosen to submit such reservations.

254. Furthermore, if the parties to a dispute agree to submit a dispute to another procedure of peaceful settlement, the provisions of the Convention do not apply. The only restriction in this connection is that in respect of legal disputes the parties shall refrain from invoking, as between themselves, agreements which do not provide for a procedure entailing binding decisions.

(e) Conference on Security and Cooperation in Europe (CSCE)

255. In accordance with provisions contained in the 1975 Helsinki Final Act of the Conference on Security and Cooperation in Europe (CSCE), and subsequent relevant documents, such as the 1990 Charter of Paris for a New Europe and the 1991 Valletta Report of the CSCE Meeting of Experts on Peaceful Settlement of Disputes, participating States will endeavour to reach a peaceful, rapid and equitable solution of disputes among them, on the basis of international law, by means such as negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice, including any settlement procedure agreed to in advance of disputes to which they are parties.

256. If the parties are unable, within a reasonable period of time, to settle the dispute by direct consultation or negotiation, or to agree upon an appropriate procedure, any party to the dispute may request the establishment of a CSCE Dispute Settlement Mechanism by notifying the other party or parties to the dispute. The parties to the dispute have a large measure of participation in the selection of members of the Mechanism, enjoying the right to reject several proposed members. However, the relevant provisions also ensure that individual rejections by parties to the dispute or the failure by any party to make a pronouncement on the nominations shall not prevent the establishment of a Mechanism.

257. Once established, the Mechanism will seek such information and comments from the parties as will enable it to assist the parties in identifying suitable procedures for the settlement of the dispute. The Mechanism may offer general or specific comments or advice relating to the inception or resumption of a process of negotiation among the parties, or to the adoption of any other dispute settlement procedure in relation to the circumstances of the dispute or to any aspect of any such procedure. If the parties so agree, they may entrust the Mechanism with fact-finding or expert functions as well as with binding powers regarding the partial or total settlement of the dispute.

258. In three specific instances, the system set up by the CSCE contemplates the intervention of another organ, namely, the Committee of Senior Officials, in the settlement of a dispute:

(a) If, after considering in good faith and in a spirit of cooperation the advice and comments of the Mechanism, the parties are unable, within a reasonable time, to settle the dispute, any party to the dispute may so notify the Mechanism and the other party, whereupon any party may bring that circumstance to the attention of the Committee of Senior Officials.

(b) Notwithstanding a request by a party to the dispute, the Mechanism will not be established or continued if another party considers that because the dispute raises issues concerning its territorial integrity, or national defence, title to sovereignty over land-territory, or competing claims with regard to the jurisdiction over other areas, the Mechanism should not be established or continued. In that case, any other party to the dispute may bring that circumstance to the attention of the Committee of Senior Officials.

(c) In the case of a dispute of importance to peace, security or stability among the participating States in CSCE, any party to the dispute may bring it before the Committee of Senior Officials, without prejudice to the right of any participating State to raise an issue within the CSCE process.

(f) European and inter-American systems for the protection of human rights

259. As the 1950 Rome Convention has been an important source of inspiration for the 1969 Pact of San José, it may be appropriate to examine both systems together, indicating their similarities and differences. Both conventions create a procedural first stage involving organs with functions of mediation and conciliation (European Commission of Human Rights and Inter-American Commission, respectively) and a possible second stage involving judicial organs (European Court of Human Rights and Inter-American Court of Human Rights).

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299Ibid., article 34.
298Ibid., article 28; see also paragraph 284 below for examples of application of the Convention.
297ILM, 1975, p. 1292 and ff.
296A/45/859, annex.
2941975 Helsinki Final Act, chapter V; 1991 Valletta Report, sections I and III.
2931991 Valletta Report, section IV.
292Ibid., section V, paras. 1 to 5.
300Ibid., section XIII.
301Composed of representatives of participating States in the Conference and chaired by a representative of the State whose Minister for Foreign Affairs had been Chairman at the preceding meeting of the Council of Ministers for Foreign Affairs. See Charter of Paris, A/45/859, annex, Supplementary Document, I.B. Institutional arrangements: the Committee of Senior Officials.
3021991 Valletta Report, section IX.
303Ibid., section XII.
304Ibid., section II.
305See note 262, supra.
306The European Commission consists of a number of members equal to that of States parties to the Convention; they are elected for a period of six years by the Committee of Ministers of the Council of Europe.
307The Inter-American Commission on Human Rights is composed of seven members elected for a period of four years by the General Assembly of the organization.
308The European Court of Human Rights consists of a number of judges equal to that of the members of the Council of Europe elected for nine years by the Consultative Assembly of the Council.
Rights, respectively. The European Convention also contemplates the possible intervention of a political organ, the Committee of Ministers, with functions partly mediatory and conciliatory and partly judicial. Under both systems the applications or petitions, whether from States or individuals, must always be referred in the first place to the Commission.

260. In the practice of both systems so far, the cases of individuals bringing applications or communications alleging a breach of the Convention have been far more numerous than cases involving a State alleging the violation of Convention provisions by another State. The latter are the only true cases in which both regional systems may function as regional means for the peaceful settlement of disputes between States. In this connection, some differences between both systems are to be noted. Under the European Convention any State party may bring before the Commission a claim that another State party has violated the Convention (article 24). Under the Inter-American Convention, however, a special declaration is required from both the claimant and the defendant States whereby they recognize the competence of the Commission to receive and examine communications by which a State party alleges that another State party has committed a violation of a human right set forth in the Convention (article 45). Conversely, no special declaration is required under the Inter-American system for individuals to bring cases before the Commission alleging the violation of the Convention by a State (article 44), whereas under the European system a special declaration by the defendant State is required to have been made recognizing the Commission's competence in such cases (article 25).

261. Under the European system, when cases concerning human rights violations have been brought before the Commission by States rather than individuals, the procedure has, with one exception, ended up before the Committee of Ministers rather than the Court. This transpired, for instance, in the various cases concerning South Tyrol, Greece and Turkey. 112

262. The coming into functioning of the American system is relatively recent and its practice not yet very abundant. Apart from the exercise by the Inter-American Court of its consultative jurisdiction, which does not fall under the concept of "peaceful settlement of disputes between states", only three contentious cases have been brought so far before the Court. They are all cases against the Government of Honduras and were submitted by the Inter-American Commission.

(g) African Charter on Human and Peoples' Rights

263. Adopted under the aegis of the Organization of African Unity, the African Charter adopted at Banjul created the African Commission on Human and Peoples' Rights which may receive communications from States parties to the Charter alleging that another State party to the Charter has violated the Charter's provisions. These communications may be made either after the failure of a period of direct negotiations between the States concerned on the possible settlement of the human rights dispute or directly to the Commission. The Commission may seek all relevant information from the States concerned and also has mediatory and conciliatory functions, trying all appropriate means to reach an amicable solution. In cases of a series of serious or massive violations of human and peoples' rights, the Commission may also consider communications from States other than parties to the Charter. In all cases the Commission draws up a report stating its factual findings and its recommendations, which it transmits to the OAU Assembly of Heads of State and Government.

(h) European Communities

264. As regards the settlement of disputes between members of the European Communities, the latter have undertaken not to submit a dispute concerning the interpretation or the implementation of the Treaty establishing the European Economic Community of 25 March 1957 to any method of settlement other than those provided in the Treaty.

265. Two organs are involved in the settlement of these disputes: (a) the Commission of the European Communities and (b) the Court of Justice.

266. If a member State considers that another member State has failed to fulfill an obligation under the Treaty establishing the Community, it must (a) present to the Commission of the European Communities any measures it deems necessary for the enforcement of the Treaty. The European Communities shall adopt rules for the functioning of the Commission and the Court of Justice in cases of this nature. If the matter is not cleared up within a period of three months, the Commission of the European Communities shall submit it to the Court of Justice. The Court of Justice shall, within a period of three months, give an opinion on the question. The opinion of the Court of Justice shall be final. If the Member State concerned asks the Council of Ministers to take the final decision, the Council of Ministers shall take the decision within a period of three months. In the meantime, no action may be taken against the Member State in question.

111 At the request of various States parties to the Convention, the Court has issued several advisory opinions on the interpretation or application of the Convention (1969 Pact of San José, article 64).
113 ibid., articles 47 and 48.
114 ibid., article 49.
115 ibid., articles 51-53.
116 ibid., article 58.
117 ibid., articles 52, 53 and 58.
118 1957 EEC Treaty, article 219; see also note 263 above.
119 The Commission consists of 17 members elected for a four-year term by the Council of the European Communities. There must be at least one and no more than two nationals of each member State but commissioners act in a personal capacity and are appointed by common accord of the Governments of the member States.
first bring the matter before the Commission. The Commission shall deliver a reasoned opinion within three months but this opinion is not final. If the Commission does not meet its deadline or if the claimant party does not agree with the Commission’s opinion or if the defendant party does not comply with the opinion, the matter may then be brought before the Court of Justice.

267. The Court is thus competent to decide on cases in which a State member of the Community considers that another member State has failed to fulfill an obligation under the Treaty but it also has jurisdiction on any dispute between member States relating to the subject-matter of the Treaty if the dispute is submitted to it under a special agreement between the parties. If the Court finds that a member State has failed to fulfill an obligation under the Treaty, the State shall be required to take the necessary measures to comply with the judgement.

(i) Economic Community of West Africa

268. As to disputes arising between members of the Economic Community of West Africa (ECOWAS), regarding the interpretation or application of the Treaty under which it was created, the latter provides that such disputes shall be amicably settled by direct agreement. Whenever such an amicable settlement is not possible, any party to the dispute may refer the matter to a Tribunal of the Community whose function will be to settle the dispute, through final decisions, ensuring the observance of law and justice in the interpretation of the provisions of the Treaty.

(j) Agreements on shared management of resources

269. Provisions on the peaceful settlement of disputes may also be found in some regional agreements of a multilateral nature concerning the shared management of resources. Thus, the 1963 Agreement on navigation and economic cooperation between the States of the Niger Basin provides that any dispute arising between the riparian States regarding the interpretation or application of the Agreement shall be amicably settled by direct agreement between them or through the intergovernmental organization contemplated in the Agreement. Failing such settlement, the dispute shall be decided by arbitration, in particular by the Commission of Mediation, Conciliation and Arbitration of the Organization of African Unity, or by judicial settlement by the International Court of Justice.

270. The 1956 Convention on the Canalization of the Moselle and the 1961 Protocol on prevention of the pollution of the Moselle provide for direct negotiation. Failing this, the Convention contemplates arbitration, with a series of provisions regulating this procedure, including a special procedure for cases involving urgency.

271. The 1959 Lake Inari Agreement provides that any dispute regarding the application of the agreement shall be settled by a mixed commission composed of two members appointed by each party to the agreement. If this procedure fails, the agreement contemplates the settlement of dispute through the diplomatic channel.

3. Actual resort to regional agencies or arrangements in dispute settlement

272. International practice shows that regional agencies or arrangements have dealt with a number of disputes, applying the relevant provisions on peaceful settlement contained in their constituent instruments as well as principles derived from subsequent practice. Further to the previous section of the present chapter, which examined in some detail the institutional arrangements involved in the regional procedures, the following paragraphs will outline a brief account of actual disputes submitted by States to some of these regional procedures of peaceful settlement.

(a) League of Arab States

273. An example of intervention of the League Council as an arbitration organ is a 1949 dispute between Syria and Lebanon concerning extradition matters. After the Council intervention, the parties agreed to submit their dispute to the Governments of Saudi Arabia and Egypt for arbitration.

274. As to the Council’s functions of good offices, mediation and conciliation, the Council has considered that they also imply fact-finding activities and has appointed committees to that effect. Such was the case, for instance, in the 1958 Lebanon crisis, in which Lebanon complained to the League Council about acts of intervention of the United Arab Republic in the internal affairs of Lebanon, as well as in the 1962 Yemen situation of internal civil strife and, similarly, in the 1963 boundary dispute between Algeria and Morocco and in the 1972 border dispute between the Democratic People’s Republic of Yemen and the Yemen Arab Republic.

275. Often the League Council has included the Secretary-General in the special bodies it created for its mediation and fact-finding missions. Examples of the latter are the 1948 and 1962 Yemen situations of internal civil strife and the 1963 boundary dispute between Algeria and Morocco. In some...
cases the Council has vested in the Secretary-General alone the functions of offering good offices, as in the 1961 situation involving the secession of Syria from the United Arab Republic.337

276. As far as ad hoc mechanisms are concerned, it may be mentioned that, with regard to the recent Lebanese crisis, the Special Arab Summit of the League, held at Casablanca from 23 to 26 May 1989, decided to constitute a High Committee composed of the heads of State of Algeria, Morocco and Saudi Arabia. The High Committee was entrusted with the mission of promoting the convening of a meeting of the members of the Lebanese Parliament in order to discuss the adoption of political reforms, to proceed to the election of the President of the Republic and to constitute a Government of national unity.338

(b) Organization of American States

277. The Permanent Council may exercise a variety of functions, including good offices, inquiry and fact-finding at the request of one party to a dispute. The border conflict between Costa Rica and Nicaragua may be mentioned as an example of their application. As a result of serious incidents having taken place on the border between Costa Rica and Nicaragua, the Government of Costa Rica had recourse to the OAS Permanent Council, which by means of a resolution adopted on 7 June 1985339 requested the Governments of Colombia, Mexico, Panama and Venezuela to form a fact-finding committee, with the participation of the Secretary-General of OAS, to ascertain the events described by Costa Rica. After carrying out an on-site investigation, the committee reported to the Permanent Council. After considering the report,340 on 11 July 1985 the Permanent Council adopted a resolution in which it recommended to the Governments of Nicaragua and Costa Rica that they proceed to start talks within the framework of the Contadora countries’ negotiating process.341 By the same resolution, the Permanent Council decided to consider that the committee’s mandate was accomplished.

278. As for the role of the OAS Secretary-General, his functions further to that of participation in the above-mentioned fact-finding Committee may be noted. Thus, as regards the global situation in Central America, he has taken the initiative of submitting on 18 November 1986 an aide-mémoire to the Governments of the five Central American States (Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua) and the eight Governments making up the Contadora and Support Groups (Colombia, Mexico, Panama and Vene-

337Ibid., pp. 312-316.
338See the final communiqué of the Special Arab Summit, held at Casablanca from 23 to 26 May 1989, in: Actualité arabe (Centre arabe de documentation et d’information), vol. IX (203), p. 66 (June 1989) (in French); see also S/20789.
339See OAS Permanent Council resolution CP/Res. 427 (618/85).
340See the report of the Fact-Finding Committee established by the Permanent Council to investigate the complaint filed by the Minister of Foreign Affairs of Costa Rica, OAS document CP/Doc. 1592/85.
341See the resolution adopted by the Permanent Council of the Organization of American States at its special meeting held on 11 July 1985 (A/40/737-S/17549, annex IV). The Contadora countries are Colombia, Mexico, Panama and Venezuela.

zuela, and Argentina, Brazil, Peru and Uruguay, respectively), in which he explained the assistance that both organizations, singly or jointly, could provide for the purpose of promoting the peace efforts of the two Groups. As a result of said initiative, the Contadora and Support Group States requested the participation of the two Secretaries-General (United Nations and OAS) in a visit to the capitals of the five Central American countries,342 which took place in January 1987.

279. On 7 August 1987, the Presidents of the five Central American countries signed an agreement entitled “Procedure for the Establishment of a Firm and Lasting Peace in Central America”, better known as the Esquipulas II Agreement,343 which established an International Verification and Follow-up Commission to be composed of the Foreign Ministers of the five Central American States and of the Contadora and Support Group States as well as the two Secretaries-General. Therefore, the OAS General Assembly, by a resolution adopted on 14 November 1987,344 authorized the Secretary-General of OAS to continue carrying out the functions he had been performing, namely, participation in the International Verification and Follow-up Commission, and also requested him to provide every assistance to the Central American Governments in their efforts to achieve peace. The International Verification and Follow-up Commission met several times from August 1987 to January 1988 and reported to the signatories of the Esquipulas II Agreement on 14 January 1988.345

280. As part of the agreements reached at Tela, Honduras, on 7 August 1989, the five Central American States agreed on a Joint Plan for the Demobilization, Repatriation and Relocation of the Nicaraguan Resistance and Their Families, the execution of which will be placed under the supervision of an International Support and Verification Commission (CIAV) whose membership includes the Secretary-General of OAS.346 Furthermore, the Secretary-General of OAS, together with the Secretary-General of the United Nations, was requested by the indicated Plan to certify that it had been fully implemented.

281. As the Pact of Bogotá347 is envisaged by the OAS Charter (article 26) as the special treaty which will establish the adequate means for the settlement of disputes, contemplated in the OAS Charter, it is appropriate to mention here an example of the application of this treaty. It concerns the recent judgment by the International Court of Justice of 30 December 1988 on the case concerning Border and Transborder Armed Actions (Nicaragua v. Honduras). The Court concluded, as invoked by Nicaragua, that it had jurisdiction over the case under article XXXI of the Pact of Bogotá.348

343See OAS General Assembly resolution 870 (VI-0/87).
344See A/43/729-S/20234.
345See A/44/451, annex.
(c) Organization of African Unity

282. Several examples may be given of ad hoc organs created either by the Council of Ministers or by the Assembly of Heads of State and Government in their efforts towards the peaceful settlement of disputes among African States. Thus, after armed incidents took place in October 1963 between Algeria and Morocco in connection with a disputed area of the Sahara, and following the personal intervention of some heads of State, an extraordinary meeting of the Council of Ministers was convened at which an ad hoc commission was established to examine the questions connected with the frontier dispute and make recommendations for its peaceful settlement. Other cases of mediation by heads of State included the following: in 1966, President Mobutu of Zaire, at the request of the OAU Assembly, mediated in an ethnic conflict between Rwanda and Burundi; in 1972, the President of Somalia and the Administrative Secretary-General of OAU successfully mediated in serious troop clashes and border incidents between the United Republic of Tanzania and Uganda.

283. Furthermore, an ad hoc committee was created by the Assembly in 1971 to attempt to mediate in a conflict involving Guinea and Senegal on the extradition of Guinean exiles alleged to have committed acts of government destabilization in Guinea. More recently, the Assembly of Heads of State and Government of the Organization of African Unity created an Ad Hoc Committee of Heads of State on Western Sahara in order to find a peaceful solution to the ongoing conflict between Morocco and the Popular Front for the Liberation of Saguia el-Hamra and Rio de Oro (POLISARIO Front). That Ad Hoc Committee set up the Implementation Committee of Heads of State on Western Sahara to ensure the observance of a cease-fire that had to be agreed upon between the parties to the dispute. Also, the Implementation Committee had to organize and conduct a referendum, under the auspices of OAU and the United Nations, to enable the people of that territory to exercise their right to self-determination.

(d) European Convention for the Peaceful Settlement of Disputes (Council of Europe)

284. Two specific instances may be cited, as regards juridical settlement, in which the Convention's provisions were invoked. First, they were invoked as a basis of the International Court of Justice's jurisdiction in the 1969 North Sea Continental Shelf cases. The Convention also was at the basis of an agreement dated 17 July 1971 between Austria and Italy accepting the jurisdiction of the International Court of Justice in connection with any dispute concerning the status of the German-speaking minority in the southern Tyrol.

4. Relations between regional agencies or arrangements and the United Nations in the field of the peaceful settlement of local disputes

285. An important question concerns the harmonization of various provisions of the Charter of the United Nations dealing with the respective competence of regional agencies or arrangements under Article 52 of the Charter on the one hand and of the United Nations organs, on the other, in the area of the peaceful settlement of local disputes. These provisions are, mainly, Articles 34, 35, paragraph 1, and 52 of the Charter of the United Nations. While the States members of some regional bodies have consistently observed the principle of "try first" the machinery of the regional body concerned and have acquiesced in resolutions of their regional body reaffirming this principle, some States members of other regional bodies have insisted that disputes to which they are parties be handled directly by the Security Council.

286. A practice has evolved which tends to reconcile in a balanced manner the "regional" and the "universal" approaches represented by the positions described in the preceding paragraph. Certainly, if the parties to a dispute agree ab initio to resort to a regional agency or agreement for the peaceful resolution of a local dispute and both parties maintain this initial disposition throughout the various stages of the regional procedure, then the regional attempts to solve the local dispute may prove effective and fruitful, to the exclusion of the universal forum.

287. The question really arises whenever one of the parties to a local dispute has reservations about the regional forum and is interested in having direct access to the universal forum of the United Nations and brings the dispute to the attention of the Security Council. Under such circumstances, the Security Council has evolved a practice whereby it inscribes the matter in its agenda. After consultations with the parties to the dispute and if the dispute has not yet become sufficiently acute as actually to endanger international peace and security, the Council may decide, in accordance with Article 52, paragraphs 2 and 3, of the Charter, to refer the dispute to the regional forum but keep the matter in its agenda, under review. The advantage of maintaining the dispute in the agenda of the Security Council while the dispute is being handled in the regional forum and the Council awaits the latter's report lies in the fact that if the dispute evolves into one actually endangering international peace and security, or if one of the parties to the dispute deems the regional procedure

395Ibid., p. 359.
396Ibid.
397Ibid.
398Cf. OAU resolution ARG/res. 104 (XIX).
to have failed in its attempts to settle the controversy, the Security Council may resume immediately its consideration of the dispute without a prior discussion of the advisability of incorporating the matter into its agenda. 337

337 See, inter alia, the 1960 complaint by Cuba, Repertory of Practice of United Nations Organs, vol. II, Supplement No. 3, 1971, article 52, paras. 32-36; Security Council resolution 144 (1960) of 19 July 1960, and 1964 complaint by Panama, ibid., paras. 49-64, as well as Security Council resolution 190 (1964) of 30 December 1964. Cf. also chapter II, "Agenda", of the provisional rules of procedure of the Security Council (United Nations publication, Sales No. E.83.I.4), in particular rules 9 and 10, which read as follows: "Rule 9. The first item of the agenda of the Security Council shall be the adoption of the agenda. Rule 10. Any item of the agenda of a meeting of the Security Council, consideration of which has not been completed at that meeting, shall, unless the Security Council otherwise decides, automatically be included in the agenda of the next meeting."

I. Other peaceful means

1. Main characteristics and legal framework

288. The list of means for the peaceful settlement of disputes contained in Article 33, paragraph 1, of the Charter of the United Nations is completed by the phrase "other peaceful means". 338 These words indicate that the list found in that Article is not exhaustive, but is illustrative only. The obligation imposed on States by Article 33, paragraph 1, of the Charter—and by a number of treaties in which the terms of that provision are incorporated—is that they must endeavour to settle their disputes by the use of peaceful procedures. To this end, they may use any procedure they wish and on the use of which they can agree, provided that it is peaceful in nature. States are therefore free to use that particular means which they consider most apt for the settlement of the particular dispute with which they are faced, provided that it falls within the framework of Article 33, paragraph 1, of the Charter, even if it is not specifically listed therein.

2. Resort to other peaceful means

289. Examples may be found of cases in which States have endeavoured to settle, or have provided for the settlement of, their disputes by the use of means which constitute "other peaceful means" within the meaning of Article 33, paragraph 1, of the Charter. Analysis of the practice adopted up to now by States reveals that while in certain of these cases the means which States have used, or for which they have provided, are completely novel in character, in a majority of cases the means which States have used or provided for represent adaptations or combinations of familiar means of settlement. The means which come within the scope of the present section of the handbook may therefore be considered to fall into three broad categories: (a) those constituting entirely novel means which are not adaptations or combinations of the familiar means of settlement described in the preceding sections of the present chapter; (b) those constituting adaptations of one of the familiar means of settlement; and (c) those constituting combinations, in the work of a single organ charged with resolving the dispute, of two or more of the familiar means of settlement.

338 See also the second paragraph of the second principle proclaimed in the preamble to the Friendly Relations Declaration (supra, chap. I, para. 2), as well as section I, paragraph 5, of the Manila Declaration (ibid.).


340 In this connection, it may be recalled that under section I, paragraph 5, of the Manila Declaration the parties to a dispute are enjoined to "agree on such peaceful means as may be appropriate to the circumstances and nature of the dispute" and a similar injunction can be found in article 15 (2) of the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (General Assembly resolution 34/68 of 5 December 1979, annex).
(a) Novel means which do not consist in the adaptation or combination of familiar means

290. States often make provision for or use of means of peaceful settlement which do not appear in the list of specific means contained in Article 33, paragraph 1, of the Charter and whose originality does not reside in the manner in which those means are adapted or combined. Certain of these means—namely, consultations, international conferences and good offices—are described elsewhere in the present handbook and do not call for further discussion here;361 but there do exist others.

291. A novel procedure not listed in Article 33, paragraph 1, of the Charter which States may choose to employ consists in the referral of their dispute for a ruling to a political or non-judicial organ of an international organization. They may agree that the ruling of that body is to be binding upon them or they may agree that it is to be advisory in nature only, but in either case the procedure merits consideration as a means of settlement which is distinct both from the familiar means described in the other sections of this chapter and from the less familiar means described elsewhere in this section, at least where the dispute to be settled is predominantly legal in nature.

292. The constituent instruments of many international organizations provide that disputes relating to their interpretation and application are to be referred for a ruling to the political or non-judicial organs of those organizations. The relevant provisions of these instruments are reviewed elsewhere in the present handbook and do not call for further analysis here.362 However, States often choose to employ a similar procedure to settle disputes arising out of treaties which are not the constituent instruments of international organizations. In such cases, they typically designate as the body to which their disputes are to be referred an organ of that international organization whose responsibilities include the matter which is the subject of the treaty between them.

293. For example, many treaties dealing with aviation matters provide that disputes relating to their interpretation or application are to be referred for a ruling to the Council of the International Civil Aviation Organization.363 Sometimes it is stipulated that the ruling of that body is to have the status of an advisory report.364 Thus, for example, the Agreement between the Government of the United States of America and the Government of the United Kingdom relating to Air Services between their respective Territories, signed at Bermuda on 11 February 1946,365 provided in its article 9 that:

"Except as otherwise provided in this Agreement or in its Annex, any dispute between the Contracting Parties relating to the interpretation or application of this Agreement or its Annex which cannot be settled through consultations shall be referred for an advisory report to the Interim Council of the Provisional International Civil Aviation Organization . . . or its successor."

Likewise, the North Atlantic Weather Stations Agreement, signed at London on 12 May 1949,366 provides in its article XIV that:

"Any dispute relating to the interpretation or application of this Agreement or Annex II, which is not settled by negotiation, shall, upon the request of any Contracting Government party to the dispute, be referred to the Council [of the International Civil Aviation Organisation] for its recommendation."

On other occasions, the treaty stipulates that the ruling of the Council is to be binding upon the parties to the dispute. Thus, for example, the Agreement between the Government of the Kingdom of Thailand and the Government of the United Kingdom of Great Britain and Northern Ireland for Air Services between and beyond their respective Territories, signed at Bangkok on 10 November 1950,367 provides in its article 9 that:

"2. . . . either Contracting Party may submit the dispute for decision to any tribunal competent to decide it which may hereafter be established within the International Civil Aviation Organisation or, if there is not such tribunal, to the Council of the said Organisation.

"3. The Contracting Parties undertake to comply with any decision given under paragraph 2 of this article."

294. A procedure closely analogous to the one described above consists in the submission of a dispute for an advisory report to a panel of experts which, while it is not an organ of an international organization, is nevertheless a non-judicial body operating within its framework. An example of a treaty which envisages the use of such a procedure is the International Plant Protection Convention, done at Rome on 6 December 1951,368 which provides in its article IX:

"1. If there is any dispute regarding the interpretation or application of this Convention, or if a contracting Government considers that any action by another contracting Government is in conflict with the

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361 For consultations, see chap. II A 1, para. 24, for international conferences, see chap. II A 1, para. 41, for good offices, see chap II, sect. C.
362 See chaps. III and IV below.
363 Or to its predecessor, the Interim Council of the Provisional International Civil Aviation Organization.
364 Occasionally it is further provided that the parties to the dispute are to endeavour, within certain limits, to secure the implementation of the advice contained in the report. Cf. the provisions referred to in paragraphs 300 and 301 of the present section. Indeed, a provision of this type is usual in those bilateral air services agreements which provide for the reference of disputes to the ICAO Council for an advisory report. See, for example, article VIII of the Air Transport Agreement between the Government of the United Kingdom and the Government of the United States of Brazil, signed at Rio de Janeiro on 31 October 1946, United Nations, Treaty Series, vol. 11, p. 115.
366 Ibid., vol. 101, p. 91.
367 Ibid., vol. 96, p. 77.
368 Ibid., vol. 150, p. 67. For other similar provisions, see, for example, the Constitution of the European Commission for the Control of Foot-and-Mouth Disease, approved by the Conference of the Food and Agriculture Organization of the United Nations at its seventh session in Rome on 11 December 1953, ibid., vol. 191, p. 285, article XVII; Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, General Assembly resolution 31/72 of 10 December 1976, annex; and ibid., vol. 1108, p. 151, article V and annex, para. 1.
obligations of the latter under articles V and VI of this Convention... the Government or Governments concerned may request the Director-General of FAO to appoint a committee to consider the question in dispute.

2. The Director-General of FAO shall thereupon, after consultation with the Governments concerned, appoint a committee of experts which shall include representatives of those Governments...

3. The contracting Governments agree that the recommendations of such a committee, while not binding in character, will become the basis for renewed consideration by the Governments concerned of the matter out of which the disagreement arose.

295. An unusual method for the settlement of disputes arising under a treaty is to be found in some of the agreements concluded by the Nuclear Regulatory Commission of the United States. For example, the Agreement on Research Participation and Technical Exchange between the United States Nuclear Regulatory Commission (USNRC) and the Federal Ministry for Research and Technology of the Federal Republic of Germany (FRGMRt) in the USNRC Loss of Fluid Test (LOFT) Research Program covering a Four-year Period, signed at Washington on 20 June 1975, provides in its article VI (A):

"Any disputes between the USNRC and FRGMRt concerning the application or interpretation of this Agreement that is not settled through consultation shall be submitted to the jurisdiction of the United States federal courts. This agreement shall be construed in accordance with the internal federal law applicable in the appropriate United States courts, to agreements which to the Government of the United States is a party."

An identically worded provision is to be found in article VI (A) of the Agreement on Research Participation and Technical Exchange between the United States Nuclear Regulatory Commission and the Nordic Group (Forsosanglaeg Riso, Denmark; Valtion Teknillinen Tutkimuskeskus, Finland; Institut for Atomenergie, Norway; and Ab Atomenergi, Sweden) in the USNRC LOFT Research Program and the Nordic Norhav Project covering a Four-year Period, concluded on 15 September 1976.

(b) Adaptations of familiar means

296. As has been noted in the preceding sections of the present chapter, States are free to make adaptations to most of the means of settlement listed in Article 33, paragraph 1, of the Charter. States might exercise this power of adaptation in such a way as to change the very nature of what might otherwise be considered a familiar method of settlement and thereby create a distinct, new process.

297. For example, it is an essential feature of conciliation that the conclusions contained in the report of the conciliator are proposals only, and it remains within the unfettered discretion of the parties whether or not to accept them: the purpose of conciliation is to facilitate, and not to replace the need for, negotiations between the parties. Consequently, for the parties to a dispute to agree in advance to accept as binding and to abide by the terms of the settlement proffered by the conciliator would be to alter the very nature and outcome of the process. Those cases in which States have assumed such an obligation should therefore be considered instances of a distinct adaptation of conciliation.

298. A recent example of an agreement between States to adapt the method of conciliation so as to make binding the report of the conciliator is the Treaty Establishing the Organisation of Eastern Caribbean States, done at Basseterre on 18 June 1981, article 14 (3) of which provides:

"Any decisions or recommendations of the Conciliation Commission in resolution of the dispute shall be final and binding on the Member States."

Similarly, annex A, paragraph 6, of that Treaty provides:

"... The report of the Conciliation Commission, including any conclusions stated therein regarding the facts or questions of law, shall be binding upon the parties."

299. States may also agree that while the report of the conciliator is not to be binding upon them they are nevertheless to be under an obligation to consider in good faith the recommendations which it contains or to make them the basis of their future negotiations. Thus, for example, article 11 (5) of the Convention for the Protection of the Ozone Layer, done at Vienna on 22 March 1985, provides in its article 11 (5) that:

"The Conciliation Commission shall render a final and recommendatory award, which the parties shall consider in good faith."

A provision of this type gives to the report of the conciliator a legal importance greater than that which is typically enjoyed by such a document. Cases in which States have assumed an obligation of the kind described thus involve a departure from the traditional practice of conciliation. They should consequently be considered instances of a distinct adaptation of that method.

300. It is an essential feature of mediation that the terms of settlement presented to the parties by the mediator are proposals only, and it remains within the unfettered discretion of the parties whether or not to accept them. Consequently, for the parties to a dispute to agree in advance to abide by the terms

376ibid., vol. 1066, p. 211.
377ibid., vol. 1088, p. 53. See also the Agreement on Research Participation and Technical Exchange between the United States Nuclear Regulatory Commission and the Österreichische Studienfersellschaft für Atomenergie in the USNRC PBF Research Program covering a Four-year Period, signed on 25 February and on 3 March 1977, ibid., vol. 1087, p. 267, article V.
of the settlement placed before them by the mediator would be to alter the very nature and outcome of the process. Those cases in which States have agreed to such an obligation should, therefore, be considered instances of a distinct adaptation of mediation.

301. France and New Zealand made use of a procedure of this type in order to settle the dispute between them arising out of the sinking of the Rainbow Warrior. Following the intervention of the Prime Minister of the Netherlands, who proffered the parties his good offices, the two States approached the Secretary-General of the United Nations in order to ask him "to act as mediator in the dispute" between them.376 The Secretary-General indicated his willingness to do so.376 The two States then proceeded to agree "to refer all of the problems between them arising out of the Rainbow Warrior affair to the Secretary-General of the United Nations for a ruling." 377 They also "agreed to abide by his ruling." 378 The Secretary-General announced that he was willing to undertake this task and to make his ruling in the near future.379 The "mandate" which the parties gave the Secretary-General was to find solutions which "both respect[ed] and reconcile[d]" the conflicting positions of the parties,380 and which at the same time were both "equitable and principled." 375 To this end, once each of the parties had presented its position to him in a brief written memorandum,392 the Secretary-General made contact with the parties through diplomatic channels in order to satisfy [himself] that [he] had a full and complete understanding of their respective positions and to be sure that [he was] able to produce a ruling of that type.381 He then proceeded to issue his ruling, one of the terms of which was that "[t]he two Governments should conclude and bring into force as soon as possible binding agreements incorporating" the other, substantive terms of his ruling.382 The parties did this three days later by means of three exchanges of letters.383

302. It is one of the essential features of arbitration that it results in the handing down of an award which is binding upon the parties to the dispute and which they are obligated to implement.386 However, States are free to alter even this aspect of the arbitral process if they so wish, and to agree in advance that the award of the arbitral tribunal shall have the juridical nature of a recommendation only. Cases in which States have agreed that the award of an arbitral tribunal is to have this character should be considered instances of a distinct adaptation of arbitration.

303. Many examples of such provisions can be found in State practice. In some cases, the dispute-settlement clause or compromis does not, either explicitly or implicitly, impose on the States parties to the arbitration any obligation to comply with the conclusions set forth in the award of the arbitral tribunal, though it may impose on them an obligation to give those findings sympathetic consideration. Thus, for example, the Convention on International Liability for Damage Caused by Space Objects, opened for signature at London, Moscow and Washington on 29 March 1972,387 provides in its article XIX (2) that:

"The decision of the [Claims] Commission shall be final and binding if the parties have so agreed; otherwise the Commission shall render a final and recommendatory award, which the parties shall consider in good faith." (emphasis added)

304. In other cases, States, while agreeing that the award of the arbitral tribunal is to have the status of a recommendation rather than of a binding decision, also undertake, within certain limits, to endeavour to secure the implementation of the conclusions contained in the award. Thus, for example, the Air Transport Agreement between the Government of the United States of America and the Government of Italy, signed at Rome on 6 February 1948,388 provided in its article 12 that:

"Except as otherwise provided in the present Agreement or its Annex, any dispute between the contracting parties relative to the interpretation or application of the present Agreement or its Annex, which cannot be settled through consultation, shall be submitted for an advisory report to a tribunal of three arbitrators . . . . The executive authorities of the contracting parties will use their best efforts under the powers available to them to put into effect the opinion expressed in any such advisory report . . . ."

In 1964, the United States and Italy decided to take to arbitration under that article a dispute which had arisen between them concerning the interpretation of the 1948 Agreement.389 and in the following year the arbitral tribunal constituted pursuant to that compromis handed down its advisory opinion.390

305. A further example of such a provision can be found in article X of the Agreement between the Government of the United States of America and the Provisional Government of the French Republic relating to Air Services between their respective Territories, signed at Paris on 27 March
1946. 491 as amended in 1951. 492 That article is almost indistinguishable from article 12 of the United States-Italy agreement of 1948, in that it provides for an arbitral award which is to have the status of an "advisory report" but also contains an undertaking by the parties to endeavour, within certain limits, 493 to implement the advice which it contains. However, when in 1962-1963 the United States and France decided to take to arbitration under article X a dispute which had arisen between them relating to the 1946 Agreement, 494 they agreed in an exchange of letters "to consider the decision of the Arbitral Tribunal in this dispute, as binding upon [them]." 495 Moreover, when a further aviation dispute arose between the two States in 1978, they agreed in clause 2 of the agreement by which they submitted the dispute to arbitration under article X of the 1946 Agreement that, while the award of the arbitral tribunal on the second of the two questions put to it was to be advisory only, as envisaged by article X, its award on the first question was to be binding. 496 It should therefore be realized that, while States may agree to settle their future disputes by employing a procedure in which the process of arbitration is modified in such a way as to make the award the arbitral tribunal mandatory only, they are nevertheless free, when they use that procedure to settle a particular dispute, to agree that it should nevertheless result in a decision which is legally binding upon them. 497

492 Exchange of Notes Constituting an Agreement Amending article X of the Agreement of 27 March 1946 between the Government of the United States of America and the Provisional Government of the French Republic relating to Air Services between their respective Territories, done at Paris on 19 March 1951, ibid., vol. 139, p. 151.
493 In the English text, these limits are specified in terms identical to those used in article 12 of the United States-Italy agreement. The French text, which is equally authentic, provides: "les parties contractantes feront de leur mieux dans les limites de leurs pouvoirs légaux pour donner effet à l'avis consultatif." (emphasis added)
494 Compris of Arbitration between the Government of the United States of America and the Government of the French Republic relating to the Agreement between the Governments of the United States of America and France relating to Air Services between their respective Territories signed at Paris on 27 March 1946, as amended, signed at Paris on 22 January 1963, ibid., vol. 473, p. 3.
496 Compris of Arbitration between the Government of the United States of America and the Government of the French Republic, signed at Washington on 11 July 1978, United Nations, Treaty Series, vol. 1106, p. 195. Clauses 9, 10 and 11 of this agreement accordingly describe the award of the tribunal as "a decision and advisory report".
497 Cases exist of dispute-settlement clauses and compris which appear to provide for a departure from one of the essential features of arbitration, in so far as they stipulate that the award of the arbitral tribunal is to be advisory only, but which do in fact impose on the States parties an obligation to implement in full the advice which the arbitral award contains. See, for example, paragraphs 1 and 5 of the Agreement between the Governments of the French Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America for the Submission to an Arbitrator of Certain Claims with respect to Gold Looted by the Germans from Rome in 1943, signed at Washington on 25 April 1951, ibid., vol. 91, p. 21.

(c) Combination of two or more familiar means in the work of a single organ

306. While it is by no means uncommon for a treaty to envisage the sequential application to a given dispute of several different means of settlement, 498 it is more unusual for a treaty to provide for two—or more—different methods to be applied sequentially by one and the same organ. The procedures instituted by such treaties merit consideration as autonomous means of dispute settlement, distinct from the two methods of which they are a combination. It is for this reason that conciliation, which involves the sequential discharge by one organ of the tasks of inquiry and mediation, 499 is listed in Article 33, paragraph 1, of the Charter as a discrete means of settlement, distinct from both of those other two methods.

307. The two methods of conciliation and arbitration may be combined and administered by a single organ. This may occur where a treaty, in addition to empowering an arbitral tribunal to hand down a binding decision, also authorizes that body, before issuing its final award, to try to bring the parties to an amicable settlement of their dispute by proposing to them the terms of a satisfactory solution. Thus, for example, the Agreement on Economic and Technical Cooperation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Senegal, signed at Dakar on 12 June 1965, 500 provides in its article 6 (5) that:

"... Before giving its verdict, [the arbitral tribunal] may, at any stage of the proceedings, propose an amicable settlement of the dispute to be agreed by the Parties."

Sometimes the exercise of this power of conciliation is made mandatory, rather than optional, the arbitral tribunal being empowered to proceed to hand down a binding award only after it has first tried and failed to persuade the parties to resolve their differences by proposing to them the terms of a possible settlement. Thus, the Agreement concerning Air Services between France and Kuwait, signed at Kuwait on 5 January 1975, 501 provides in its article 14 (4) that:

"If the arbitral tribunal cannot arrive at an amicable settlement of the dispute, it shall take a decision by majority vote ..."

308. A recent example of an agreement between States thus to combine in the work of a single organ the methods of conciliation and arbitration, it being incumbent upon the arbitral tribunal to explore the possibilities of conciliation before proceeding to hand down an award, is the Arbitration Compris between Israel and Egypt, done at Giza on 11 September 1986. 502

498 See, for example, the instruments cited in chapter II, section E of the handbook, notes 91 and 92; article 286 of the 1982 United Nations Convention on the Law of the Sea; articles 65 (3) and 66 of the 1969 Vienna Convention on the Law of Treaties; and article 21 of the 1928 General Act for the Pacific Settlement of Disputes.
499 See chap. II.D.1, para. 123.
By article II of that agreement, Israel and Egypt submitted a dispute concerning the demarcation of a portion of their land boundary for decision by a five-member arbitral tribunal. At the same time, they also agreed, in article IX, that:

"1. A three-member chamber of the [arbitration] Tribunal shall explore the possibilities of a settlement of the dispute. The three members shall be the two national arbitrators and, as selected by the President of the Tribunal . . . , one of the two non-national arbitrators.

"2. . . . [T]his chamber shall give thorough consideration to the suggestions made by any member of the chamber for a proposed recommendation concerning a settlement of the dispute . . . . Any proposed recommendation concerning a settlement of the dispute which obtains the approval of the three members of the chamber will be reported as a recommendation to the parties not later than the completion of the exchange of written pleadings . . . ."

"3. The arbitration process shall terminate in the event the parties jointly inform the Tribunal in writing that they have decided to accept a recommendation of the chamber and that they have decided that the arbitration process should cease. Otherwise, the arbitration process shall continue in accordance with this Compromis.

"4. All work pursuant to the above paragraphs absolutely shall not delay the arbitration process . . . ."

A three-member chamber of the arbitral tribunal was constituted pursuant to paragraph (1) of the article, but in spite of the efforts of the chamber to find a proposal which might prove acceptable to both of the States parties to the arbitration, it was unable to place before them any recommendation for a settlement of the dispute. The arbitration tribunal, consequently, proceeded, in accordance with paragraph (3), to hear the parties’ oral arguments to hand down an award.

309. The methods of conciliation and arbitration may also be combined in the work of a single organ in a manner rather different from that described in the two preceding paragraphs. In addition to empowering an arbitral tribunal to hand down a binding award, States may also direct that body, at the same time as it issues its award, to recommend to them the manner in which they should agree to implement the conclusions which it contains. A well-known instance of a treaty in which States did this is the Special Agreement for the Submission of Questions relating to Fisheries on the North Atlantic Coast under the General Treaty of Arbitration concluded between the United States and Great Britain on 4 April 1908, signed at Washington on 27 January 1909. Under article 1 of that agreement, the United States and Great Britain submitted a series of seven questions for binding decision to a tribunal of arbitration. At the same time, they also agreed, in article 4, that:

"The tribunal shall recommend for the consideration . . . of the Parties rules and a method of procedure under which all questions which may arise in future regarding the exercise of the liberties above referred to [which were the subject of the seven questions submitted to the tribunal for its decision] may be determined in accordance with the principles laid down in the award . . . ."

The tribunal made several such recommendations, some of which were subsequently accepted by the parties, albeit with certain modifications.

310. States may choose to combine in the work of a single organ the method of conciliation and that distinct means of settlement, described above, in which the process of conciliation is adapted so as to yield a binding final report. Thus, in addition to empowering a conciliation commission to hand down a binding final report, States may also authorize that body, before it issues such a report, to try to induce them to settle their dispute amicably by proposing to them the terms of a possible solution. Indeed, practice reveals that, if States choose to give the former power to a conciliation commission, they will usually choose also to give it the latter. Thus, for example, the Treaty Establishing the Organisation of Eastern Caribbean States, in addition to providing that the report of the Conciliation Commission is to be binding, also stipulates, in its annex A, paragraph 4, that:

"The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement."

311. States may also agree to combine the two methods of negotiation and arbitration in the work of what is effectively a single organ. Usually, when States employ the two methods sequentially, such a combination does not occur, things being so arranged that those persons who are responsible for the conduct of the negotiations do not subsequently sit as arbitrators in respect of the same dispute. However, States may decide that this shall happen, thereby, in effect, entrusting the tasks of negotiation and arbitration to a single organ. In such cases, States usually charge the negotiations to a joint commission, composed of an equal number of their representatives or of persons appointed by them. Such a commission may be empowered to agree upon a solution to the dispute which is binding upon the parties, or it may be authorized simply to formulate the terms of a draft settlement which has to be placed before the parties for their approval. If the negotiations within the commission should fail, however, the commissioners are to proceed to serve as arbitrators, together with a newly appointed, neutral member, creating the situation of an odd number of arbitrators overall. Thus, for example, the

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406 Award of the Tribunal of Arbitration in the Question relating to the North Atlantic Coast Fisheries, ibid., pp. 174-176 and 188-189.
407 Agreement between the United States of America and Great Britain adopting with certain Modifications the Rules and a Method of Procedure recommended in the Award of 7 December 1910 of the North Atlantic Coast Fisheries Arbitration, signed at Washington on 20 July 1912, ibid., p. 221.
408 Paras. 297 and 298.
409 Supra, note 372.
410 For joint commissions, see chap. II.A, para. 38 and note 7.
Agreement between Canada and France on their Mutual Fishing Relations, signed at Ottawa on 27 March 1972, provides in its article 10 that:

"1. The Contracting Parties shall establish a Commission to consider all disputes concerning the application of this Agreement.

"2. The Commission shall consist of one national expert nominated by each of the Parties for ten years. In addition, the two Governments shall designate by mutual agreement a third expert who shall not be a national of either Party.

"3. If, in connection with any dispute referred to the Commission by either of the Contracting Parties, the Commission has not within one month reached a decision acceptable to the Contracting Parties, reference shall be made to the third expert. The Commission shall then sit as an arbitral tribunal under the chairmanship of the third expert.

"4. Decisions of the Commission sitting as an arbitral tribunal shall be taken by a majority, and shall be binding on the Contracting Parties."

However, when a dispute arose in 1985 between Canada and France concerning the application of the 1972 Agreement, the two States agreed that, notwithstanding the terms of paragraph (1), the matter should not be considered by the joint commission provided for in paragraph (2), but should, rather, be submitted directly to the three-member arbitral tribunal provided for in paragraph (3).

312. The procedure described in the preceding paragraph should be distinguished from those cases in which a dispute is referred, first, to a joint commission, and, if the commissioners cannot agree upon the terms of a settlement, is then brought before either an umpire or an arbitral tribunal whose membership does not include the commissioners who were responsible for the conduct of the failed negotiations. In cases of the latter type, the tasks of negotiation and arbitration are entrusted not to one, but to two separate organs.

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412 Joint press communiqué issued on 23 October 1985 by the Canadian and French Governments.
413 Compromis of Arbitration, signed at Paris on 23 October 1985, UNRIAA, vol. XIX, p. 226. For the award of the tribunal, see Decision of the Arbitral Tribunal of 17 July 1986 in the Case concerning Filling within the Gulf of St. Lawrence, ibid., p. 225.
414 See, for example, article XI (3) of the Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Portugal relative to the Construction of a Connecting Railway between Swaziland and Mozambique, signed at Lisbon on 7 April 1964, United Nations, Treaty Series, vol. 539, p. 167.
III. PROCEDURES ENVISAGED IN THE CHARTER OF THE UNITED NATIONS

A. Introduction

313. The principal organs of the United Nations established under Chapter III (Article 7, paragraph 1) of the Charter of the United Nations, namely, “a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat”, constitute the most important part of the machinery necessary for the implementation of the main purposes and principles of the United Nations, in particular, to maintain international peace and security, and to that end to bring about by peaceful means, and in conformity with the principles of justice and international law, the adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

314. In exercising the powers conferred upon them by the Charter, the Security Council and the General Assembly may call upon States parties to a dispute to use any of the peaceful means of settlement of disputes listed in Article 33, paragraph 1, of the Charter. As shown by the examples given in the present chapter, the organs themselves also rely upon the application of these peaceful means when they put in motion the process of settlement of a dispute.

315. This chapter is therefore aimed to illustrate the way in which the principal organs of the United Nations perform their functions in the area of the settlement of disputes between States.

B. The Security Council

1. Role of the Security Council in the peaceful settlement of disputes

316. Under Article 24 of the Charter, the Security Council has the primary responsibility for the maintenance of international peace and security and in that context plays an important role in the settlement of disputes between States.

317. The Security Council, in performing its functions in the field of settlement of disputes, acts under various Chapters of the Charter and does not always indicate the Chapter under which it is proceeding. Primarily, the Council exercises the powers contained in Chapter VI of the Charter, using also other functions and powers under Chapter VII (under which the Council is empowered to take preventive or enforcement measures to maintain or restore international peace and security) and Chapter VIII, relating to procedures under regional agencies or arrangements. The main basis of its activities in the field of the peaceful settlement of disputes, however, is Chapter VI of the Charter, empowering the Security Council, inter alia: to investigate any dispute or any situation which might lead to international friction or give rise to a dispute in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security; to recommend, at any stage of a dispute or situation, appropriate procedures or methods of adjustment; to establish whether the continuance of a dispute is in fact likely to endanger the maintenance of international peace and security for the purpose of deciding whether to act under article 36 or of making recommendations for appropriate terms of settlement; and to call upon the parties to settle their disputes by the peaceful means listed in Article 33, paragraph 1, or to make recommendations to them with a view to a pacific settlement of the dispute. Thus, only the functions of the Security Council under Chapter VI, directly relating to the settlement of disputes, and some functions in this field under Chapter VIII, relating to procedures under regional agencies or arrangements, are discussed in the present section.

318. Some examples of actions taken by the Security Council under the various Articles of Chapter VI on various questions referred to it for settlement are presented below to illustrate the functions of the Council in this field.

(a) Investigation of disputes and determination as to whether a situation is in fact likely to endanger international peace and security

319. With regard to its agenda item entitled “Complaint of armed invasion of Taiwan (Formosa)”, the Security Council, relying on Article 34 of the Charter, affirmed that it was “its duty to investigate any situation likely to lead to international friction or to give rise to a dispute, in order to determine whether the continuance of such dispute or situation may endanger international peace and security, and likewise to determine the existence of any threat to peace.”

320. The task of investigating disputes or situations has been performed by the Security Council by various means. Thus, dealing with the situation concerning Western Sahara, the Council, at its 1850th meeting, on 22 October 1975, by its resolution 377 (1975), acting “in accordance with Article 34 of the Charter”, requested the Secretary-General to enter into immediate consultations with the parties concerned and to report to the Coun-

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416 Charter of the United Nations, Article 34.
417 Ibid., Article 36, paragraph 1.
418 Ibid., Article 37, paragraph 2.
419 Ibid., Articles 33, paragraph 2, and 38.
421 See Official Records of the Security Council, Thirtieth Year, Supplement for October, November and December 1975, 1850th meeting.
cil on the results of his consultations "in order to enable the Council to adopt the appropriate measures" to deal with the situation. With regard to the Spanish question, the Council, at its 39th meeting, on 29 April 1946, established a sub-committee and instructed it to examine the evidence and to report to the Council in order to enable the Council itself to determine the nature of the dispute, as envisaged in Article 34, although express reference to the Article was not made in the relevant Security Council resolution.122 In the India-Pakistan question, by contrast, the Security Council, by its resolution of 20 January 1948,123 established an independent Commission for India and Pakistan to, inter alia, "investigate the facts pursuant to Article 34 of the Charter". The Commission was composed of representatives of three Members of the United Nations: one member selected by each of the two parties, and the third designated by the two members so selected. Such a commission was also established in the Greek question.124 In that case, the Commission, pursuant to the Council's decision of 19 December 1946, was composed of a representative of each member of the Council. In connection with the complaint by Benin (1977), the Security Council, at its 1987th meeting, on 8 February 1977, by its resolution 404 (1977), decided to send a Special Mission composed of three members of the Council to the People's Republic of Benin in order to investigate the events of 16 January 1977 in Cotonou and to report on them. In connection with the situation in the occupied Arab territories, the Council, at its 2134th meeting, on 22 March 1979, by its resolution 446 (1979), established "a commission consisting of three members of the Security Council, to be appointed by the President of the Council after consultation with the members of the Council, to examine the situation relating to settlements in the Arab territories occupied since 1967, including Jerusalem" and requested the Commission "to submit its report to the Security Council by 1 July 1979".125

321. The determination of the nature of disputes or situations under Article 34 is relevant also to the application of Article 37, according to which the Security Council is to decide whether to take appropriate steps if it deems that the continuance of the dispute "is in fact likely to endanger the maintenance of international peace and security". In this connection it should be emphasized that, where the Council has established a subsidiary organ to carry out an investigation, it reserves the right of making the final determination as to the nature of the dispute or situation as envisaged in Article 34. This was illustrated by the actions it took in the above-mentioned Spanish question,127 which also brought to light the difficulties concerning the establish-
Council, at its 127th meeting, on 9 April 1947, recommended that the parties refer the dispute to the International Court of Justice;

(b) In the course of the debate in connection with the Palestine question, in 1948, the Council identified the particular procedures and methods aimed at halting the hostilities. Procedures of pacific settlement under Chapter VI of the Charter were expressly asserted, and the Council supplemented its earlier call for the cessation of acts of violence. As regards the procedures aimed at achieving the political settlement, the Security Council requested the convocation of a special session of the General Assembly in accordance with Article 20. The Council, in its resolutions, enjoined all concerned to take specific measures with a view to the cessation of violence and established a truce commission to supervise the implementation of these measures. It further instructed the United Nations Mediator in Palestine, appointed by the General Assembly, to promote a peaceful adjustment of the situation and to supervise the implementation of the cease-fire measures and reinforced them by the decisions to consider possible action under Chapter VII in the case of the failure of the parties to implement the cease-fire resolution;

(c) In the course of the Council's efforts to assist the Governments of Malta and the Libyan Arab Jamahiriya in settling their differences regarding the delimitation of the continental shelf area between the two countries and in connection with the complaint by Malta against the Libyan Arab Jamahiriya (1980), the use of judicial procedures to obtain a peaceful resolution of the conflict was envisaged by the Council.

325. As indicated in paragraph 310 above, the Security Council, in performing its functions in the pacific settlement of disputes, may rely upon the application of some of the specific means of peaceful settlement enumerated in Article 33 of the Charter. In a number of instances involving armed hostilities—for example, in the Indonesian question (1947), the Palestine question (1948) and the India-Pakistan question (1948-1950)—the Security Council adopted decisions under Article 36 involving recourse to procedures of good offices, mediation, conciliation and arbitration or other peaceful means. With respect to the India-Pakistan question, it may be further noted that the Security Council used a combination of such procedures as investigation, mediation, conciliation, good offices and arbitration. In two questions not involving hostilities, the Iranian question (1946) and the Corfu Channel incidents, the Security Council, in the former instance, at its 5th meeting, on 30 January 1946, took note of the proposed recourse to direct negotiations and, in the latter, at its 127th meeting, on 9 April 1947, recommended settlement by judicial means. A call for negotiations was made, for example, in paragraph 5 of the Council's resolution 353 (1974) of 20 July 1974, adopted in connection with the situation in Cyprus, while in paragraph 2 of Security Council resolution 479 (1980), of 28 September 1980, adopted with regard to the situation between Iran and Iraq, the parties were urged to accept any appropriate offer of mediation or conciliation or resort to regional agencies or arrangements or other peaceful means. Other instances in which the Security Council has endorsed the efforts of the parties to settle their disputes by peaceful means include paragraph 6 of Council resolution 473 (1980) of 13 June 1980, adopted in connection with the question of South Africa, and paragraph 2 of Council resolution 395 (1976) of 25 August 1976, adopted with regard to the complaint by Greece against Turkey.

326. The Council has recognized that when using its power to make recommendations under Article 36, paragraph 2, it "should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties". This was illustrated at its meeting of 27 May 1958 in connection with the complaint by Lebanon. After its consideration of a proposal by the representative of Iraq that the Council postpone its consideration of the question pending its consideration at an upcoming meeting of the League of Arab States, when reference was made to Article 36, paragraph 2, the Council adopted the proposal to adjourn the meeting until 3 June 1958 (by which time it would be known whether the question could be resolved outside the Council), on the understanding that the Council would meet at short notice at the request of the representative of Lebanon.

327. The Charter provides that the Security Council, when exercising its power to recommend appropriate procedures or methods of adjustment, should take into consideration the distribution of competence between the Council in the field of peaceful settlement of disputes and the International Court of Justice as the principal judicial organ of the United Nations. This distribution of competence is referred to in Article 36, paragraph 3, of the

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433See Security Council resolution 43 (1948) of 1 April 1948.
434See Security Council resolution 44 (1948) of 1 April 1948.
437Security Council resolution 50 (1948), paragraph 11.
438The Council's activities in this respect may be illustrated by its consideration of the issue at the 2246th meeting of the Council, on 4 September 1980 (see Official Records of the Security Council, Thirty-Fifth Year). See also ibid., Supplement for October, November and December 1980, documents S/14228, S/14229 and S/14256.
439See Security Council resolution 27 (1947) of 1 August 1947.
Charter, which provides that "in making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court." 448 One instance of the application of Article 36, paragraph 3, was the Corfu Channel incidents (1947), in connection with which the Council recommended, at its 127th meeting, on 9 April 1947, 449 that the United Kingdom and Albanian Governments should immediately refer the dispute to the International Court of Justice in accordance with the provisions of the Statute of the Court. 450 Another example is the question of the detention of United States diplomatic personnel in Tehran, in which the Council, in its resolution 461 (1979), of 31 December 1979, took into account the Order of the International Court of Justice of 15 December 1979 (S/13697). 451 However, in its resolution 395 (1976) of 25 August 1976, concerning the complaint by Greece against Turkey, the Council invited both Governments to continue to take into account the contribution that appropriate judicial means, in particular the International Court of Justice, would make within the purpose of the pacific settlement of remaining differences in connection with the dispute. Thus the question was being considered by both the Security Council and the International Court of Justice.

328. The practice indicates, however, that the distinction between the "appropriate procedures or methods of adjustment" which can be recommended by the Council under Article 36, paragraph 1, and "terms of settlement" which can be recommended by the Council under Article 37, paragraph 2 (in addition to its right to call upon the parties to settle the dispute by the peaceful means under Article 33), is not always clear. As an example appears the recommendation by the Council in its resolution 47 (1948) adopted at its 286th meeting, on 21 April 1948, 452 for a plebiscite concerning the State of Jammu and Kashmir in order to settle the India-Pakistan question. The role played by the Security Council under Article 36 is closely connected with its role under Article 37, 453 which provides that "if the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate."

329. It is necessary, however, to point out in respect of the application of Article 37, paragraph 2, that the Security Council takes into account the positions of the parties to the dispute. 446 This issue is illustrated, for example, in the Council's consideration of the India-Pakistan and the Suez Canal questions. During the proceeding on the India-Pakistan question, in 1957, the Council adopted a resolution which omitted the terms that were regarded as unacceptable by one of the parties to the dispute and adopted a draft resolution which took into account the position of both parties. 455 In dealing with the Suez Canal question, at its 743rd meeting, on 13 October 1956, the Council failed to adopt a second part of the draft resolution which had not been accepted by both parties. 456

(ii) General recommendation to the parties to resort to peaceful means of settlement of the dispute

330. With respect to Article 38, which provides that, "without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute", it should be noted that the Council is empowered to make recommendations which are not necessarily limited to disputes the continuance of which is likely to endanger the maintenance of international peace and security.

331. Articles 33 to 37 deal with disputes the continuance of which is likely to endanger the maintenance of international peace and security, while Article 38 gives the Security Council the power to make recommendations with respect to "any dispute" if "all the parties" so request. However, the practice shows that States have tended not to make such a request under Article 38. 457

332. Nevertheless, in future, the possibility of more frequent recourse by States to Article 38 cannot be excluded in view of the new demands facing the international community and the United Nations in the field of the prevention and pacific settlement of disputes. This can be expected, for example, in connection with the application of the provisions of the Manila Declaration on the Peaceful Settlement of International Disputes, which, inter alia, reconfirms the need to exert utmost efforts in order to settle any conflicts and disputes between States exclusively by peaceful means. The same can be expected in the application of the Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and

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448 Another important issue of the "distribution of competence" of the principal organs in this field—the correlation between the Security Council and the General Assembly—will be considered in section C dealing with the role of the General Assembly, in particular under Articles 11, 12 and 35, paragraph 3.


450 See also I.C.J. Yearbook 1947-1948, pp. 55-60; The Corfu Channel Case, (Preliminary Objection), I.C.J. Reports 1948, p. 15, at pp. 31 and 32.

451 Security Council resolution 461 (1979) of 31 December 1979, sixth preambular paragraph.

452 See Official Records of the Security Council, Third Year, No. 61, 286th meeting, pp. 9-40.

453 In connection with the role played by the Security Council in pacific settlement in the course of application of Article 37, it is necessary to mention that the application of the Article is closely related to the application not only of Article 36, but also of other Articles of Chapter VI of the Charter, namely, Articles 33, 34 and 35 (see ibid., Second Year, No. 59, 159th meeting, document S/410, pp. 1343-1345; ibid., Third Year, No. 115, 364th meeting, p. 36).


456 See also Security Council resolution 22 (1947) of 9 April 1947.

457 See also I.C.J. Yearbook 1947-1948, pp. 55-60; The Corfu Channel Case, (Preliminary Objection), I.C.J. Reports 1948, p. 15, at pp. 31 and 32.

458 Security Council resolution 461 (1979) of 31 December 1979, sixth preambular paragraph.


460 In connection with the role played by the Security Council in pacific settlement in the course of application of Article 37, it is necessary to mention that the application of the Article is closely related to the application not only of Article 36, but also of other Articles of Chapter VI of the Charter, namely, Articles 33, 34 and 35 (see ibid., Second Year, No. 59, 159th meeting, document S/410, pp. 1343-1345; ibid., Third Year, No. 115, 364th meeting, p. 36).
Security and on the Role of the United Nations in this Field, which provides in its paragraph 1 (5) that “States concerned should consider approaching the relevant organs of the United Nations in order to obtain advice or recommendations on preventive means for dealing with a dispute or situation”.

(c) Relation to procedures under regional agencies or arrangements

333. In addition to Chapter VI of the Charter, which deals directly with the pacific settlement of disputes, provisions relevant to the role of the Security Council in the field of peaceful settlement are found also in Chapter VIII, concerning “Regional arrangements”.

334. According to Article 52, paragraph 3, of the Charter, the Security Council “shall encourage the development of pacific settlement of local disputes” through “regional arrangements” or by “regional agencies” either “on the initiative of the States concerned” or “by reference from the Security Council”. Under paragraph 2 of the same Article it is provided that the Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council. Thus, as analysed in chapter II, section H, above, some States members of certain regional agencies have taken the position that local disputes should first be tried through the mechanism of the relevant regional agency, while others have maintained the view that local disputes to which it are parties should be handled directly by the Security Council.

335. The practice of application of Chapter VIII, under its Article 54, is that the Security Council is kept informed of activities undertaken or in contemplation by regional organizations through communications addressed to the United Nations Secretary-General, from the Secretary-General of the respective regional organizations and from States parties to a dispute or situation.

2. Recent trends

336. Some of the international instruments recently adopted by the Organization reflect the ongoing process of positive changes in international relations and the growing awareness of the interdependence of States, indicating the trend to add new significance to the efforts of the United Nations in the area of prevention and peaceful settlement of international disputes and to enhance the effectiveness of the role of the Security Council in this field.

337. Thus, in the 1982 Manila Declaration on the Peaceful Settlement of International Disputes, the General Assembly called upon Member States to strengthen “the primary role of the Security Council so that it may fully and effectively discharge its responsibilities, in accordance with the Charter of the United Nations, in the area of the settlement of disputes or of any situation the continuance of which is likely to endanger the maintenance of international peace and security” (sect. II, para. 4). The Declaration stressed the need to consider “making greater use of the fact-finding capacity of the Security Council in accordance with the Charter” (sect. II, para. 4 (d)); encouraged the Council “to make wider use, as a means to promote peaceful settlement of disputes, of the subsidiary organs established by it in the performance of its functions under the Charter” (sect. II, para. 4 (e)) and “to act without delay, in accordance with its functions and powers, particularly in cases where international disputes develop into armed conflicts” (sect. II, para. 4 (g)).

338. Some of the principles in the 1982 Manila Declaration have been further specified in the 1988 Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field, which addressed both States and the United Nations organs, as well as in the 1991 Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security.

339. Thus, the General Assembly in the 1988 Declaration called upon States parties to a dispute or directly concerned with a situation, particularly if they intended to request a meeting of the Security Council, to approach the Council “directly or indirectly, at an early stage and, if appropriate, on a confidential basis” (para. 1 (6)). An emphasis on the necessity to approach the Council at an early stage and on a confidential basis (if appropriate) reflects the need to develop the preventive abilities and potentials of the Council and enhances its effectiveness through informal, confidential contacts with the States concerned.

340. A need for the improvement of monitoring capacities of the Security Council, for the purposes of prevention, on the basis of regular interaction with high-level governmental structures of the States in respect of international situations is formulated by the Declaration in its call addressed to the Security Council to “consider holding from time to time meetings, including at a high level with the participation, in particular, of Ministers of Foreign Affairs, or consultations to review the international situation and search for effective ways of improving it” (para. 1 (7)).

341. Special attention is given to preparations for the prevention or removal of particular disputes or situations. For this purpose, the Security Council is urged to “consider making use of the various means at its disposal, including the appointment of the Secretary-General as rapporteur for a specified question” (para. 1 (8)).

342. The Declaration also outlines procedures and actions of the Security Council in cases when disputes or situations are brought to its attention “without a meeting being requested”. Such procedures include “holding consultations with a view to examining the facts of the dispute or situation and keeping it under review, with the assistance of the Secretary-General when needed” and granting the States concerned “the opportunity of making their views known” (para. 1 (9)). In respect of such consultations, the Decla-
ration again stresses the necessity of wider use of informal, confidential procedures, stating that “consideration should be given to employing such informal methods as the Security Council deems appropriate, including confidential contacts by its President” (para. 1 (10)).

343. Furthermore, the Declaration suggests to the Security Council, in connection with particular disputes or situations, to “consider, inter alia:

(1) reminding the States concerned to respect their obligations under the Charter;

(2) making an appeal to the States concerned to refrain from any action which might give rise to a dispute or lead to the deterioration of the dispute or situation;

(3) making an appeal to the States concerned to take action which might help to remove, or to prevent the continuation or deterioration of, the dispute or situation” (para. 1 (11)).

344. Stressing again the preventive functions of the United Nations activities in this field, the Declaration formulates “means of preventing” the further “deterioration of the dispute or situation in the areas concerned” which the Security Council should consider, namely “sending, at an early stage, fact-finding or good offices missions or establishing appropriate forms of United Nations presence” (para. 1 (12)). The 1991 Declaration on Fact-Finding also calls for the use of fact-finding by the Security Council.

345. The Security Council’s responsibility for promoting resort to regional agencies or arrangements also was not omitted by the Declaration, which indicated the Council’s obligation to consider “encouraging and, where appropriate, endorsing efforts at the regional level by the States concerned or by regional arrangements or agencies to prevent or remove a dispute or situation in the region concerned” (para. 1 (13)).

346. Once again the balance between the right of States to settle their disputes on the basis of the principle of free choice of means of settlement and the Security Council’s responsibility in the field of pacific settlement was reaffirmed: “Taking into consideration any procedures that have already been adopted by the States directly concerned, the Security Council should consider recommending to them appropriate procedures or methods of settlement of disputes or adjustment of situations, and such terms of settlement as it deems appropriate” (para. 1 (14)).

347. The Declaration emphasized once more the existing distribution of competence between the Security Council and the International Court of Justice in this area, drawing attention to the role played by the Council in the promotion of settlement on the basis of judicial procedures: “The Security Council, if it is appropriate for promoting the prevention and removal of disputes or situations, should, at an early stage, consider making use of the provisions of the Charter concerning the possibility of requesting the International Court of Justice to give an advisory opinion on any legal question” (para. 1 (15)). It should be noted in this respect that the necessity of appropriate actions “at an early stage” was stressed once again, clearly indicating the growing emphasis on preventive functions of the United Nations in this field.

348. New trends in the practice of the Security Council are also reflected in the 1989 and 1990 reports of the Secretary-General on the work of the Organization.464 The reports contain a review of the latest multilateral efforts of the Council in this field, emphasizing the strong support given by the Council’s resolutions to the peace process in various regions of the world. They point out the regular interaction between the Security Council and the Secretary-General and the fact that the latter has frequently been encouraged to continue to lend his good offices on the basis of the mandate entrusted to him by the Council. They also mention attempts to pave the way to an effective negotiating process, which included repeated contacts and consultations by the Secretary-General at the highest level with the parties directly concerned and with the permanent members of the Council, and urgent meetings of the Council at the request of the Secretary-General.

349. As stated in the 1989 report:

“Efforts to prevent possible conflicts, reduce the risk of war and achieve definitive settlements of disputes, whether long-standing or new, are part and parcel of a credible strategy for peace.

“The United Nations needs to demonstrate its capacity to function as guardian of the world’s security. Neither any alterations in the structure of the Organization nor in the distribution of competence among its respective organs are needed for that purpose. What is needed is an improvement of existing mechanisms and capabilities in the light of the demands of the unfolding international situation.”

In this connection, the Secretary-General stresses the necessity of prevention of international disputes, indicating the priorities for the United Nations and formulates concrete proposals aimed at enhancing its effectiveness in the modern world.

350. The 1989 report contains a number of proposals concerning the procedure of the Security Council, as well as the improvement of its mechanism of work, in dealing with matters of prevention and pacific settlement of disputes and situations. Among the proposals are those suggesting that the Security Council could meet periodically to consider the state of international peace and security in different regions at the level of ministers for foreign affairs and, when appropriate, in closed session, and that “where international friction appears likely”, the Council “could act on its own or request the Secretary-General to exercise his good offices directly or through a special representative”, enlisting, when appropriate, “the cooperation of the concerned regional organization in averting a crisis”.

351. Evaluating the recent positive development of positions of Member States and permanent members of the Council, especially in respect of the role of the United Nations and the Security Council, the Secretary-General mentioned, in particular in his 1989 report, that “the decision-making process on political matters has vastly improved with the emergence of a collegial

spirit among the permanent members of the Security Council and with the daily cooperation between the Council as a whole and the Secretary-General". He also noted the special significance of the cooperation between "the two militarily most powerful States" for the purposes of the maintenance of international peace and security for the effectiveness of the efforts of the United Nations in this field. At the same time, the Secretary-General reaffirmed in his 1990 report that "agreement among the major Powers must carry with it the support of a majority of Member States if it is to make the desired impact on the world situation". That is fully applicable to the field of peaceful settlement of disputes between States.

C. The General Assembly

1. Role of the General Assembly in the peaceful settlement of disputes

352. The functions and powers of the General Assembly in the field of prevention and settlement of disputes and situations are specified mainly in Chapter IV of the Charter. Under the various Articles of the Charter, the Assembly is empowered, inter alia: to discuss any questions or matters within the scope of the Charter or relating to the powers and functions of any organs provided for in the Charter, including those relating to the maintenance of international peace and security which have been brought before it by Member States or by the Security Council, and make recommendations on such questions or matters; to call the attention of the Council to situations which are likely to endanger international peace and security; to consider the general principles of cooperation in the maintenance of international peace and security; and make recommendations with regard to such principles; to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification; and to recommend measures for the peaceful adjustment of any situation which it deems likely to impair the general welfare or friendly relations among nations.

Some instances in which the General Assembly has exercised these powers and functions in the field of the prevention and peaceful settlement of disputes and situations are outlined below.

(a) Discussion of questions and making recommendations on matters relating to the peaceful settlement of disputes

353. The General Assembly, under Article 10 of the Charter, may discuss any questions or any matters within the scope of the Charter, or relating to the powers and functions of any organs provided for in the Charter, and make recommendations "to the Members of the United Nations or to the Security Council or to both" on any such questions or matters, "except as provided in Article 12". The powers of the Assembly as thus stated in Article 10 include the power to discuss and make recommendations on questions relating to the settlement of disputes. The Charter authorizes the Assembly not only to address directly the States parties involved in a dispute or situation, but also to play an important role in the coordination of the activities of the principal organs of the United Nations in the field of the prevention and peaceful settlement of disputes and situations, but within the limits established by the Charter in Article 12.

354. While the general powers and functions of the Assembly are thus contained in Article 10, they are specified further under Articles 11, 13 and 14, as indicated below.

355. Article 11, paragraph 2, enables the General Assembly to discuss any questions relating to the maintenance of international peace and security brought before it and to make recommendations with regard to them "to the State or States concerned or to the Security Council or to both". According to Article 11, paragraph 3, the Assembly may call the attention of the Council to situations "which are likely to endanger international peace and security". The Assembly has widely exercised these specific powers, adopting a number of resolutions in which it has made recommendations in the field of the maintenance of international peace and security or drawn the attention of the Security Council to situations considered as endangering, or likely to endanger, international peace and security, and referring to the Council, either before or after discussion, any such question on which action is necessary.

356. This mechanism of distribution of competence between the Security Council and the General Assembly and interaction of the two organs, as envisaged in Article 11, paragraphs 1 to 3, of the Charter, is to be viewed in the light of the broad powers of the General Assembly, under article 10, to perform functions in the field of the maintenance of international peace and

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467See the Charter of the United Nations, Articles 10 and 11, paragraph 2; see also the limitation imposed on the power of the General Assembly to make recommendations by Article 12, paragraph 1.

468Ibid., Article 11, paragraph 3.

469Ibid., paragraph 1.

470Ibid., Article 13.

471Ibid., Article 14.
security and prevention and pacific settlement of disputes and situations. It is therefore essential to keep in mind Article 11, paragraph 4, which provides that the powers of the General Assembly set forth in the Article “shall not limit the general scope of Article 10”. Besides, any such limitation would have to be lifted by the Security Council itself if it adopted a resolution requesting the General Assembly to make recommendations with respect to a particular dispute or situation.

357. With respect to the distribution of competence between the two organs, it is important to note the procedure under which the General Assembly is to be informed of the matters being dealt with by the Security Council or with which the Council has ceased to deal. This procedure, as provided in Article 12, establishes a system of notification of the activities of the Security Council and the General Assembly in this field in order to avoid unnecessary overlapping of their functions.

358. With respect to the question of the correlation between the primary responsibility of the Security Council in the maintenance of international peace and security and the powers of the General Assembly to discuss any questions relating to the maintenance of international peace and security and to make recommendations with regard to any such questions, it is necessary to mention, as an example, the establishment by the Assembly, in 1947, of the Interim Committee and the adoption of the “Uniting for peace” resolution.

359. The mandate of the Interim Committee was to assist the General Assembly between its sessions in handling disputes and situations brought to the Assembly, in case the Security Council was unable to take action because of the use of the veto. The Committee was to assist the Assembly in preparing studies and making recommendations for international political cooperation according to Article 11, paragraph 1 and Article 13, paragraph 1 (a), and dealing with disputes or situations. The General Assembly, for example, took some actions on the basis of the report of the Interim Committee, and in one case addressed a recommendation to the Security Council concerning the possible use of the rapporteur system, and decided to revise the 1928 Geneva General Act for the Pacific Settlement of International Disputes and to establish a panel for inquiry and conciliation (which has never been used).

360. Another step in the same direction was the adoption of the “Uniting for peace” resolution, in 1950, which gave rise to one of the most extensive debates on the Charter of the United Nations. In that resolution (resolution 377 (V) of 3 November 1950), the Assembly:

\[\text{Resolve[d]}\] that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.

The resolution also “establishes a Peace Observation Commission ... which could observe and report on the situation in any area where there exists international tension the continuance of which is likely to endanger the maintenance of international peace and security” and “recommends to the States Members of the United Nations that each member maintain within its national armed forces elements so trained, organized and equipped that they could promptly be made available, in accordance with its constitutional processes, for service as a United Nations unit or units, upon recommendation by the Security Council or the General Assembly”. The resolution further establishes a Collective Measures Committee “to study and make a report to the Security Council and the General Assembly ... on methods ... which might be used to maintain and strengthen international peace and security”. There are cases in which the Security Council, in exceptional circumstances, when it has been prevented from exercising its primary responsibility for the maintenance of international peace and security owing to the lack of unanimity of its permanent members, has decided to call emergency special sessions of the General Assembly to consider the matter. In one case, the Security Council specifically invoked the “Uniting for peace” resolution, while in another it did not invoke the resolution as such but applied the same procedure of convening an emergency special session of the General Assembly.

(b) Recommendation of measures for the peaceful adjustment of situations

361. The specific functions of the General Assembly under this heading are described in Article 14 of the Charter. Under that Article, the Assembly has the power to recommend measures for the peaceful adjustment, not only in respect of matters relating to the maintenance of international peace and security, but also in respect of other matters, and any situations, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations”. The Article was intended to enable the General Assem-

\[\text{468}\text{See, e.g., Security Council resolution 119 (1956) of 31 October 1956; see also General Assembly resolution 997 (ES-I) of 2 November 1956.}\]
bly to make recommendations for the peaceful adjustment of situations in various areas, such as the self-determination of peoples and human rights.  

362. One of the early examples of the application of Article 14 occurred in connection with the question of the treatment of Indians in the Union of South Africa, which was included in the agenda of the first session of the General Assembly on the request of the delegation of India. This resulted in the adoption by the General Assembly of its resolution 44 (I) of 8 December 1946, entitled "Treatment of Indians in the Union of South Africa", in which the Assembly observed that because of that treatment friendly relations between the two Member States had been impaired and that unless a satisfactory settlement was reached the relations between the States concerned were likely to be further impaired.

2. Recent trends

363. The trends in the practice of the General Assembly, reflected in its recent declarations, clearly indicate an emphasis not only upon removal of disputes and situations likely to endanger international peace and security, but primarily upon their prevention.

364. Like the 1982 Manila Declaration, the 1988 Declaration stresses the importance of the timely prevention of disputes and situations and urges States to consider approaching the relevant organs of the United Nations (including the General Assembly) "in order to obtain advice or recommendations on preventive means for dealing with a dispute or situation" (para. 1 (5)), stressing the need to consider, where appropriate, supporting efforts undertaken at the regional level by the States concerned or by regional arrangements or agencies, to prevent or remove a dispute or situation in the region concerned. This clearly indicates the important role of the General Assembly in providing the interaction between universal and regional systems in the prevention and removal of disputes and situations.

365. Furthermore, the 1988 Declaration attaches special attention also to the promotion of the use of fact-finding, urging the General Assembly in the case when a dispute or situation has been brought before it to consider "including in its recommendations making more use of fact-finding capabilities, in accordance with Article 11 and subject to Article 12 of the Charter" (para. 1 (18)), and calls upon the Assembly to "consider making use of the provisions of the Charter concerning the possibility of requesting the Inter-

479 Official Records of the General Assembly, First Session, Second Part, Joint Committee of the First and Sixth Committees, annex 1, document A/149.
480 General Assembly resolution 44 (I), para. 1.
481 Manila Declaration on the Peaceful Settlement of Disputes (supra, para. 2). Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field and Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security (ibid.). It should be noted also that in the effort to encourage States to settle their disputes by peaceful means, the General Assembly adopted a decision on resort to a commission of good offices, mediation or conciliation within the United Nations (decision 44/15).

national Court of Justice to give an advisory opinion on any legal question" (para. 1 (19)), and thus to contribute to the enhancement of the role of the Court. The 1991 Declaration on Fact-finding also aims at promoting the use of fact-finding by the General Assembly.

366. The important role of the General Assembly as a principal organ of the United Nations in the field of the prevention and pacific settlement of international disputes and situations is further indicated in the 1989 and 1990 reports of the Secretary-General on the work of the Organization. Noting the valuable efforts of the General Assembly in various areas of international relations, including those concerning the promotion of pacific settlement of disputes, as well as his own activities in the field, in pursuance of the mandate entrusted to him by the Assembly, the Secretary-General has underlined the growing demand for the effective conduct of multilateral diplomacy on the basis of political and moral persuasion, combined with a judicious use of leverage aimed at the settlement of disputes. In this respect, it should be noted that the General Assembly, as the organ in which all Member States are represented, is capable of performing this task on the basis of the multilateral efforts of all the Member States in directing their combined political will, inseparable from their moral responsibility, to undertake the timely prevention and peaceful settlement of international disputes.

D. The Secretariat

1. Role of the Secretary-General

367. The contribution of the Secretariat of the United Nations to the efforts of the Organization in the area of the peaceful settlement of disputes is made primarily through the role of the Secretary-General. Article 97 of the Charter of the United Nations provides that "the Secretariat shall comprise a Secretary-General and such staff as the Organization may require" and describes the Secretary-General as "the chief administrative officer of the Organization". Article 98, however, establishes the duty of the Secretary-General not only to act in that capacity, but also to perform such other functions as are entrusted to him by the other principal organs, which may include those in the field of the prevention and peaceful settlement of disputes. Article 99 gives the Secretary-General more specific powers in connection with the prevention and peaceful settlement of disputes by providing that "the Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security".

(a) Functions of the Secretary-General in the implementation of the resolutions of other principal organs in the field of the prevention or settlement of disputes

368. The Secretary-General, within the framework of the Charter of the United Nations and the means at his disposal, renders assistance and

provides facilities not only for the other principal organs of the Organization but also for all institutions of the United Nations acting in this field.483 In that connection, and pursuant to Article 98, he performs technical and any other functions as may be requested by the other principal organs directly involved in the prevention and peaceful settlement of disputes.

369. A review of the functions of the Secretary-General in the field of the maintenance of international peace and security and the prevention and settlement of international disputes shows that he has performed manifold actions to implement a vast number of resolutions of other principal organs.484 These include, for example, his activities with regard to the situation in the Middle East,485 the situation in Cyprus,486 the situation between Iran and Iraq,487 the situation in Kampuchea,488 the situation in Afghanistan,489 Western Sahara,490 and Central America,491 and his role in the efforts to settle the Falkland Islands (Malvinas) question492 and in the settlement of the question of Namibia.493

370. In performing this function in the course of the prevention or peaceful settlement of disputes, the Secretary-General has either taken certain actions himself, appointed special representatives or requested the assistance of a third State. For example, in April 1965, when fighting broke out in the Dominican Republic, he requested the United States Government to use its good offices to urge the opposing forces to heed the call of the Security Council for a strict cease-fire.494 In connection with the complaint by Malta against the Libyan Arab Jamahiriya (1980), the Secretary-General held con-

483In this connection see, for example, the coordination of the work of the United Nations Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA) in various situations of conflict where assistance to the civilian population is needed.
484These functions were discussed in chapter II of the handbook. See, for example, section C, on "Good offices".
485See the 1989 and 1990 reports of the Secretary-General on the work of the Organization (supra, note 482).
489See document S/19835, as well as General Assembly resolution 44/15 of 1 November 1989.

sultations with the parties and sent his Special Representative to the countries concerned in order to assist in the search for a mutually acceptable solution.495

(b) Diplomatic functions

371. Since the Secretary-General is the chief administrative officer of the Organization, which gives wide-ranging powers to the Charter in the field of peaceful settlement of disputes, it follows naturally that he plays an important role in this process. Such functions include: communications containing démarches and appeals; discussions and consultations with the parties; fact-finding activities; participation in, or assistance to, negotiations aimed at the settlement of a dispute or the implementation of an agreed settlement. All such functions are performed either by him directly or by personal or special representatives appointed by him.496

(c) Functions of the Secretary-General based on the powers expressly conferred upon him by the Charter

372. According to Article 98 of the Charter, the Secretary-General "shall make an annual report to the General Assembly on the work of the Organization.497 The most recent such annual report of the Secretary-General is that submitted to the General Assembly at its forty-fifth session.498 In that document, in addition to presenting a comprehensive review of various activities of the Organization and an evaluation of its work in the field of the maintenance of international peace and security, the Secretary-General also suggests ways and means by which the functions of the Organization may be improved, for example, in the area of the prevention and peaceful settlement of international disputes. Such a reporting system enables the Secretary-General to contribute to the process of achieving the peaceful solution of conflicts or situations in various regions of the world499 in the course of implementing the various resolutions of the other principal organs.

373. The competence given to the Secretary-General under Article 99 has been used by him mainly in the sphere of the maintenance of peace and security, rather than in the peaceful settlement of disputes. His functions in the field of the prevention and peaceful settlement of disputes are provided in this Article, under which the Secretary-General "may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security". However, such competence of the Secretary-General has also been used effectively for purposes of the

497Rule 48 of the Rules of procedure of the General Assembly (United Nations publication, Sales No. E.85.I.13) provides that the Secretary-General shall also make "such supplementary reports as are required".
499See A/44/344/Add.1 and S/20699/Add.1, as well as A/44/642 and A/45/436/Add.1.
peaceful settlement of disputes. The importance of this competence is underlined by further mention that was given to Article 99 in the 1982 Manila Declaration and in the 1983 annual report of the Secretary-General on the work of the Organization, in which he stressed the need "to carry out effectively the preventive role foreseen for the Secretary-General under Article 99", in order to "inhibit the deterioration of conflict situations" and to assist the parties "in resolving incipient disputes by peaceful means".

374. The Secretary-General's activities performed under Article 99 can be illustrated by his actions with regard to the situation between the United States and Iran in 1979 and the situation between Iran and Iraq in 1980. Among the more recent examples is his action in connection with the situation in Lebanon. On 15 August 1989, after an alarming escalation in the military confrontation in and around Beirut, and with the danger of even further involvement of outside parties, the Secretary-General requested the President of the Security Council to convene an urgent meeting of the Council, in view of the serious threat to international peace and security.

2. Recent trends

375. The instruments in the field of the peaceful settlement of disputes adopted by the international community recently, reflecting the realities of modern international life, clearly indicate the trend towards enlarging the role of the Secretary-General in the area of the prevention and peaceful settlement of international disputes.

376. As stated, for example, in the 1982 Manila Declaration on the Peaceful Settlement of International Disputes: "The Secretary-General should make full use of the provisions of the Charter of the United Nations concerning the responsibilities entrusted to him" (sect. II, para. 6).

377. The functions of the Secretary-General in this field are also stated in the 1988 Declaration on the Prevention and Removal of Disputes and Situations:

"20. The Secretary-General, if approached by a State or States directly concerned with a dispute or situation, should respond swiftly by urging the States to seek a solution or adjustment by peaceful means of their own choice under the Charter and by offering his good offices or other means at his disposal, as he deems appropriate;

21. The Secretary-General should consider approaching the States directly concerned with a dispute or situation in an effort to prevent it from becoming a threat to the maintenance of international peace and security."

These provisions emphasize the role of the Secretary-General in taking preventive actions in the field of pacific settlement.

378. Both the 1988 and 1991 Declarations encourage the Secretary-General to consider making full use of fact-finding capabilities, including sending, with the consent of the State, a representative or a fact-finding mission to areas where a dispute or a situation exists. The former further encourages him to consider using, at as early a stage as he deems appropriate, the right conferred upon him under Article 99 of the Charter, thus calling the attention of the Security Council to any matter which in his opinion may threaten the maintenance of international peace and security. Moreover, under the 1998 Declaration the Secretary-General is also encouraged to make efforts towards the prevention and removal of disputes or situations at the regional level and to establish an effective mechanism for collaboration between regional agencies and the United Nations in dealing with local disputes or situations.

379. New trends and proposals in connection with the role of the Secretary-General in the area of pacific settlement as well as an evaluation of past and present activities in the field are also reflected in the report submitted by the Secretary-General to the General Assembly at its forty-fourth session, in 1989. In particular, the Secretary-General pointed out that the deployment of the United Nations military observers throughout the Central American region could provide a new opportunity to render assistance in the field of pacific settlement and reconciliation; set forth proposals that the Organization receive information from space-based and other technical surveillance systems, thereby enabling the Secretariat to monitor conflict situations impartially, and recommended that the Security Council meet periodically to consider the state of international peace and security in different regions at the level of foreign ministers. He also noted the important role of "fact-finding teams" which might be dispatched to establish "timely, accurate and unbiased information" concerning a situation likely to lead to international friction.

380. Reaffirming the evaluation of recent trends and proposals in the field of peaceful settlement contained in his 1989 report on the work of the Organization, the Secretary-General in his 1990 report specially emphasized the role of the peace-keeping efforts of the United Nations in the context of the peaceful settlement of disputes and situations. In that connection, he pointed out as examples of recent trends both the expansion of the role of the United Nations and the widening United Nations practice of combining peace-keeping and peace-making, noting that recent United Nations operations

"... have so combined elements of peace-keeping and peace-making as to have radically altered traditional concepts of the arrangement between the two. Formerly, peace-keeping was understood to mean essentially to contain or contain conflicts while peace-making was meant to resolve them. A deeper and more active involvement of the United Nations has over time, however, increasingly shown that peace-making itself determines, as it should, the size, scope and duration of peace-keeping as
conventionally understood and that it is often by a fusion of the two in an integral undertaking that peace can genuinely be brought to troubled areas”.

The report also pointed out that:

“From 1948 onwards, the United Nations has launched 18 operations, five of them during 1988 and 1989. Indeed, in recent years, the Organization’s role in combinations of peace-keeping and peace-making has expanded impressively. The composite nature of these recent operations means that the tasks assigned to them have multiplied. The United Nations Transition Assistance Group in Namibia provides a standing example of important civilian and police components working together with military elements to secure the implementation of a complex peace plan under its supervision and control. The delicate mission accomplished in Nicaragua also illustrated the versatile forms that undertakings assigned to the Secretariat by the competent organs of the United Nations can take.”

381. The Secretary-General also indicated that as the consent of the parties concerned is crucial to the mandate of the United Nations, peace-keeping operations conducted “in order to stop or avert fighting and help facilitate or implement a settlement” are “to be distinguished from measures under Chapter VII of the Charter”. While recognizing the unique and important role of the Secretary-General in the prevention and peaceful settlement of international disputes and situations, it is necessary to emphasize once again that its potential can be used effectively only on the basis of interaction with other principal organs of the United Nations, especially the Security Council and the General Assembly, and under the condition of full support by States.
IV. PROCEDURES ENVISAGED IN OTHER INTERNATIONAL INSTRUMENTS

A. Introduction

382. The international instruments whose procedures for the settlement of disputes are the subject of the present chapter may be divided into two broad categories, as briefly described below.

383. One category consists of the constituent instruments of international organizations of a universal character, such as the specialized agencies of the United Nations and the International Atomic Energy Agency (IAEA), with competence in specific areas of activities. Disputes between any of the States members of such organizations are settled in accordance with the procedures established under the relevant constituent instruments. As further discussed in section B below, certain instruments provide more elaborate procedures for dispute settlement consistent with the degree of interaction of the Member States inter se, as determined by the nature of the activities of the organization. Other constituent instruments do not, by contrast, establish elaborate procedures and mechanisms for dispute settlement apart from the general requirement that disputes which are not settled by direct negotiations or by other diplomatic means should be referred to one of the organs of the organization in question for settlement, and that if no settlement is reached the dispute may be referred to a particular forum for a judicial settlement.

384. The second category consists of the numerous multilateral treaties which regulate the relations between States parties thereto and establish appropriate procedures for the settlement of disputes arising from their interpretation or application. Depending upon the subject-matter of each multilateral treaty, and as further discussed in section C of the present chapter, the dispute settlement procedures established under such instruments also rely upon the application of the various means of peaceful settlement discussed in chapter II of the handbook.

385. In presenting the materials under the two broad categories of the types of instruments described above, the present chapter aims at providing an analysis of dispute settlement procedures envisaged under the instruments, taking into account those already discussed in the preceding chapters and, where possible, giving examples of cases handled through the procedures in question.

While for the purposes of the present handbook only multilateral treaties are discussed in the present chapter, a study of the equally large number of bilateral treaties indicates that the types of dispute settlement procedures they contain are fully reflected in those presented here or elsewhere in the handbook.

B. Procedures envisaged in the constituent instruments of international organizations of a universal character other than the United Nations

386. The procedures for the settlement of disputes envisaged under the instruments falling under this category reflect the distinction between the instruments which created economic or financial organizations and those which established organizations with other specific areas of activities and competence.

1. Procedures envisaged in economic and financial organizations

387. The disputes settlement procedures under the General Agreement on Tariffs and Trade (GATT) and under commodity agreements provide examples of the ways in which some of the specific peaceful means of dispute settlement discussed in chapter II above are adapted to deal with the types of disputes arising within the scope of the activities of the institutions in question.

388. The GATT dispute settlement procedure consists of several steps, the first of which is consultations, which are mainly bilateral, although article XXII, paragraph 2, of the General Agreement provides for joint consultations with contracting parties if bilateral consultations do not produce a satisfactory result. Under this system, consultations are undertaken as means of settlement of disputes in itself and are considered a precondition for conciliation as the next procedure established under such international economic organizations.

389. The second step is the referral of the dispute, on the basis of article XXIII, paragraph 2, of the Agreement, to the Contracting Parties for conciliation. A party to a dispute may request the setting up of a panel or working party. In practice, recourse to panels has become the usual procedure (see paras. 392-395).

390. Recourse to this conciliation procedure is limited to cases where a contracting party considers "that any benefit accruing to it directly or indirectly under the Agreement is being nullified or impaired". Nullification or impairment of any kind is a condition precedent to the establishment of a conciliation panel. The conciliation panel, which is composed of five members nominated by the contracting parties, has the power to consider the merits of the dispute, to make recommendations to the parties, and to decide the case in the manner it considers appropriate. The panel may make its report by majority vote, and its decision is binding on the parties. The parties may then appeal to the General Agreement, which, in turn, may decide on the merits of the case.
cation or impairment of benefits is presumed in cases where there is a breach of obligations under the General Agreement. In the absence of such a breach, the party claiming nullification or impairment of benefit is called upon to provide detailed justification of such a claim.507

391. The 1982 Ministerial Declaration provides that before the matter is referred to the Contracting Parties and without prejudice of the right of the parties to do so, the latter can seek the good offices of the Director-General of GATT to facilitate a confidential conciliation.508

392. Although the establishment of a panel is not an automatic right of the requesting party,509 it has never been refused. Panels are composed of three to five members, preferably governmental representatives, but serving in their individual capacity. As opposed to traditional conciliation commissions in the political field, all panelists are chosen by a third party—in this case the Director-General of GATT. They may not be nationals of a party to the dispute.510

393. Paragraph 16 of the 1979 Understanding describes the functions of panels as follows:

"To assist the Contracting Parties in discharging their responsibilities under Article XXIII; accordingly, a panel should make an objective assessment of the facts before it, including an objective assessment of the facts of the case and the applicability of and conformity with the General Agreement... panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution."

394. As is the case with traditional conciliation, the function of the panel thus emphasizes the elements of inquiry, in order to establish the facts giving rise to a dispute and to seek a settlement. The main concern of the dispute settlement procedure of GATT, including the panels, as has been repeatedly pointed out, is to reach a settlement agreed by the parties. The requirement that the conclusions of the panel be distributed to the parties to the dispute before circulation to the Contracting Parties is one more evidence of the effort "to encourage development of mutually satisfactory solutions between the parties"511 to the dispute.

395. The GATT Council usually adopts the panel’s report as submitted, thereby giving the recommendations contained therein an authoritative character, in the form of recommendations or rulings. The following are examples of recently established panels: a panel established in 1973 on a matter referred by the European Communities relating to United States tax legislation;512 one established in 1973 on a matter referred by the United States relating to income tax practices maintained by the Netherlands;513 in 1978, or a matter referred by Australia relating to sugar practices of the European Communities (EC);514 in 1985, on a matter referred by EC relating to Canadian discriminative measures against imported alcoholic drinks;515 in 1986, on a matter referred by Canada, EC and Mexico relating to taxes levied on petroleum and certain imported substances by the United States;516 in 1986, on a matter referred by the United States regarding restrictions on imports of certain agricultural products by Japan;517 in 1986, on a matter referred by EC relating to the Japanese tax system on imported wine and spirits;518 in 1987, on a matter referred by the United States relating to export restrictions on fish by Canada;519 and in 1987, on a matter referred by EC and Canada relating to United States import processing fees.520 The duration of the proceedings has varied in these cases from a few months to three years.

396. Although article XXIII, paragraph 2, provides for retaliatory measures if the recommendations are not implemented,521 there has been in the entire history of GATT only one case of such sanction, namely, a 1952 dispute between the Netherlands and the United States regarding the latter’s quotas for dairy products.522 In practice, any matter in which recommendations have been made or rulings given is kept "under surveillance" by the Contracting Parties, which periodically review the action taken pursuant to such recommendations and may be asked to "make suitable efforts with a view to finding an appropriate solution."523

397. This conciliation procedure and its sanction (permissible retaliation) is operative mostly in cases where both parties have similar economic strength, and therefore similar potential retaliatory powers.524 Mindful of conditions of economic disequilibrium between States, a special regime for disputes in which the plaintiff is a developing country was adopted in 1966.525 Although the special regime never functioned as such, the 1979 Understanding reinforces it and elaborates on its principles. The main differences between it and the "regular" procedures are that throughout the phases of the dispute settlement process particular attention is to be paid to the interests of less developed countries;526 and that

507 GATT, BISD, 26 S/306.
508 GATT, document L/6304.
509 GATT, document L/6175.
510 GATT, document L/6253.
511 GATT, BISD, 30 S/43.
512 GATT, document L/6256.
513 GATT, document L/6269.
514 The relevant text reads: "[the Contracting Parties] may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances."
515 GATT, BISD, 23 S/98.
516 GATT, BISD, 23 S/137.
517 GATT, BISD, 26 S/290.
518 GATT, document L/6304.
519 GATT, document L/6175.
520 GATT, document L/6253.
521 GATT, BISD, 30 S/43.
522 GATT, BISD, 23 S/98.
523 GATT, BISD, 23 S/137.
more attention is to be given to enforcement of the recommendations, so that action may be taken, as appropriate, against the non-complying developed party.\footnote{527}

398. The dispute settlement clauses of commodity agreements\footnote{528} are similar to those of GATT in that they also provide for a step-by-step procedure, beginning with consultations or negotiations between the parties to the dispute. Upon failure of such mode of settlement, the matter is referred to the council of the organization (which is a plenary organ) established by the respective commodity agreements. The council takes a binding decision on the matter, in most cases after having sought the opinion of an advisory panel. Unless the Council decides otherwise, advisory panels usually consist of five persons acting in their personal capacity as follows: two members nominated by the exporting members, two by the importing members and a chairman selected either by the other four members or, if they fail to agree, by the chairman of the council. For example, in 1965 an advisory panel was set up by the International Coffee Organization (under the 1962 Coffee Agreement) to interpret certain provisions of the Agreement.\footnote{529} An advisory panel was also set up in 1969, under the 1968 Agreement relating to a dispute between Brazil and the United States on processed coffee.\footnote{530}

399. Enforcement provisions are also contained in the Agreement. The council, if it establishes that a member has committed a breach of the Agreement, may suspend the rights of that member, including voting rights, or even under certain conditions may exclude that member from the organization. As in the case of GATT, however, such sanctions have not been used in practice.

400. The constitutions of the specialized agencies of the United Nations with financial and economic activities and of certain regional institutions all provide for the same dispute settlement mechanism for any question of interpretation of these treaties arising between any members of the organization or between a member and the organization.\footnote{531} Such disputes are submitted to the organ of restricted membership for decision. If one of the parties is not represented in that organ, it shall be entitled to representation. In any case where the organ has given such a decision, any member may require that the question be referred to the plenary organ, whose decision shall be final.\footnote{532} It is further provided that disputes between the organization and a former member shall be submitted to arbitration.

401. As is the case with the above-mentioned trade organizations, sanctions are also envisaged. A State member of the International Bank for Reconstruction and Development (World Bank), the International Development Association (IDA), the International Finance Corporation (IFC) or the International Fund for Agriculture and Development (IFAD) that does not fulfill its obligations under any of the respective Agreements may be suspended from membership by the plenary organ.\footnote{533} A State member of the International Monetary Fund (IMF) which fails to fulfill its obligations under the Agreement may be declared ineligible to use the resources of the Fund or may be required to withdraw from the Fund.\footnote{534}

402. In order to provide an international forum for the settlement of investment disputes between a State and nationals of another State, apart from those available through the customary law of diplomatic protection, there was established in 1966,\footnote{535} under the auspices of the World Bank, the International Centre for Settlement of Investment Disputes (ICSID).\footnote{536} The Centre provides facilities for the conciliation and arbitration of "any legal dispute arising directly out of an investment, between a Contracting State [. . .] and a national of another Contracting State".\footnote{537} The Centre does not itself act as conciliator or arbitrator: disputes are referred to conciliation commissions or arbitral tribunals constituted under ICSID’s auspices. To that effect, ICSID maintains a Panel of Conciliators and a Panel of Arbitrators,\footnote{538} but conciliators and

\footnote{527}{Ibid., para. 23.}
\footnote{528}{Such agreements include: the Sixth International Tin Agreement of 26 June 1981 (arts. 48 and 49) (United Nations registration No. 21139), the International Coffee Agreement of 16 September 1982 (arts. 57, 58 and 66) (United Nations registration No. 22376), the International Agreement on June and July Products of 1 October 1982 (arts. 33 and 44) (United Nations registration No. 22672), the International Tropical Timber Agreement of 18 November 1983 (arts. 29 and 40) (United Nations registration No. 23337), the International Wheat Agreement of 14 March 1986 (arts. 8 and 10) (registered 1 July 1986), the International Agreement on Olive Oil and Table Olives of 1 July 1986 (arts. 50 and 58) (registered 1 January 1987), the International Cocoa Agreement of 25 July 1986 (arts. 62, 63 and 73) (registered with the United Nations on 20 January 1987), the International Rubber Agreement of 20 March 1987 (arts. 54, 55 and 64) (United Nations registration No. 19190), the Agreement establishing the fund for encouraging private enterprises to supplement activities of the Inter-American Development Bank, the Inter-American Development Corporation of 19 November 1984 (art. IX, International Legal Materials (1985), p. 455).}
\footnote{529}{The IMF Agreement provides for the establishment of a Committee on Interpretation of the Board of Governors which will normally take a final decision in a case instead of the Board of Governors itself (art. XVIII, para. (b)).}
\footnote{530}{Article VI of the World Bank Agreement; article V of the IFC Agreement; article VIII of the IDA Agreement; article 9 of the IFAD Agreement.}
\footnote{531}{Article XV of the IMF Agreement.}
\footnote{532}{Article 27 of the ICSID Convention expressly precludes a contracting State from giving diplomatic protection or bringing an international claim on behalf of one of its nationals if the dispute is under the jurisdiction of the Centre unless the other State "shall have failed to abide by and comply with the award rendered in such dispute". See also article 26 on the requirement of exhaustion of local remedies.}
\footnote{533}{Article 25, paragraph 1.}
\footnote{534}{Articles 12-16.}
arbitrators may be appointed from outside the panel. Recourse to ICSID conciliation or arbitration is voluntary and based on the consent of the parties. The mere fact that a State is party to the ICSID Convention does not obligate that State to submit a particular dispute to ICSID.\footnote{Seventh preambular paragraph.}

403. Conciliation has been used only twice since the establishment of ICSID. In one case (SEDITEX v. Madagascar), the proceedings were discontinued before the establishment of a commission; a commission was established in the case Tesoro v. Trinidad and Tobago and its recommendations accepted by the parties in 1985.\footnote{News from ICSID, vol. 4, No. 1, winter 1987.} Recommendations of conciliation commissions are, as usual, not binding.

404. Parties have more frequent recourse to arbitration. Nevertheless, a high proportion of cases has been settled by the parties directly rather than through an arbitral award. The most recent arbitrations include: Klocker/Cameroun case\footnote{ICSID, ARB 81/2.} of 26 January 1988 and Société Ouest Africaine des Bétons Industriels v. Senegal of 25 February 1988.\footnote{ICSID, ARB 82/1: Thirteen cases are still pending.} Although awards are binding, requests for interpretation, revision and even annulment are considered under certain circumstances.\footnote{Articles 50-52 of the ICSID Convention.}

405. Part XI of the 1982 United Nations Convention on the Law of the Sea\footnote{United Nations publication, Sales No. E.83.V.5.} establishes the International Sea-Bed Authority which, with respect to activities in the Area, is a specialized international organization of economic scope, albeit different from the other organizations mentioned above. Disputes with respect to activities in the Area under part XI of the Law of the Sea Convention are settled according to a specific system,\footnote{This mechanism is described in section 5 of part XI, articles 186-191 and annex VI of the Convention.} distinguishable from those established for the settlement of disputes concerning other parts of the Convention.\footnote{See para. 428 below.}

406. Disputes between States Parties arising from the conduct of activities in the international sea-bed area may be submitted either to a special chamber of the International Tribunal for the Law of the Sea by mutual consent of all parties to the dispute or, at the request of any party to the dispute, to an ad hoc chamber of the Sea-Bed Disputes Chamber of the Tribunal. Moreover, certain categories of disputes between a State Party and the Sea-Bed Authority or between the Authority and a State enterprise or a natural or juridical person sponsored by a State Party in conformity with the Convention may also be referred to the Sea-Bed Disputes Chamber.\footnote{For the categories of disputes, see articles 187 and 189.} As for disputes concerning the interpretation or application of a contract under part XI, they shall be submitted, at the request of any party to the dispute and unless otherwise agreed, to binding commercial arbitration. In the latter case, if questions of interpretation of part XI arise, the arbitral tribunal shall refer such questions to the Sea-Bed Disputes Chamber for a binding ruling. It is also worth mentioning that the Assembly or the Council of the Authority may request advisory opinions from the Sea-Bed Disputes Chamber on legal questions arising within the scope of their activities.

2. Procedures envisaged in the constitutions of other international organizations with specialized activities

407. The constitutive treaties of other specialized agencies of the United Nations as well as of the International Atomic Energy Agency contain provisions on the settlement of disputes relating to the application or interpretation of the respective texts. The general procedure is as follows: if the matter is not settled by negotiations, it is referred to one of the main organs of the organization. Failing its settlement by that organ, the dispute is further referred to the International Court of Justice or to an arbitral tribunal, unless it is otherwise agreed.\footnote{This paragraph does not apply to the cases of the International Civil Aviation Organization and the International Labour Organization, which will be discussed below, paras. 409-417.} The latter part of the procedure has never been used in practice, given the fact that the scope of activities of these specialized agencies does not give rise to serious disputes between them and their members or between the members inter se. Thus the bulk of disagreements which have arisen have been mostly settled by negotiation.\footnote{See, e.g., article XVII of the Constitution of the Food and Agriculture Organization of the United Nations (FAO) (arbitration is not expressly mentioned as a mode of settlement, only referral to ICI) (FAO, Basic Texts, vol. 1); article XIV, para. 2, of the Constitution of the United Nations Educational, Scientific and Cultural Organization (UNESCO) (United Nations, Treaty Series, vol. 4, p. 275); article 22, para. 1, of the Constitution of the United Nations Industrial Development Organization (UNIDO) (which also provides for referral to a conciliation commission (United Nations registration No. 23432); article 75 of the Constitution of the World Health Organization (WHO) (arbitration is not expressly mentioned, only referral to ICI) (ibid., vol. 14, p. 186); articles 65 and 66 of the Convention on the International Maritime Organization (IMO) (referral to ICI is expressly envisaged only in the form of a request for advisory opinion) (IMO, Basic Documents, vol. 1, 1979, p. 3 and IMO Assembly Resolution A.358 (IX) of 14 November 1975); article XVII, para. (A) of the Statute of the International Atomic Energy Agency (IAEA) (ibid., vol. 276, p. 3); article 29 of the Convention of the World Meteorological Organization (WMO) (referral to ICI is not expressly provided for, only arbitration) (ibid., vol. 77, p. 143); articles 50 and 82 of the Convention of the International Telecommunications Union (ITU) (referral to ICI is not expressly provided for, only arbitration) (United Nations registration No. 19497).}
408. In the majority of these treaties, it is furthermore provided that the organization may under certain conditions request of the International Court of Justice an advisory opinion on any legal question arising within the scope of its activities.531 This procedure has been followed in two instances: regarding the interpretation of a provision of the Convention on the Inter-Governmental Maritime Consultative Organization (now the International Maritime Organization)532 and regarding the interpretation of an agreement between the World Health Organization and a member State.533

409. The International Civil Aviation Organization has a somewhat different mechanism for the peaceful settlement of disputes relating to the interpretation or application of the ICAO Convention.534 Negotiations between the parties to the dispute are the first step of the dispute settlement. Upon the failure of negotiations, the matter is referred to the ICAO Council for decision. The procedure before the Council consists of written and oral parts. The Council may ask the Secretary-General of ICAO to institute an investigation to determine the facts relating to a dispute.535 In contrast to constitutions of other specialized agencies which provide for direct referral to the International Court of Justice (ICJ) or arbitration if the dispute is not settled by the competent organ,536 in the case of ICAO referral to the International Court of Justice or an arbitral tribunal is made in the form of an appeal of the Council’s decision.537 Sanctions for failure to conform with the Council’s decisions are also envisaged. Thus, defaulting airlines are not allowed to operate through the airspace of contracting States; and the voting powers of a defaulting State may be suspended by the ICAO Assembly.538

410. In the history of ICAO, three disputes have been explicitly submitted to the Council for resolution under chapter XVIII of the Chicago Convention relating to the settlement of disputes: a complaint by India against Pakistan in 1952,539 a complaint by the United Kingdom against Spain in 1969540 and a complaint by Pakistan against India in 1971.541 In those cases, the Council did not issue a decision on the merits, since the dispute was settled by the parties while the proceedings before the Council were still pending. Such an outcome is actually encouraged by the Council itself.542 The procedure of appeal to the International Court of Justice under chapter XVIII of the Chicago Convention also has been used; e.g., India appealed during the 1971 dispute with Pakistan.543 There has also been a case of resort to the International Court of Justice by the Islamic Republic of Iran, which filed an application instituting proceedings against the United States of America with a view to appealing the decision rendered on 17 March 1989 by the ICAO Council.545

411. The scope of activities of the International Labour Organisation (ILO) also calls for a more elaborate dispute settlement procedure because of potential disputes arising from the conduct of States towards individuals in their territories, including their own nationals, in connection with the application of specific ILO Conventions. The ILO Constitution contains a general provision that disputes relating to its interpretation or to the interpretation of Conventions concluded under it shall be referred to the International Court of Justice and does not envisage a non-judicial procedure for that purpose.

412. Under articles 24 and 25 of the ILO Constitution, any organization of either workers or employers may make a representation with the International Labour Office alleging that a member State has failed to observe any part of the ILO Convention to which it is a party.546 The Government may be invited by the ILO Governing Body to respond to the allegation. If a response is either not received or, if received, is not deemed to be satisfactory by the Governing Body, the latter may publish the representation and any responses relating thereto. The most recent cases include: a 1985 representation by the Japanese Trade Unions alleging non-observance by Japan of the Fee-charging Employment Agencies Convention,547 a 1985 representation by the National Trade Union Coordinating Council of Chile alleging non-observance of certain international labour conventions by Chile,548 a 1986

See, e.g., article XVII of the FAO Constitution; article V, para. 11, of the UNESCO Constitution; article 22, para. 2, of the UNIDO Constitution; article 76 of the WHO Constitution; article 66 of the IMO Convention; and article XVII, para. (B), of the IAEA statute.


See para. 407 above.

Article 85 of the ICAO Convention contains details on the establishment of such an arbitral tribunal.

Two ICAO Conventions, the International Air Services Transit Agreement of 7 December 1944 (United Nations, Treaty Series, vol. 84, p. 389) and the International Air Transport Agreement of 7 December 1944 (ibid., vol. 171, p. 387) stipulate that chapter XVIII of the ICAO Convention is applicable with respect to disputes or the interpretation and application of these texts. Furthermore, numerous bilateral agreements between States relating to air services provide for the settlement of disputes or by a decision of the ICAO Council, through arbitration or judicial settlement. In practice, arbitration has been the procedure to which parties in dispute have resorted. See chap. II, sect. F ("Arbitration") above, note 107, as well as a 1981 dispute between Belgium and Ireland (not yet published).
representation by the Spanish State Federation of Associations of Employees and Workers of the State Administration alleging non-observance by Spain of the Discrimination and Social Policy Conventions;\(^{576}\) and a 1986 representation by the Hellenic Airline Pilots Association alleging non-observance by Greece of the Forced Labour Convention and the Abolition of Forced Labour Conventions.\(^{571}\)

413. A more developed procedure is established under article 26 of the ILO Constitution relating to disputes between States. According to paragraph 1 of the article:

"Any of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing articles."

The procedure, which can also be set in motion by the Governing Body itself, is as follows.\(^{572}\) The Governing Body may first communicate the complaint to the Government concerned. If no such communication was made or no satisfactory response was received from the Government, the Governing Body may appoint a commission of inquiry to consider the complaint. All members of ILO undertake to cooperate with such a commission. The latter adopts a report containing its recommendations; the report is communicated to the Governing Body and the Governments concerned, and is published. Governments have a three-month limit within which to inform the Director-General of ILO of their acceptance or refusal of the commission’s recommendations. In the latter case, they may refer the matter to IJC for a final decision. If a member fails to carry out the recommendations of the commission or the decision of the Court, the organization may take "such action as it may deem wise and expedient to secure compliance therewith".\(^{573}\)

414. In practice, the complaint procedure has been used on relatively few occasions. Commissions of inquiry have been established to examine some of these complaints, the most recent of which include: a 1981 complaint relating to observance of certain international labour conventions by the Dominican Republic and Haiti;\(^{574}\) a 1982 complaint relating to the observance by Poland of certain international labour conventions;\(^{575}\) and a 1984 complaint relating to the observance of the Discrimination Convention by the Federal Republic of Germany.\(^{576}\)

415. Apart from the above-mentioned procedure, a special machinery has been established for the examination of complaints of the violation of trade union rights.\(^{577}\) Such complaints can be examined, regardless of whether

... the State concerned has ratified the Freedom of Association Conventions, by two specially established bodies: the Governing Body Committee on Freedom of Association and the Fact-Finding and Conciliation Commission on Freedom of Association.

416. The Committee,\(^{578}\) a tripartite body of nine independent members from the ILO Governing Body, examines complaints even without the consent of the State concerned. Since its establishment in 1951 it has considered over a thousand cases.\(^{579}\) The complaint is communicated to the Government concerned, which may be requested to provide further information. The Committee conducts hearings and undertakes on-site visits. Its task is mainly to consider whether cases are worthy of examination by the Governing Body and to make recommendations thereon to the Governing Body. The reports of the Committee are published.

417. The Committee may recommend the referral of the matter to the Fact-Finding and Conciliation Commission. The latter, composed of independent persons appointed by the Governing Body, can only consider a case with the consent of the Government concerned. As opposed to the Committee, the Commission conducts hearings in the presence of members of the parties to the dispute. The Commission also conducts on-site visits. The report of the Commission, as is usual for conciliation commissions, contains both factual findings and recommendations for the solution of the problem. It is also published. In practice, only five cases have been referred to the Commission: concerning Japan, Greece, Chile, Lesotho and the United States (Puerto Rico).\(^{579}\)

C. Procedures envisaged in multilateral treaties creating no permanent institutions

418. Multilateral treaties (excluding those of a regional or subregional scope) may be classified as follows on the basis of the types of procedures they provide for the settlement of disputes: (1) those establishing optional procedures;\(^{580}\) (2) those establishing, under the treaty itself, combined non-compulsory and compulsory procedures in which both the International Court of Justice and an arbitral tribunal are offered as choices for judicial

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\(^{571}\)Ibid., p. 1.

\(^{572}\)Ibid., p. 16.

\(^{573}\)Articles 26-33 of the ILO Constitution.


\(^{575}\)Ibid., vol. LXVII, 1984, special supplement.

\(^{576}\)Ibid., vol. LXX, 1987, Suppl., Series B.

\(^{577}\)Allegations regarding infringements of trade union rights received by the United Nations against an ILO member State are forwarded by the Economic and Social Council to the Governing Body to follow the described procedure.
settlement; 479 (3) those establishing a combined procedure in which ICJ is the only compulsory judicial settlement procedure provided; (4) those in which arbitration is the only compulsory procedure for judicial settlement; (5) those in which conciliation is the only third-party compulsory procedure; (6) those which combine adjudication and conciliation as third-party compulsory procedures; and (7) those which rely on panels of experts for resolving technical disputes.

1. Conventions containing optional procedures for dispute settlement

419. Certain multilateral conventions establish a dispute settlement procedure in a separate optional protocol. Thus the procedure is only binding between parties to the dispute which are also parties to the optional protocol. Seven conventions concluded under the auspices of the United Nations after consideration by the International Law Commission, envisage the following procedure in an optional protocol: any dispute arising out of the interpretation or application of any of the conventions may be brought before ICJ by unilateral request. However, the parties to the dispute may agree before bringing the dispute to ICJ, and within a period of two months, to resort to arbitration or to adopt a conciliation procedure. In the latter case, the conciliation commission shall make its recommendations within five months after its appointment. If they are not accepted by the parties to the dispute within two months, either party may bring the dispute before ICJ.

420. Another type of optional procedure is contained in several human rights conventions, which set up a committee to, inter alia, consider claims by a State Party that another State Party is not fulfilling its obligations under the Convention. The procedure is optional in that, although it is an integral part of the treaty in question, it is subject to a declaration of acceptance by both the respondent and the claimant State Party. The procedure is as follows:

The committee first makes its good offices available to the parties concerned in order to reach an amicable solution. The committee may also appoint an ad hoc conciliation commission. A report on the matter is then submitted, which is communicated to the parties to the dispute.

421. Moreover, a procedure for examination by the committee of claims by individuals subject to the jurisdiction of a State Party is also provided for in these treaties, on the condition of the acceptance of the procedure by the State party concerned, either by declaration or by becoming party to an optional protocol.

2. Conventions containing non-compulsory and compulsory procedures in which both the International Court of Justice and an arbitral tribunal are established as choices for judicial settlement

422. A number of multilateral treaties provide the parties to a dispute arising out of the interpretation or application of the respective conventions with a choice of any of the peaceful means of dispute settlement described in chapter II above. In this case, parties to the dispute are usually called upon first to try to resolve their dispute by negotiation, then by use or intervention of a third party (for good offices mediation, conciliation, inquiry) and then, failing the resolution of the dispute, by referral to arbitration or to the International Court of Justice, the latter two methods being put on the same level. A variation of such a type of clause envisages unilateral referral of the dispute to ICJ, if it cannot be settled by other means, including arbitration. The Court is thus the only means of last resort for the settlement of the dispute. There is yet another type of dispute settlement clause which provides for referral to ICJ if arbitration fails, but limits the choice of non-judicial means to negotiations. It is a standard clause in many treaties and reads as follows:

"1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted..."
to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

"2. Each State Party may, at the time of signature or ratification of the present Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party which has made such a reservation.

"3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations."

3. Conventions in which resort to the International Court of Justice is the only compulsory judicial settlement procedure

423. Several international conventions provide that disputes between States Parties arising out of the interpretation or application of those treaties shall be referred to ICJ, at the request of any party to the dispute, unless the dispute can be settled otherwise. However, the application of this procedure is often subject to reservations by certain States Parties to the conventions

Board Aircraft of 14 September 1963 (art. 24); the only difference with the standard clause is that withdrawal of the reservation is notified to ICAO (ibid., vol. 704, p. 220); Convention on the Suppression of Unlawful Seizure of Aircraft of 16 December 1970 (ibid., vol. 360, p. 106, art. 12); Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971 (ibid., vol. 974, p. 178, art. 14); Convention to Discourage Acts of Violence Against Civil Aviation of 23 September 1971; the withdrawal of reservations is notified to depositary Governments (International Legal Materials (1971), p. 1151, art. 14); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents of 14 December 1973 (United Nations, Treaty Series, vol. 1035, p. 168, art. 13); International Convention against the Taking of Hostages of 17 December 1979 (General Assembly resolution 34/146, annex, art. 16); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (IMO document SUA/CON/15, art. 16); Convention on the Making of Plastic Explosives for the Purposes of Detection of 1 March 1991; the withdrawal of reservation is notified to ICAO (S/22393, article XI). See also certain human rights conventions: Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 (General Assembly resolution 34/180, annex, art. 29); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (General Assembly resolution 39/46, annex, art. 30); and Convention against the Recruitment, Use, Financing and Training of Mercenaries of 4 December 1989 (General Assembly resolution 44/34, annex, art. 17).


insisting that mutual consent of the parties to the dispute is necessary for referral of the dispute to ICJ.\footnote{For reservations to certain human rights conventions mentioned in note 578 above, see Multilateral treaties deposited with the Secretary-General (United Nations publication, Sales No. E.89.V3), pp. 97-114, 289-291. Moreover, there are treaties which expressly provide for the possibility of making reservations regarding the unilateral referral of a dispute to the Court, e.g.: Berne Convention for the Protection of Literary and Artistic Works revised on 14 July 1971 (United Nations, Treaty Series, vol. 828, p. 273, art. 33); Paris Convention for the Protection of Industrial Property revised on 14 July 1967 (ibid., vol. 828, p. 365, art. 28). See, e.g., International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973 (ibid., vol. 1015, p. 244, art. XII); International Convention against Apartheid in Sports of 10 December 1985 (International Assembly resolution 40/64 G, annex, art. 19); Antarctic Treaty of 1 December 1959 (United Nations, Treaty Series, vol. 402, p. 71, art. XI).}

424. Other conventions provide that disputes which have not been settled by negotiation shall be referred to the International Court of Justice by mutual consent, unless another mode of settlement is agreed to by the parties.\footnote{For reservations to certain human rights conventions mentioned in note 578 above, see Multilateral treaties deposited with the Secretary-General (United Nations publication, Sales No. E.89.V3), pp. 97-114, 289-291. Moreover, there are treaties which expressly provide for the possibility of making reservations regarding the unilateral referral of a dispute to the Court, e.g.: Berne Convention for the Protection of Literary and Artistic Works revised on 14 July 1971 (United Nations, Treaty Series, vol. 828, p. 273, art. 33); Paris Convention for the Protection of Industrial Property revised on 14 July 1967 (ibid., vol. 828, p. 365, art. 28). See, e.g., International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973 (ibid., vol. 1015, p. 244, art. XII); International Convention against Apartheid in Sports of 10 December 1985 (International Assembly resolution 40/64 G, annex, art. 19); Antarctic Treaty of 1 December 1959 (United Nations, Treaty Series, vol. 402, p. 71, art. XI).}

4. Conventions in which arbitration is the only compulsory procedure for judicial settlement

425. A number of multilateral treaties provide for arbitration as the only judicial means for the peaceful settlement of disputes (if negotiations are unsuccessful). Thus, certain treaties provide that any dispute concerning the interpretation or application of the respective convention, which cannot be settled through negotiation, and unless the parties otherwise agree, shall be submitted to arbitration at the request of one of the parties.\footnote{See, e.g., Convention on the Conservation of Migratory Species of Wild Animals of 23 June 1979 (International Legal Materials (1980), p. 56, art. XIII). It is worth mentioning that certain regional conventions also contain such a clause; see, e.g., Convention for the Protection of the Mediterranean Sea against Pollution of 16 February 1976 (ibid., 1976), p. 206, art. 22; Convention for the Cooperation in the Protection and Development of Marine and Coastal Environment of the West and Central African Regions of 23 March 1981 (International Legal Materials (1981), p. 754, art. 24); the Convention for the Protection of the Marine Environment of the Wider Caribbean Region of 24 March 1983 (ibid., 1984), p. 234, art. 23). See, e.g., the two conventions of 1976 and 1983 on protection of regional seas mentioned in note 593 above.}
5. Conventions in which conciliation is the only third-party compulsory procedure

426. There are three conventions concluded under the auspices of the United Nations after consideration by ILC which fall into this category, namely, the two conventions on the succession of States and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975. They provide for the following procedure: the parties to a dispute have a certain time period in which to resolve the dispute by negotiation or consultation; after this period, any party may submit it to the conciliation procedure specified in the Convention or an annex to it, unless the parties otherwise agree.

6. Conventions combining adjudication and conciliation as compulsory procedures

427. There are various types of such combinations. The law-of-treaties conventions provide for the following mechanism: the parties to the dispute have 12 months to try to settle it by any means of their choice. If, after this time, the dispute involves the relation between a treaty and a peremptory norm of international law (jus cogens), any State party may unilaterally submit the dispute to IJC unless the parties agree by common consent to submit it to arbitration. If the dispute relates to any other matter, any party to it may set in motion a conciliation procedure, the details of which are spelt out in an annex to each of these Conventions.

428. The 1982 United Nations Convention on the Law of the Sea also provides for such a combination of compulsory procedures. In part XV of the Convention, the following dispute settlement system is established under section 1 (non-compulsory procedures) and sections 2 and 3 (compulsory procedures). Parties to a dispute concerning the interpretation or application of the Convention shall under section 1 of part XV first "proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means". If a settlement is not reached, then recourse to the compulsory sections of part XV shall be had, depending upon the category of dispute in question, as provided in article 286. Thus for disputes for which compulsory judicial procedures are envisaged, i.e., environmental disputes and disputes arising from the exercise of certain freedoms and rights and other uses of the sea, parties have four choices of forums for such settlement: the International Court of Justice, the International Tribunal for the Law of the Sea, an arbitral tribunal established under annex VII of the Convention and a special arbitral tribunal established under annex VIII. Parties have to make declarations conferring jurisdiction to one or more of these forums. If a dispute arises between States which have conferred jurisdiction to the same forum, the dispute is to be submitted to that forum. If a dispute arises between parties that have conferred jurisdiction to different forums, the dispute shall be submitted to arbitration under annex VII. Also, where a dispute is between a State which has made a declaration on the choice of a forum and another State which has made no declaration, such a dispute shall be referred to arbitration under annex VII. Further, where a dispute arises between States with declarations that are found not to be operative at the time of the dispute, it will be referred for settlement by arbitration under annex VII. Thus, under this system, arbitration under annex VII is assigned a special role. However, for disputes relating to the exercise by coastal States of their rights concerning the management of living resources within the exclusive economic zone and to boundary delimitation, compulsory resort to conciliation is the established third-party procedure under annex V, section 2, of the Convention.

429. Another example in this category is the Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties of 29 November 1969, which provides for recourse to conciliation and, if conciliation fails, to arbitration.

7. Conventions which rely on panels of experts for resolving technical disputes

430. In accordance with the procedure described in paragraph 425 above, parties to a technical dispute concerning the interpretation or application of the 1982 United Nations Convention on the Law of the Sea relating to four special fields—namely, fisheries, protection and preservation of the...
marine environment, marine scientific research and navigation—may submit the dispute to a special arbitral tribunal in accordance with annex VIII. In that case, the special arbitral tribunal is composed of five experts, preferably chosen from a list established in each field by the relevant international organization. In the field of fisheries, the list is drawn up by the Food and Agriculture Organization of the United Nations; in the field of protection and preservation of the marine environment by the United Nations Environment Programme; in the field of marine scientific research by the Inter-Governmental Oceanographic Commission; in the field of navigation, including pollution from vessels and by dumping, by the International Maritime Organization, or in each case by the appropriate subsidiary body concerned to which such organization, programme or commission has delegated this function. The experts constituting the special arbitral tribunal under this system render a binding decision, in contrast to other panels of experts, which deliver non-binding recommendations.

606 Annex VIII, article 2, para. 2.
607 See chap. II, sect. 1 ("Other peaceful means") above, para. 294.