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STUDY MATERIALS
PART I

Codification Division of the United Nations Office of Legal Affairs

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Peaceful Settlement of International Disputes

*Professor Lucius Caflisch*

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1. **Single arbitrator**

   ![Diagram of single arbitrator]

   

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   ![Diagram of joint commissions]

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   ![Diagram of five-member commission]

* Only one may have the nationality of the appointing State
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a) First option

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A   B
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b) Second option

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A   B
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c) Third option

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A   B
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Appointing authority
Convention for the Pacific Settlement of International Disputes, 1907
1907 CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

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 14

The parties are entitled to appoint special agents to attend the Commission of Inquiry, whose duty it 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.

Article 15

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.

Article 16

If the Commission meets elsewhere than at The Hague, it appoints a Secretary-General, whose office serves as registry.

It is the function of the registry, under the control of the President, to make the necessary arrangements for the sittings of the Commission, the preparation of the Minutes, and, while the inquiry lasts, for the charge of the archives, which shall subsequently be transferred to the International Bureau at The Hague.

Article 17

In order to facilitate the constitution and working of Commissions of Inquiry, the Contracting Powers recommend the following rules, which shall be applicable to the inquiry procedure in so far as the parties do not adopt other rules.

Article 18

The Commission shall settle the details of the procedure not covered by the special Inquiry Convention or the present Convention, and shall arrange all the formalities required for dealing with the evidence.

Article 19

On the inquiry both sides must be heard.

At the dates fixed, each party communicates to the Commission and to the other party the statements of facts, if any, and, in all cases, the instruments, papers, and documents which it considers useful for ascertaining the truth, as well as the list of witnesses and experts whose evidence it wishes to be heard.
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,
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.

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**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.

1907 Convention for the Pacific Settlement of International Disputes

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 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.
Revised General Act for the Pacific Settlement of International Disputes, adopted by the General Assembly of the United Nations on 28 April 1949
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 REVISE
POUR LE RÉGLEMENT PACIFIQUE
DES DIFFÉRENTS 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\(^1\) FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES. ADOPTED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS ON 28 APRIL 1949\(^2\)

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.

\(^1\) In accordance with article 44 the Revised General Act came into force on 20 September 1950, the ninetieth day following the receipt by the Secretary-General of the second instrument of accession.

Accessions:

BELGIUM, 23 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.

\(^2\) 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 26 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 and the Permanent Court of International Justice 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 208 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 26 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 26 September 1928 and subsequent accessions thereto see: League of Nations, Treaty Series, Volume XCVIII, page 343; Volume C, page 260; Volume CVII, page 529; Volume CXI, page 414; Volume CVII, page 304; Volume CLII, page 297; Volume CLVI, page 211; Volume CLX, page 354; Volume CXVII, page 415, and Volume CXVII, page 304.

Article 3

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, in the latter, if 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.

Article 11

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 36 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.

**Chapter III

ARBITRATION**

**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 the party 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.

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*.

**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 acceded 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

1 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 commission 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.

Article 41

Disputes relating to the interpretation or application of the present
General Act, including those concerning the classification of disputes and
the scope of reservations, shall be submitted to the International Court of
Justice.

Article 42

The present General Act shall bear the date of 28 April 1949.

Article 43

1. The present General Act shall be open to accession by the Members
of the United Nations, by the non-member States which shall have become
parties to the Statute of the International Court of Justice or to which
the General Assembly of the United Nations shall have communicated a
copy for this purpose.

2. The instruments of accession and the additional declarations
provided for by article 40 shall be transmitted to the Secretary-General
of the United Nations, who shall notify their receipt to all the Members
of the United Nations and to the non-member States referred to in the
preceding paragraph.

3. The Secretary-General of the United Nations shall draw up three
lists, denominated respectively by the letters A, B and C, corresponding
to the three forms of accession to the present Act provided for in article 38,
in which shall be shown the accessions and additional declarations of the
Contracting Parties. These lists, which shall be continually kept up to
date, shall be published in the annual report presented to the General
Assembly of the United Nations by the Secretary-General.

Article 44

1. The present General Act shall come into force on the ninetyt
day following the receipt by the Secretary-General of the United Nations
of the accession of not less than two Contracting Parties.

2. Accessions received after the entry into force of the Act, in
accordance with the previous paragraph, shall become effective as from the
ninetieth day following the date of receipt by the Secretary-General of the
United Nations. The same rule shall apply to the additional declarations
provided for by article 40.

Article 45

1. The present General Act shall be concluded for a period of five
years, dating from its entry into force.
2. It shall remain in force for further successive periods of five years in the case of Contracting Parties which do not denounce 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
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

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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 (XXVIII) 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.

1883rd plenary meeting, 24 October 1970.

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 co-operation 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 co-operation 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 an 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 fulfil 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 to use force to invade or seize territory not in accordance with the Charter.

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.
Resolutions adopted on the reports of the Sixth Committee

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 acquisicing 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 pursue 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 measures 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 an 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 fulfill in good faith the obligations assumed by them in accordance with the Charter

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

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

Every State has the duty to fulfill 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)
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### 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.

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 conformity with the Charter of the United Nations,

Reaffirming the principle of the Charter of the United Nations that all States shall resort to 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

Bear 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 similar 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:

I.

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 in 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 co-operation 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 by mutual agreement to the principles of international law and, in so doing, to strengthen international peace and security, they shall resort 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 such a dispute to which they are parties if they fail to settle it 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) Encourage the Security Council to make wider use of the opportunities provided for by the Charter in order to review disputes or situations the continuance of which is likely to endanger the maintenance of international peace and security;

(d) 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 be 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 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;

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
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.

1 See resolution 55/2.
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 sustainable 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 continue to move 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, the Monterrey Consensus and the Johannesburg Plan of Implementation.

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 imposed 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 as, 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. Some countries have launched the International Finance Facility for Immunization. Some countries will implement in the near future, utilizing their national authorities, a contribution on airline tickets to enable the financing of development projects, in particular in the health sector, directly or through financing of 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 we 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, private and...
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 multilender 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.  

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 Declaration and the Doha Plan of Action, 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, 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 2000 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
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 goals 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. 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 Change and other relevant international agreements, including, for many of us, the Kyoto Protocol. 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
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, \(^{15}\) 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 \(^{20}\) and the Johannesburg Plan of Implementation, \(^{3}\) 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;


\(^{16}\) Ibid., vol. 1760, No. 30619.

\(^{17}\) UNEP/CBD/COP/1/ and Corr. 1, part two, annex.

\(^{18}\) UNEP/CBD/COP/6/20, annex I, decision VI/24A.


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;

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 multisectoral 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 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. 1, 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 global trading system, and call upon donor countries to ensure that assistance they provide to landlocked developing countries is made available on mutually agreed terms to support their development efforts.

66. We recognize that the special needs of and challenges faced by small island developing States and the need to address the role of international oceans in contributing to the sustainable development of those Islands.

67. We reaffirm our commitment to ensure that the special needs of and challenges faced by least developed countries, landlocked developing countries and small island developing States are given greater consideration in United Nations organs and bodies.

68. We welcome the establishment of the Digital Solidarity Fund and encourage voluntary contributions to its financing.


24 TD/412, part II.
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.25

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,26 the Barbados Programme of Action27 and the outcome of the twenty-second special session of the General Assembly.28 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 society:

(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.

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 it. We note that States have different perspectives on the appropriate approach, and that 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 Nations.
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.

96. We underscore the importance of the recommendations of the Adviser to the Secretary-General on Sexual Exploitation and Abuse by United Nations Peacekeeping Personnel, and urge that those measures adopted in the relevant General Assembly resolutions be fully implemented without delay.

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 (1) below, should include as members, in addition to members of the Organizational Committee, representatives from:

(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) 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) The relevant regional and subregional organizations; (f) The major financial and economic institutions as may be relevant; (g) The relevant regional and subregional organizations, giving due consideration to those countries that have experienced post-conflict recovery.

101. The Peacebuilding Commission should have a standing Organizational Committee, responsible for developing its procedures and organizational matters, comprising:

(a) Top providers of military personnel and civilian police to United Nations peacekeeping missions; (b) Top donors of financial contributions to the Standing Peacebuilding Fund; (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) The relevant regional and subregional organizations; (f) The major financial and economic institutions as may be relevant; (g) The relevant regional and subregional organizations, giving due consideration to those countries that have experienced post-conflict recovery.

102. The Peacebuilding Commission should have a standing Organizational Committee, responsible for developing its procedures and organizational matters, comprising:

(a) Members of the Economic and Social Council, elected from regional groups, giving due consideration to those countries that have experienced post-conflict recovery; (b) The major financial, troop and civilian police contributors involved in the recovery effort; (c) The senior United Nations representative in the field and other relevant United Nations representatives; (d) The relevant regional and subregional organizations; (e) The major financial and economic institutions as may be relevant; (f) The relevant regional and subregional organizations, giving due consideration to those countries that have experienced post-conflict recovery.

103. The Peacebuilding Commission should have a standing Organizational Committee, responsible for developing its procedures and organizational matters, comprising:

(a) Top providers of military personnel and civilian police to United Nations peacekeeping missions; (b) Top donors of financial contributions to the Standing Peacebuilding Fund; (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) The relevant regional and subregional organizations; (f) The major financial and economic institutions as may be relevant; (g) The relevant regional and subregional organizations, giving due consideration to those countries that have experienced post-conflict recovery.

104. We also request the Secretary-General to establish, within the Secretariat and in cooperation with international financial institutions and other relevant organizations and institutions, 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.

106. We underscore the important role of women in the prevention and resolution of conflicts and in peacemaking and peacebuilding. We call upon States to implement all provisions of relevant United Nations resolutions and other international instruments on gender and women's rights and to promote gender equality in all decision-making processes.
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\(^\text{36}\) and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.\(^\text{37}\) 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\(^\text{38}\) 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.


\(^{37}\) Resolution 54/203, annex 1

\(^{38}\) Resolution 217 A (III).
Internally displaced persons

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.

Refugee protection and assistance

133. We commit ourselves to safeguarding the principle of refugee protection and to upholding our responsibility in resolving the plight of refugees, including through the support of efforts aimed at addressing the causes of refugee movement, bringing about the safe and sustainable return of those populations, finding durable solutions for refugees in protracted situations and preventing refugee movement from becoming a source of tension among States. We reaffirm the principle of solidarity and burden-sharing and resolve to support nations in assisting refugee populations and their host communities.

Rule of law

134. Recognizing the need for universal adherence to and implementation of the rule of law at both the national and international levels, we:

(a) Reaffirm our commitment to the purposes and principles of the Charter and international law and to an international order based on the rule of law 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 continue their efforts to eradicate policies and practices that discriminate against women and to adopt laws and promote practices that protect the rights of women and promote gender equality;

(e) Support the idea of establishing a rule of law assistance unit within the Secretariat, in accordance with existing 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 adjudicating disputes among States and the value of its work, call upon States that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute and consider means of strengthening the Court’s work, including by supporting the Secretary-General’s Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice on a voluntary basis.

Democracy

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 democracy, development and respect for all human rights and fundamental freedoms are interdependent and mutually reinforcing.

136. We renew our commitment to support democracy by strengthening countries’ capacity to implement the principles and practices of democracy and resolve to strengthen the capacity of the United Nations to assist Member States upon their request. We welcome the establishment of a Democracy Fund at the United Nations. We note that the advisory board to be established should reflect diverse geographical representation. We invite the Secretary-General to help ensure that practical arrangements for the Democracy Fund take proper account of existing United Nations activity in this field.

137. We invite interested Member States to give serious consideration to contributing to the Fund.

Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

140. We fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide.

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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.  

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 Peace  

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 the role that the Charter and the General Assembly have vested in the Economic and Social Council and recognize the need for a more effective Economic and Social Council as a principal body for coordination, policy review, policy dialogue and recommendations on issues of economic and social development, as well as for implementation of the international development goals agreed at the major United Nations conferences and summits, including the Millennium Development Goals. To achieve these objectives, the Council should:

   (a) Promote global dialogue and partnership on global policies and trends in the economic, social, environmental and humanitarian fields. For this purpose, the Council should serve as a quality platform for high-level engagement among
Member States and with the international financial institutions, the private sector, performance and transparency and reinforce ethical conduct, and invite him to report to the General Assembly on the progress made in their implementation.

We urge the Secretary-General to:

(a) Complete the work of the UN Anticorruption Panel, in accordance with its mandate, and request that the report be made public.

(b) Ensure compliance with the standards of the United Nations in the implementation of the recommendations of the Panel, and, in the interest of all Member States, propose measures to strengthen the role of the Secretary-General in this regard.

(c) Strengthen the role of the Secretary-General in the field of ethics and transparency, including by establishing a mechanism for the effective and efficient implementation of the recommendations of the Panel.

(d) Involve the United Nations in promoting ethical conduct, more specifically through the adoption of standards for the protection of human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner.

We call on Member States and the United Nations to:

(a) Support the efforts of the Secretary-General to ensure ethical conduct, more specifically through the adoption of standards for the protection of human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner.

(b) Promote the effective management of the United Nations and his commitment to update the Organization. Bearing in mind our responsibility as Member States, we commend the Secretary-General's previous and ongoing efforts to enhance the effective management of the United Nations, including the results of the General Assembly, in the interest of all Member States, while ensuring that the United Nations continues to be a driving force for positive change in the world.

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.

157. Pursuant to our commitment to further strengthen the United Nations human rights machinery, we resolve to create a Human Rights Council, based on a comprehensive review of the United Nations human rights machinery, in accordance with the principles set out in the Charter and the General Assembly resolution of 9 December 1990, and in the interest of all Member States.

158. The Council will be responsible for promoting and safeguarding 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 sixty-first session of the General Assembly, to establish the mandate, modalities, functions, size, composition, membership and working methods of the Council.

161. We recognize that in order to effectively comply with the principles and objectives set out in the Charter and the General Assembly resolution of 10 December 1990, the United Nations must be able to respond better and more rapidly to developments in the international economic, environmental and social fields.

We call on Member States and the United Nations to:

(a) Emphasize the importance of establishing effective and efficient mechanisms for responsibility and accountability of the Secretariat.

(b) Urge the Secretary-General to ensure that the highest standards of performance and transparency and reinforce ethical conduct, and invite him to report to the General Assembly on the progress made in their implementation.

(c) Support international cooperation and the development of effective and efficient mechanisms for responsibility and accountability of the Secretariat.

(d) 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.

162. We reaffirm the role of the Secretary-General as the chief administrative and management official of the United Nations, in accordance with Article 97 of the Charter. We request the Secretary-General to make the best and most efficient use of resources in accordance with clear rules and procedures agreed by the best practices.

163. We commend the Secretary-General's previous and ongoing efforts to enhance the effective management of the United Nations, and encourage him to continue these efforts, including by submitting proposals for implementing management reform to the General Assembly for consideration and decision during the first quarter of 2006, which will include the following elements:

(a) Strengthening the Secretariat's accountability and oversight, improve management and performance, and increase transparency;

(b) Strengthening the Secretariat's ability to respond better and more rapidly to developments in the international economic, environmental and social fields;

(c) Ensuring 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 measures and establish a new ethics office with independent status, which he intends to create, to the General Assembly at its sixty-first session, 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.

164. 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.

165. We recognize that in order to effectively comply with the principles and objectives set out in the Charter and the General Assembly resolution of 10 December 1990, the United Nations must be able to respond better and more rapidly to developments in the international economic, environmental and social fields.

We call on Member States and the United Nations to:

(a) Emphasize the importance of establishing effective and efficient mechanisms for responsibility and accountability of the Secretariat.

(b) Urge the Secretary-General to ensure that the highest standards of performance and transparency and reinforce ethical conduct, and invite him to report to the General Assembly on the progress made in their implementation.

(c) Support international cooperation and the development of effective and efficient mechanisms for responsibility and accountability of the Secretariat.

(d) 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.
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;

(A) 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 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

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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.

8th plenary meeting
16 September 2005
Permanent Court of International Justice

Status of Eastern Carelia
Advisory Opinion of 23 July 1923

P.C.I.J., Series B, No. 5
PERMANENT COURT OF INTERNATIONAL JUSTICE.

THIRD ORDINARY SESSION

Present:

MM. LODER, President,
WEISS, Vice-President,
Lord FINLAY,
MM. NYHOLM,
MOORE,
DE BUSTAMANTE,
ALTAMIRA,
ODA,
ANZILOTTI,
HUBER,
M WANG, Deputy-Judge.

No. 5.

The Council of the League of Nations on April 21st, 1923, adopted the following Resolution:

(English text.)

“The Council of the League of Nations requests the Permanent Court of International Justice to give an advisory opinion on 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?”

“The Secretary-General is authorized to submit this 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 Carélie orientale, constituent des engagements d'ordre international obligant 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,
"à 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 Carélie 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 Esthonian 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. Tchitcherin, 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 Carelia 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, Tchitcherin, 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. Tchitcherin."

"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 veuf 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 Yourieff Vrg Attendu aussi que le Traité de Yourieff mentionne en traitant un autre sujet la Carélie autonome comme déjà existante sans stipuler d'obligation à ce sujet pour la Russie Vrg Attendu"
aussi que la délégation russe à Yorief chaque fois que cette question surgiatia a toujours déclaré qu'elle était une affaire intérieure de la Fédération russe. Vrk Attendu aussi que le Président de la délégation russe Berzine à la séance du quatorze octobre mil neuf cent vingt portait uniquement à titre d'information à la connaissance de la délégation finlandaise le fait de l'autonomie de la Carélie. Vrk 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 Tchitchéine protesta catégoriquement contre l'acte du Gouvernement finlandais qui avait posé 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. Vrk 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 repoussait 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 relativ aux conflits entre un de ses Membres et une Puissance non participant serait considérée par le Gouvernement russe comme acte hostile contre la République russe. Vrk 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 soviériste se voit obligé de déclarer qu'il ne peut considérer la prétendue Société des Nations et la Cour permanente comme impartiale en cette matière ou que la majorité des Puissances adhérent à la Société des Nations ne reconnaissent point encore de jure le Gouvernement soviériste 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 Con- seil des Ambassadeurs ont souvent adopté des décisions manifestement dirigées contre les intérêts élémentaires des Républiques soviétistes 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 écartere 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 carénoise devant la Cour permanente. Stop N. 364. Tchitchéine."

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 troupes des communes de Repola et de Porajärvi. Ces communes seront réincorporées dans l'État russe et attachées au territoire autonome de la Cardélié de l'Est, qui comprendra la population cardérienne des gouvernements d'Arkhangël 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 Repola et de Porajärvi, citées dans l'article précédent, avec le Territoire autonome de la Cardélié de l'Est, les dispositions suivantes ont été adoptées par les Puissances contractantes en faveur de la population locale :

"1. 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 Carélie 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 territoire
autonome de la Carélie de l’Est, tous leurs droits aux
immeubles laissés par elles dans le territoire desdites com-

«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 Carélie 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 fédérative des Soviets de
Russie garantit à la population cardéenne des gouverne-
ments d’ Arkhangel et d’ Olonetz (Annen) les droits suivants :

«1) La population cardéenne des gouvernements
d’ Arkhangel et d’ Olonetz (Annen) jouira du droit des
nations de disposer d’elles-mêmes.

«2) La Carélie de l’Est habiée par cette population
formerai, en ce qui concerne ses affaires intérieures, un
territoire autonome uni à la Russie sur base fédérative.

«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 Carélie 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 Cardie 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 process-verbal on behalf of the Russian Delegation:

"The Socialist Federative Republic of the Russian Soviets guarantees the following rights to the Carelian population of the Governments of Archangel and Ononetz (Aunus):

"(1) The Carelian population of the Governments of Archangel and Ononetz (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 Carélie 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'Esthônie, de la Lettonie, de la Pologne et de la Lithuanie, 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 Porajärvi 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. 251. 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) LÖDER,
President.

(Signed) Å. HAMMARSKJÖLD,
Registrar.

MM. Weiss, Vice-President, Nyholm, de B., Stamante 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*
PUBLICATIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE.

SERIES A – No 2
August 30th, 1924

COLLECTION OF JUDGMENTS

THE MAVROMMATHIS PALESTINE CONCESSIONS

LEYDEN
SOCIETE D'EDITIONS
A. W. SJTHOFF
1924

LEYDEN
A. W. SJTHOFF'S
PUBLISHING COMPANY
1924

PERMANENT COURT OF INTERNATIONAL JUSTICE.

FIFTH (ORDINARY) SESSION

On August 30th, 1924

Before:

MM. Loder, President,
Weiss, Vice-President,
Lord Finlay,
MM. Nyholm,
Moore,
de Bustamante,
Altamira,
Oda,
Anzilotti,
Huber,
Pessôa,
Caloyanni, National Judge.

CASE OF THE MAVROMMATHIS 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, wrongly 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 20th, 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 Mavrommatis 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”, incomptence 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 :
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 or 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 fulfils 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.
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 dead lock 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 soit); but in every case it must relate to the interpretation or the application of the provisions of the Mandate.

In the first place, the exact scope must be ascertained of the investigations which the Court must, under Article 36, last paragraph, of the Statute, pursue in order to arrive at the conclusion that the dispute before it does or does not relate to the interpretation or the application of the Mandate, and, consequently, is or is not within its jurisdiction under the terms of Article 26. Neither the Statute nor the Rules of Court contain any rule regarding the procedure to be followed in the event of an objection being taken in limine litis to the Court's jurisdiction. The Court therefore is 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.

For this reason the Court, bearing in mind the fact that its jurisdiction is limited, that it is invariably based on the consent of the respondent and only exists in so far as this consent has been given, cannot content itself with the provisional conclusion that the dispute falls or not within the terms of the Mandate. The Court, before giving judgment on the merits of the case, will satisfy itself that the suit before it, in the form in which it has been submitted and on the basis of the facts hitherto established, falls to be decided by application of the clauses of the Mandate. For the Mandatory has only accepted the Court's jurisdiction for such disputes.

It is true that in Advisory Opinion No. 4 regarding the Nationality Decrees in Tunis and Morocco (French Zone), the Court, which had to take a decision upon a plea to the jurisdiction, declared that the jurisdiction of the Council of the League of Nations must be considered to exist provided that the legal grounds (titres) of an international character advanced by the Parties are such as to justify the provisional conclusion that they are of juridical importance for the dispute.

In that case, the plea was made under paragraph 8 of Article 15 of the Covenant and was directed against the very general jurisdiction given by the first paragraph to the Council of the League of Nations covering all disputes likely to lead to a rupture. Whereas in the present case, the objection to the Court's jurisdiction taken by the British Government relates to a jurisdiction limited to cer-
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 II 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 II 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 II.

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 II 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 XI, 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 XI, 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 co-operating 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."

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 co-operate, with that Administration and under its control, in the development of the country. The words used in paragraph 2 of Article 11 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 11 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 11 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 11, 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."

The express reference to the "international obligations accepted by the Mandatory" makes it clear that this statement refers to paragraph 1 of Article 11.

Again the British Agent’s oral pleading contains the following:

"Article 11 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 XI 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 XI 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 XII 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 XI 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 XI 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 concessionaire 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 11 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 11 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 it 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 limitative 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 falls 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 terms 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 11 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 11 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 Mandatory 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.
JUDGMENT No. 2

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. Hammarskjöld,
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.

(Initialized) L.

(Initialized) Å. H.
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 :
"Corfu Channel case, Judgment on Preliminary Objection :
I.C.J. Reports 1948, p. 15."
INTERNATIONAL COURT OF JUSTICE

YEAR 1948.

March 25th, 1948.

THE CORFU CHANNEL CASE
(PRELIMINARY OBJECTION)

Proceedings instituted by application alleging a case of compulsory jurisdiction specially provided for in Charter of United Nations (Article 36, paragraph i, of Statute; Articles 25, 32, 36, paragraph 3, of Charter).—Preliminary Objection to admissibility founded on an alleged procedural irregularity, as well as on alleged want of jurisdiction (Articles 40, paragraph 1, and 36, paragraph 1, of Statute; Article 32, paragraph 2, of Rules).—Jurisdiction founded on voluntary acceptance by respondent.—Waiver of objection to admissibility.—Form of acceptance of jurisdiction.—Acceptance by Parties by means of separate and successive steps.—Recommendation of Security Council to submit a dispute to the Court (Article 36, paragraph 3, of Charter of United Nations).—Reservations upon acceptance of jurisdiction.

JUDGMENT.

Present: President Guerrero; Vice-President Basdevant; Judges Alvarez, Fabela, Hackworth, Winiarski, Zoridé, De Visscher, Sir Arnold McNair, Klaestad, Badawi Pasha, Krylov, Read, Hsu Mo, Azevedo; M. Daxner, Judge ad hoc.

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 Vochot, 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 Government 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 reparation 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 Yli, 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 present 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 by unilateral application, without first concluding a special agreement with the Albanian Government.


Profoundly convinced of the justice of its case, resolved to neglect no opportunity of giving evidence of its devotion to the principles of friendly collaboration between nations and of the pacific settlement of disputes, it is prepared, notwithstanding this irregularity in the action taken by the Government of the United Kingdom, to appear before the Court.

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 Council's recommendations 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.

Accordingly, the Government of the People's Republic of Albania has the honour to inform you that it appoints as its Agent, in accordance with Article 33, paragraph 3, of the Rules of Court, M. Kahremen Yll, Minister Plenipotentiary of Albania in Paris, whose address for service at the seat of the Court is the Legation of the Federal People's Republic of Yugoslavia at The Hague.

A copy of this letter, which had been handed to the Registry by the Agent for the Albanian Government, was transmitted, on July 24th, to the Agent for the Government of the United Kingdom.

On July 31st, 1947, the President of the Court, as the Court was not sitting, made an Order, in which, after ascertaining the views of the Parties with regard to questions of procedure, it was stated:

"Whereas on July 23rd, 1947, a note signed by the Deputy-Minister for Foreign Affairs was filed with the Registry on behalf of the Government of the People's Republic of Albania, in response to the Application of the Government of the United Kingdom;...

Whereas, in this note, the Albanian Government declares inter alia that the Government of the United Kingdom, in bringing the case before the Court by unilateral application, has not proceeded in conformity with the recommendation of the Security Council of April 9th, 1947, or with the Statute of the Court or the recognized principles of international law, and that, accordingly, 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, but whereas 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. Kahremen 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 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, only the 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 specially and distinctly invites the Court to accept the case submitted by the parties, and to determine the case 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.)
THE CORFU CHANNEL CASE

May it please the Court to proceed in conformity with Article 62 of the Rules of Court,
and to give judgment in the present dispute referred to the Court by the Albanian Government.
The provision 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 27th, 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:

(9) The Government of the United Kingdom has fully complied with the recommendation of the Security Council 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.

(b) 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.

(c) 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.)

(d) 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 of 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.

In view of the circumstances above referred to, which constitute an agreement of 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 37, 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. Kahreman Ylli, Agent, and Professor Vochči, 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 4.

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
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 application, 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 "profundely 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 25 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.

(Initialled) J. G. G.

(Initialled) E. H.
International Court of Justice

Reparation for Injuries Suffered in the Service of the United Nations
Advisory Opinion

*I.C.J. Reports 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,
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 claims by United Nations.—Claim by United Nations against agent's national State.

ADVISORY OPINION.

Present: President Basdevant; Vice-President Guerrero; Judges Alvarez, Fabela, Hackworth, Winiarzki, 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 Kerno, 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 reparation 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 assistance of the organs or 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 in detachment 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 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 exercise and enjoy, and is 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 even 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 international 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 protection 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 situation 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 these 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 tasks, 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 Organization, 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—
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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 intentment 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. 22). 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 fulfil the obligations entered into by them in the interest of the good working 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.
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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.

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FOR THESE REASONS,

The Court is of opinion

On Question I (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 I (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.

(Initialized) J. B.
(Initialized) 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,
THE COURT,
composed as above,
gives the following Advisory Opinion:

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
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 Secretary-General 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, 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 it 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 that 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 prejudices 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 with Bulgaria, Article 40 of the Treaty 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 settled by direct diplomatic negotiations, shall be referred to the Three 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 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.

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 in concert 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 should 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 obligated, 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, Zoričić 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_
COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRETS,
AVIS CONSULTATIFS ET ORDONNANCES

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:
«Interprétation des traités de paix (deuxième phase),
Avis consultatif: C. I. J. Recueil 1950, p. 221.»

This Opinion should be cited as follows:
“Interpretation of Peace Treaties (second phase),
Advisory Opinion: I.C.J. Reports 1950, p. 221.”

N° de vente:
Sales number 45
INTERNATIONAL COURT OF JUSTICE

YEAR 1950

July 18th, 1950

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.

THE COURT,
composed as above,
gives the following Advisory Opinion:

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
Romana 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,
to in Question I, which relate to the settlement of disputes, including
the provisions for the appointment of their representatives
to the Treaty Commissions."

On March 30th, the Registrar notified the substance of the Court's answers to the foregoing two questions by telegrams to the Secretary-General of the United Nations and to the Governments of all the signatories of the Peace Treaties.

By telegram of May 1st, 1950, confirmed by letter of the same date and filed in the Registry on May 2nd, the Acting Secretary-General of the United Nations notified the Court that he had not received information, within thirty days of 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.

By Order made on May 5th, 1950, the President of the Court, as the Court was not then sitting, decided: (1) to fix Monday, June 5th, 1950, as the date of expiry of the time-limit for the submission by the States concerned, of written statements on Questions III and IV of the foregoing Resolution; (2) to reserve the rest of the procedure for further decision.

A certified copy of this Order, the operative part of which had been notified by telegram of May 5th to the Secretary-General and the Governments concerned, was sent to all these Governments by letter of May 9th.

By letter of May 16th, 1950, the Secretary-General of the United Nations sent to the Registrar additional documents including new diplomatic correspondence on the present case, transmitted to the United Nations by the delegations of Canada, of the United Kingdom of Great Britain and Northern Ireland and of the United States of America. These documents are listed in an annex hereto.

By letter of June 2nd, 1950, a written statement from the Government of the United States of America relating to Questions III and IV was transmitted to the Registry of the Court.

The United Kingdom Government had previously stated its views on Questions III and IV in the written statement submitted during the first phase of this case.

By letter of May 5th, 1950, the Assistant Secretary-General of the United Nations in charge of the Legal Department informed the Registry of his intention to take part in the oral proceedings.

By letters of June 12th and 22nd, 1950, respectively, the Government of the United States and the United Kingdom Government stated their intention of submitting oral statements.

At public sittings held on June 27th and 28th, 1950, the Court heard oral statements submitted:

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, of the appointment of 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."
be justified if it were 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
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

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YEAR 1959

March 21st, 1959

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INTERHANDEL CASE
(SWITZERLAND v. UNITED STATES OF AMERICA)
(PRELIMINARY OBJECTIONS)

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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.

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JUDGMENT

Present: President Klaestad; Vice-President Zafrulla Khan; Judges Basdevant, Hackworth, Winiarski, Badawi, Armand-Ugon, Kojevnikov, Sir Hersch Lauterpacht, Moreno Quintana, Córdova, Wellington Koo, Spio-poulos, Sir Percy Spender; Judge ad hoc Carry; Deputy-Registrar Garnier-Coignet.

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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,
derives 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 Honorables Loftus Becker, on behalf of the Government of the United States of America, and of M. Sauser-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;

To adjudge and declare, whether the Government of the United States of America appears or not, after considering the contents 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 Sturze negger 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 Sturze negger 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
Washington Accord of 1946, or to the arbitral tribunal provided for by the Treaty of Arbitration and Conciliation between Switzerland and the United States of February 16th, 1931;

(b) that in case of an affirmative reply to submission (a) either the arbitral tribunal provided for in the Washington Accord or the tribunal provided for in the Treaty of Arbitration and Conciliation of 1931, has jurisdiction to examine the dispute, and that the choice of one or the other tribunal belongs to the applicant State;

2. in the alternative:

(a) that the Court has jurisdiction to decide whether the dispute is fit to be submitted to the arbitral tribunal provided for by Article VI of the Washington Accord of 1946;

(b) that in case of an affirmative reply to submission (a) the said tribunal has jurisdiction to examine the dispute;

3. in the further alternative:

(a) that the Court has jurisdiction to decide whether the dispute is fit to be submitted to the arbitral tribunal provided for by the Treaty of Arbitration and Conciliation of 1931 between the Swiss Confederation and the United States of America;

(b) that in case of an affirmative reply to submission (a) the said tribunal has jurisdiction to examine the dispute;

4. in the final alternative:

that the dispute between the Swiss Confederation and the United States of America should be submitted to the examination of the Permanent Commission of Conciliation provided for in Articles II-IV of the Treaty of Arbitration and Conciliation of 1931.

The Swiss Federal Council furthermore reserves the right to supplement and to amend the preceding submissions."

On behalf of the Government of the United States of America, in its Preliminary Objections:

"May it please the Court to judge and decide:

(1) First Preliminary Objection

that there is no jurisdiction in the Court to hear or determine the matters raised by the Swiss Application and Memorial, for the reason that the dispute arose before August 26th, 1948, the date on which the acceptance of the Court's compulsory jurisdiction by this country became effective:

(2) Second Preliminary Objection

that there is no jurisdiction in the Court to hear or determine the matters raised by the Swiss Application and Memorial, for the reason that the dispute arose before July 28th, 1948,

the date on which the acceptance of the Court's compulsory jurisdiction by this country became binding on this country as regards Switzerland;

(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 (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; 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;

5. either to dismiss, or to join to the merits, preliminary objection 4 (b) 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 is acting contrary to the decision of January 5th, 1948, of the Swiss Authority of Review based on the Washington Accord, and 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, 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 Principal 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 is acting contrary to the decision of January 5th, 1948, of the Swiss Authority of Review based on the Washington Accord, and 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 the law of nations.

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;

In the alternative should the Court uphold one or the other of the preliminary objections of the United States of America, the declaration 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 1932 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 1932."

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 of 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

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 participations industrielles 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 it 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 annulled 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 affect 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 Swiss 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.

* * *

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 Sociétéd internationale pour participations industrielles et commerciales S.A. (Interhandel) possesses in General Aniline and Film Corporation have the characteristic 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 the 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 no 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:

* * *

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 adjudicate 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, 1932. 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 i: 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 declaration 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 16th, 1958, made no reference to the many questions of international law which, in the opinion of the Swiss Government, constitute the subject of the present dispute. But the decisions of the United States courts bear witness to the fact that United States courts are competent to apply international law in their decisions when necessary. In the present case, when the dispute was brought to this Court, the proceedings in the United States courts had not reached the merits, in which considerations of international law could have been profitably relied upon.

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 upon the argument that the character of the principal Submission to 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 indication of 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 Applica-
tion 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.

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.
International Court of Justice

Aegean Sea Continental Shelf
(Greece v. Turkey)
Judgment

I.C.J. Reports 1978
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
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-

cation in the circumstances in which it was seised thereof, and that consequently the Government of Turkey did not intend to appoint an agent or file a Counter-Memorial.

9. On 25 April 1978, the Court, taking account of a request by the Government of Greece, fixed 4 October 1978 as the date for the opening of the oral proceedings on the question of the jurisdiction of the Court. On 11 September 1978, a request was made by Greece that the opening of the oral proceedings be postponed for a substantial period. The Court, after taking into account the views of both interested States and the course of the proceedings since the Application was filed, considered that such a postponement was not justified and that the hearings, being limited to the question whether the Court had jurisdiction to entertain the dispute, did not affect the issues of substance dividing the parties, which were the subject of negotiations between them. Consequently, the Court decided to defer the opening of the oral proceedings only until 9 October 1978.

10. On 9, 10, 11, 12, 13, 15 and 17 October 1978, public hearings were held, in the course of which the Court heard the oral argument, on the question of the Court’s jurisdiction, advanced by Mr. Sotirios Konstantopoulos, Agent of Greece, Mr. Constantin Economides, Agent, advocate and counsel, and Mr. Daniel O’Connell, Q.C., Mr. Roger Pinto, Mr. Paul De Visscher, Mr. Prosper Wel and Mr. Dimitrios Evrigenis, counsel, on behalf of the Government of Greece. The Turkish Government was not represented at the hearings.

11. The Government of Burma requested that the pleadings and annexed documents in the case should be made available to it in accordance with Article 48, paragraph 2, of the Rules of Court. Greece and Turkey having been consulted, and no objection having been made to the Court, it was decided to accede to the request.

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

in the Application:

“The Government of Greece requests the Court to adjudge and declare:

(i) that the Greek islands referred to in paragraph 29 [of the Application], 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;

(ii) 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;

(iii) that Greece is entitled to exercise over its continental shelf sovereign and exclusive rights for the purpose of researching and exploring it and exploiting its natural resources;

(iv) that Turkey is not entitled to undertake any activities on the Greek continental shelf, whether by exploration, exploitation, research or otherwise, without the consent of Greece;
(v) 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 Candarli 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 sovereignty 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 *Msta-Sismik 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 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".

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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 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 Aegaean 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 Aegaean 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:

“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 Permanent Court of International 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 36 of the Statute of the Permanent Court of International Justice.”

The Article thus provides, under certain conditions, for the reference to the former Permanent Court of International Justice of disputes with regard to which the parties are in conflict as to their respective rights. Article 37 of the Statute of this Court, however, states that:

“Whenever a treaty or convention in force provides for reference of a matter to... the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.”

The effect of that Article, as this Court emphasized in the Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, case (I.C.J. Reports 1964, at pp. 31-39) is that, as between parties to the Statute, this Court is substituted for the Permanent Court in any treaty or convention in force, the terms of which provide for reference of a matter to the Permanent Court. Accordingly any treaty or convention providing for reference of any matter to the Permanent Court is capable as between the parties to the present Statute of furnishing a basis for establishing the Court’s jurisdiction in regard to a dispute, on condition that the treaty or convention applies to the particular matter in question and is in force as between the parties to that dispute. Clearly, Article 17 of the General Act of 1928, here invoked by Greece, contains a jurisdictional clause which does provide for reference to the Permanent Court of certain specified matters, namely, “all disputes with regard to which the parties are in conflict as to their respective rights”. It follows that, if the 1928 Act is considered to be a convention in force between Greece and Turkey and applicable to the “matter” which is the subject of the present dispute, the Act, read in combination with Article 37, and Article 36, paragraph 1, of the Statute, may suffice to establish the Court’s jurisdiction in the present case.

35. The General Act came into force in accordance with its terms on 16 August 1929, and Greece became a party to the Act by depositing an instrument of accession on 14 September 1931, subject to certain reservations. Turkey likewise became a party to the Act by depositing an instrument of accession on 26 June 1934 which, also, was subject to certain reservations. In consequence, the General Act undoubtedly became a convention in force as between Greece and Turkey on the ninetieth day following the deposit of Turkey’s instrument of accession, in accordance
with Article 44, paragraph 2, of the Act; nor is there any record of either Greece or Turkey having notified the Secretary-General, in conformity with Article 45, paragraph 3, of its denunciation of the Act. The Greek Government maintains that, in these circumstances, the General Act must be presumed to be still in force as between Greece and Turkey, in virtue of paragraph 2 of Article 45, under which the Act is expressed to remain in force for “successive periods of five years in the case of Contracting Parties which do not denounce it at least six months before the expiration of the current period”. It further maintains that neither the reservations in Greece’s own instrument of accession nor those in the Turkish instrument have any relevance to the present dispute, and that Article 17 of the General Act accordingly constitutes a valid basis for the exercise of the Court’s jurisdiction in the present case under Article 36, paragraph 1, of the Statute.

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
particular case", it is evident that any pronouncement of the Court as to the status of the 1928 Act, whether it were found to be a convention in force or to be no longer in force, may have implications in the relations between States other than Greece and Turkey. Moreover, in the present proceedings the question has also been raised of the actual relevance of the General Act as a potential source of the Court's jurisdiction with respect to the subject-matter of the present dispute. In paragraph 32 (1) of the Application, the text of which has already been set out in paragraph 33 above, the Greek Government itself, when invoking the General Act, drew attention to the fact that both the Greek and Turkish instruments of accession to the Act were accompanied by declarations, and categorically affirmed that these declarations “are irrelevant to the present case”. These declarations contained reservations to the Act made respectively by Greece and Turkey, which are for the most part without relevance to the present dispute. But this is not the case in regard to reservation (b) contained in the declaration which accompanied Greece's instrument of accession; for in its observations of 25 August 1976 the Turkish Government unequivocally took the position that, whether or not the General Act is assumed to be still in force, it is subject to a clause, i.e., reservation (b), which would exclude the Court's competence with respect to the present dispute. The Turkish Government thereafter declared that in conformity with Article 39, paragraph 3, of the Act, “Turkey opposes reservation (b) to the Greek Application”. In its further letter to the Registrar of 24 April 1978 the Turkish Government informed the Court that it maintained its view that the Court has no jurisdiction to entertain the Greek Application for the reasons which it had explained in its earlier letter of 25 August 1976.

40. The Court is thus confronted with a situation in which, even if the General Act is to be considered a convention in force, its whole relevance as a potential source of the Court's jurisdiction in a matter concerning a coastal State's sovereign rights over the continental shelf is contested by the Turkish Government. Clearly, if the Turkish Government's view of the effect of reservation (b) on the applicability of the Act as between Greece and Turkey with respect to the subject-matter of the present dispute is found by the Court to be justified, a finding on the question whether the Act is or is not a convention in force today cases to be essential for the Court's decision regarding its jurisdiction to entertain the present Application. As was pointed out by the Court in the Certain Norwegian Loans case, when its competence is challenged on two separate grounds, “the Court is free to base its decision on the ground which in its judgment is more direct and conclusive” (I.C.J. Reports 1957, p. 25). Accordingly, taking account of the nature of the issue raised in the present proceedings concerning the General Act, the Court will at once address itself to the effect of reservation (b) on the applicability of the Act with respect to the subject-matter of the present dispute.

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 exécuter celle de conciliation visée à son chapitre I:

a) les différendes 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 différendes portant sur des questions que le droit international laisse à la compétence exclusive des États et, notamment, les différendes 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
(a) 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 Littré, 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 1939 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 these 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
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 tucked 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.

* * *

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 a 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—i.e., 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 “status” (status) and “territorial” in the Dictionnaire de la terminologie du droit international, appears to the Court to be 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 area 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 protruberances 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 rest 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 it 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 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/I, 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 Égée, 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 word “décide” and the words “doivent être résolu” 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 (compromisum) 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 (compromis) 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 compromis 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 drafting 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 Verbaie 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

Official citation:
Military and Paramilitary Activities in and against Nicaragua

Mode officiel de citation:
Activités militaires et paramilitaires au Nicaragua et contre celui-ci
(Nicaragua c. États-Unis d'Amérique), compétence et recevabilité,
In the case concerning military and paramilitary activities in and against Nicaragua, the Republic of Nicaragua was represented by H.E. Mr. Carlos Argüello Guzmán, Ambassador, as Agent and Counsel.

Mr. Denis Brown, Q.C., F.B.A., Chichele Professor of International Law in the University of Oxford, Fellow of All Souls College, Oxford,

Mr. Paul S. Reichler, Reichler and Appelbaum, Washington, D.C.; Member of the Board of Directors of the International Law Commission.

Mr. Augusto Zamora Rodríguez, Legal Adviser to the Foreign Ministry of the Republic of Nicaragua;

Mr. Paul W. Kahn, Reichler and Appelbaum, Washington, D.C.; Member of the Bar of the District of Columbia and the State of California.

as Counsel and Advocates.

Mr. Aram Chaves, 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.

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as Counsel and Advocates.
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. Dosanjha, 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 inasmuch 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 claims set forth in Nicaragua's Application of 9 April 1984 (1) are not within the jurisdiction of this Court and (2) are inadmissible."

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 of 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-
The files of the League of Nations, however, contain no record of an instrument of ratification ever having been presented to the Secretary-General of the League of Nations; and the archives of the Hague Peace Conference also afford no evidence of an instrument of ratification ever having been presented to the Hague Peace Conference. The record of the Hague Peace Conference shows that a draft of the Protocol of Friendship, Commerce, and Navigation between the United States and Nicaragua was referred to the Hague Peace Conference for consideration, but that no action was taken thereon. The record of the Hague Peace Conference also shows that the draft of the Protocol was not in the possession of the Hague Peace Conference at the time the Conference was adjourned in 1913.

The case of Nicaragua is therefore not an appropriate one for the consideration of the Court. The Court is not concerned with the mere existence of an instrument of ratification, but with the validity of the instrument of ratification in accordance with the law of nations. The Court has no power to determine the validity of the instrument of ratification, but only to determine whether the instrument of ratification was submitted to the Court for consideration in accordance with the law of nations.

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(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 Depositary; 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 fulfil is that they should be “still in force” (in English) or “faites 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 dont la durée n’est 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 durée non 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 as 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”
(then accepted by comparison with the ideal of universal compulsory jurisdiction) “that the maximum, and not some merely quasi optimum preservation of this field should be aimed at” (Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1964, p. 32). Furthermore, if the highly experienced drafters of the Statute had had a restrictive intention on this point, in contrast to their overall concern, they would certainly have translated it into a very different formula from the one which they in fact adopted.

35. On the other hand, the logic of a system substituting a new Court for the former one without the cause of compulsory jurisdiction in any way suffering in the process resulted in the ratification of the new Statute having exactly the same effects as the ratification of the Protocol of Signature of the former one would have had, that is to say, in the case of Nicaragua, the step from potential commitment to effective commitment. The general system of devolution from the old Court to the new thus lends support to the interpretation whereby Article 36, paragraph 5, even covers declarations that had not previously acquired binding force. In this connection, it should not be overlooked that Nicaragua was represented at the San Francisco Conference, and duly signed and ratified the Charter of the United Nations. At that time, the consent which it had given in 1929 to the jurisdiction of the Permanent Court had not become fully effective in the absence of ratification of the Protocol of Signature; but taking into account the interpretation given above, the Court may apply to Nicaragua what it stated in the case of the Aerial Incident of 27 July 1955:

“Consent to the transfer to the International Court of Justice of a declaration accepting the jurisdiction of the Permanent Court may be regarded as effectively given by a State 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.” (I.C.J. Reports 1959, p. 142.)

36. This finding as regards the interpretation of Article 36, paragraph 5, must, finally, be compared to the conduct of States and international organizations in regard to this interpretation. In that respect, particular weight must be ascribed to certain official publications, namely the I.C.J. Yearbook (since 1946-1947), the Reports of the Court to the General Assembly of the United Nations (since 1968) and the annually published collection of Signatures, Ratifications, Acceptances, Accessions, etc., concerning the Multilateral Conventions and Agreements in respect of which the Secretary-General acts as Depositary. The Court notes that, ever since they first appeared, all these publications have regularly placed Nicaragua on the list of those States that have recognized the compulsory jurisdiction of the Court by virtue of Article 36, paragraph 5, of the Statute. Even if the I.C.J. Yearbook has, in the issue for 1946-1947 and as from the issue for 1955-1956 onwards, contained a note recalling certain facts concerning Nicaragua’s ratification of the Protocol of Signature of the Statute of the Permanent Court of International Justice, this publication has never modi-

fied the classification of Nicaragua or the binding character attributed to its 1929 Declaration — indeed the Yearbooks list Nicaragua among the States “still bound by” their declarations under Article 36 of the Statute of the Permanent Court (see paragraph 19, above). The same observation is valid for the Secretariat publication Signatures, Ratifications, Acceptances, Accessions, etc., which derived its data, including footnotes, from the I.C.J. Yearbook. As for the reports of the Court, they are quite categorical in stating that Nicaragua had accepted compulsory jurisdiction, even if the distinction between acceptances made under Article 36, paragraph 2, and those “deemed” to be such acceptances, is not spelled out.

37. The Court has no intention of assigning these publications any role that would be contrary to their nature but will content itself with noting that they attest a certain interpretation of Article 36, paragraph 5 (whereby that provision would cover the declaration of Nicaragua), and the rejection of an opposite interpretation (which would refuse to classify Nicaragua among the States covered by that Article). Admittedly, this testimony concerns only the result and not the legal reasoning that leads to it. However, the inclusion of Nicaragua in the “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”, as from the appearance of the first I.C.J. Yearbook (1946-1947), contrasts with its exclusion from the list in the last Report of the Permanent Court of International Justice of “States bound by the [optional] clause”. It is therefore difficult to escape the conclusion that the basis of this innovation was to be found in the possibility that a declaration which, though not of binding character, was still valid, and was so for a period that had not yet expired, permitted the application of Article 36, paragraph 5, so long as the State in question, by ratifying the Statute of the International Court of Justice, provided it with the institutional foundation that it had hitherto lacked. From that moment on, Nicaragua would have become “bound” by its 1929 Declaration, and could, for practical purposes, appropriately be included in the same Yearbook list as the States which had been bound even prior to the coming into force of the post-war Statute.

38. The importance of this lies in the significance to be attached to the conduct of the States concerned, which is dependent on the testimony thus furnished by these publications. The point is not that the Court in its administrative capacity took a decision as to Nicaragua’s status which would be binding upon it in its judicial capacity, since this clearly could not be so. It is that the listing found appropriate for Nicaragua amounted over the years to a series of attestations which were entirely official and public, and extremely numerous, and ranged over a period of nearly 40 years; and that hence the States concerned — first and foremost, Nicaragua — had every opportunity of accepting or rejecting the thus-proclaimed applicability of Article 36, paragraph 5, to the Nicaraguan Declaration of 1929.
The Court, however, did not rely on the advice of Nicaragua, either through express consent or acquiescence. Nicaragua's submission to the jurisdiction of the Court was not an act of acquiescence and was not made with the consent of the United Nations. Nicaragua submitted to the jurisdiction of the Court as a matter of international law, not as a matter of its consent. The Court, therefore, had no authority to bind Nicaragua, and its decision was not binding on Nicaragua.

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Nicaragua’s thesis introduces intolerable uncertainty into the system; and that thesis entails the risk of consenting to compulsory jurisdiction through silence, with all the harmful consequences that would ensue. The United States also disputes the significance of the publications and conduct on which Nicaragua bases this contention.

45. The Court would first observe that, as regards the requirement of consent as a basis of its jurisdiction, and more particularly as regards the formalities required for that consent to be expressed in accordance with the provisions of Article 36, paragraph 2, of the Statute, the Court has already made known its view in, inter alia, the case concerning the Temple of Preah Vihear. On that occasion it stated: “The only formality required is the deposit of the acceptance with the Secretary-General of the United Nations under paragraph 4 of Article 36 of the Statute.” (I.C.J. Reports 1961, p. 31.)

46. The Court must enquire whether Nicaragua’s particular circumstances afford any reason for it to modify the conclusion it then reached. After all, the reality of Nicaragua’s consent to be bound by its 1929 Declaration is, as pointed out above, attested by the absence of any protest against the legal situation ascribed to it by the publications of the Court, the Secretary-General of the United Nations and major States. The question is therefore whether, even if the consent of Nicaragua is real, the Court can decide that it has been given valid expression even on the hypothesis that the 1929 Declaration was without validity, and given that no other declaration has been deposited by Nicaragua since it became a party to the Statute of the International Court of Justice. In this connection the Court notes that Nicaragua’s situation has been wholly unique, in that it was the publications of the Court itself (since 1947, the I.C.J. Yearbook; since 1968, the Reports to the General Assembly of the United Nations), and those of the Secretary-General (as depositary of the declarations under the Statute of the present Court) which affirmed (and still affirm today, for that matter) that Nicaragua had accomplished the formality in question. Hence, if the Court were to object that Nicaragua ought to have made a declaration under Article 36, paragraph 2, it would be penalizing Nicaragua for having attached undue weight to the information given on that point by the Court and the Secretary-General of the United Nations and, in sum, having (on account of the authority of their sponsors) regarded them as more reliable than they really were.

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 empowered to handle such declarations declared that the formality in question had been accomplished by Nicaragua. The Court finds that this exceptional situation cannot be without effect on the requirements obtaining as regards the formalities that are indispensable for the consent of a State to its compulsory jurisdiction to have been validly given. It considers therefore that, having regard to the origin and generality of the statements to the effect that Nicaragua was bound by its 1929 Declaration, it is right to conclude that the constant acquiescence of that State in those affirmations constitutes a valid mode of manifestation of its intent to recognize the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute, and that accordingly Nicaragua is, vis-à-vis the United States, a State accepting “the same obligation” under that Article.

* * *

48. The United States, however, further contends that even if Nicaragua is otherwise entitled to invoke against the United States the jurisdiction of the Court under Article 36, paragraphs 2 and 5, of the Statute, Nicaragua’s conduct in relation to the United States over the course of many years estops Nicaragua from doing so. Having, it is argued, represented to the United States that it was not itself bound under the system of the Optional Clause, Nicaragua is estopped from invoking compulsory jurisdiction under that clause against the United States. The United States asserts that since 1943 Nicaragua has consistently represented to the United States of America that Nicaragua was not bound by the Optional Clause, and when the occasion arose that this was material to the United States diplomatic activities, the United States relied upon those Nicaraguan representations.

49. The representations by Nicaragua relied on by the United States were as follows. First, in 1943, the United States Ambassador to Nicaragua consulted the Nicaraguan Foreign Minister on the question whether the Protocol of Signature of the Statute of the Permanent Court had been ratified by Nicaragua. According to a despatch from the Ambassador to Washington, a decree of July 1935 signed by the President of Nicaragua, mentioning the approval of the ratification by the Senate and Chamber of Deputies, was traced, as was a copy of the telegram to the Secretariat of the League of Nations dated 29 November 1939 (see paragraph 16, above). The decree stated that it was to become effective on the date of its publication in La Gaceta. The Ambassador informed his Government that:

“The Foreign Minister informs me that the decree was never published in La Gaceta. He also declared that there is no record to the instrument of ratification having been transmitted to Geneva. It would appear that, while appropriate legislative action was taken in Nicaragua to approve adherence to the Protocol, Nicaragua is not legally bound thereby, in as much as it did not deposit its official document of ratification with the League of Nations.”

According to the United States, the United States and Nicaragua could
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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 seized 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-limited, 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
American States, and disputes arising out of events in Central America. Counsel for the United States during the hearings claimed that the notification was equally valid against Nicaragua whether it was regarded as a "modification" or as a "termination" of the Acceptance Declaration.

59. Declarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements, that States are absolutely free to make or not to make. In making the declaration a State is equally free either to do so unconditionally and without limit of time for its duration, or to qualify it with conditions or reservations. In particular, it may limit its effect to disputes arising after a certain date; or it may specify how long the declaration itself shall remain in force, or what notice (if any) will be required to terminate it. However, the unilateral nature of declarations does not signify that the State making the declaration is free to amend the scope and the contents of its solemn commitments as it pleases. In the Nuclear Tests cases the Court expressed its position on this point very clearly:

"It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being henceforth legally required to follow a course of conduct consistent with the declaration." (I.C.J. Reports 1974, p. 267, para. 43; p. 472, para. 46.)

60. In fact, the declarations, even though they are unilateral acts, establish a series of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction, in which the conditions, reservations and time-limit clauses are taken into consideration. In the establishment of this network of engagements, which constitutes the Optional-Clause system, the principle of good faith plays an important role; the Court has emphasized the need in international relations for respect for good faith and confidence in particularly unambiguous terms, also in the Nuclear Tests cases:

"One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential. Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected." (Ibid., p. 268, para. 46; p. 473, para. 49.)

61. The most important question relating to the effect of the 1984 notification is whether the United States was free to disregard the clause of six months' notice which, freely and by its own choice, it had appended to its 1946 Declaration. In so doing the United States entered into an obligation which is binding upon it vis-à-vis other States parties to the Optional-Clause system. Although the United States retained the right to modify the contents of the 1946 Declaration or to terminate it, a power which is inherent in any unilateral act of a State, it has, nevertheless assumed an inescapable obligation towards other States accepting the Optional Clause, by stating formally and solemnly that any such change should take effect only after six months have elapsed as from the date of notice.

62. The United States has argued that the Nicaraguan 1929 Declaration, being of undefined duration, is liable to immediate termination, without previous notice, and that therefore Nicaragua has not accepted "the same obligation" as itself for the purposes of Article 36, paragraph 2, and consequently may not rely on the six months' notice proviso against the United States. The Court does not however consider that this argument entitles the United States validly to act in non-application of the time-limit proviso included in the 1946 Declaration. The notion of reciprocity is concerned with the scope and substance of the commitments entered into, including reservations, and not with the formal conditions of their creation, duration or extinction. It appears clearly that reciprocity cannot be invoked in order to excuse departure from the terms of a State's own declaration, whatever its scope, limitations or conditions. As the Court observed in the Interhandel case:

"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." (I.C.J. Reports 1959, p. 23.)

The maintenance in force of the United States Declaration for six months after notice of termination is a positive undertaking, flowing from the time-limit clause, but the Nicaraguan Declaration contains no express restriction at all. It is therefore clear that the United States is not in a position to invoke reciprocity as a basis for its action in making the 1984 notification which purported to modify the content of the 1946 Declaration. On the contrary it is Nicaragua that can invoke the six months' notice against the United States — not of course on the basis of reciprocity, but because it is an undertaking which is an integral part of the instrument that contains it.

63. Moreover, since the United States purported to act on 6 April 1984 in such a way as to modify its 1946 Declaration with sufficiently immediate effect to bar an Application filed on 9 April 1984, it would be necessary, if
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. Accordingly, 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 Salvador 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 specifically 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 violations of the four multilateral conventions referred to above (paragraph 68). On the contrary, Nicaragua invokes a number of principles of customary 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 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. 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 declarations 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 Nicaragua — 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 needing 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 instituting proceedings or intervening in 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 jurisdictional problem. The present phase of examination of jurisdictional questions 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 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.

* * *

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 invoked 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 change 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 debarred 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.I.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".
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, by 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 reformulation 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 peaceful 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.
The United States emphasizes, however, that to conclude that the Court has found that the State has entered into a combination that has the effect of tying the hands of the State's officials in the exercise of their duties and of making the State's officials dependent on the activities of groups indigenous to Nicaragua or who have their own motivations to advance the activities of groups indigenous to Nicaragua does not argue that the Council must be dismissed because it presents a political question rather than a legal question. The United States has never intended the application of the Council's resolutions or measures to be characterized as an attempt to provide a legal framework for the settlement of a political question. The United States believes that the political question doctrine is not applicable in the resolution of this case and that the Council has properly exercised its responsibilities under the United States-Diplomatic and Political Support Act of 1949, as interpreted by the United Nations.
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 Collardi;

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 Collardi;

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 Collardi;

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.

(Initialized) T.O.E.
(Initialized) 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

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)

FOND

ARRÊT DU 27 JUIN 1986

Official citation:

Mode officiel de citation:
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 LACHARRIÈRE; Judges LACHS, RUDA, ELIAS, ODA, AGO, SETTE-CAMARA, SCHWEBEL, Sir ROBERT JENNINGS, MBAYE, BEDJAOUI, NI, EVESEN; Judge ad hoc COLLIER; Registrar TORRES BERNÁRDEZ.

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,
in 1956 provides an independent basis for jurisdiction under Article 36, paragraph 1, of the Statute of the Court.

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, that the Court is without jurisdiction in this case; 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 the time-limit for a Memorial of Nicaragua and 31 May 1985 as the 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 argument, 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;
   - and 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 (ARDE). 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-defence "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' briefs at its disposal and has, by its judgment of 26 November 1984, concluded that it had jurisdiction to hear 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. If 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 discordant. In the present case, the burden laid upon the Court is therefore somewhat heightened 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 33 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 justiciability of 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 careful 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 lawfulness 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 Nottiebohm 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 its 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 parties 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).

44. 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.

45. The reservation in question is not necessarily a bar to the United States accepting the Court’s jurisdiction whenever a third State which may be affected by the decision is not a party to the proceedings. According to the actual text of the reservation, the United States can always disregard this fact if it “specially agrees to jurisdiction”. Besides, apart from this possibility, as the Court recently observed: “in principle a State may validly waive an objection to jurisdiction which it might otherwise have been entitled to raise” (I.C.J. Reports 1985, p. 216, para. 43). But it is clear that the fact that the United States, having refused to participate at the merits stage, did not have an opportunity to press again at that stage the argument which, in the jurisdictional phase, it founded on its multilateral treaty reservation cannot be tantamount to a waiver of the argument drawn from the reservation. Unless unequivocally waived, the reservation constitutes a limitation on the extent of the jurisdiction voluntarily accepted by the United States; and, as the Court observed in the Aegae Sea Continental Shelf case,

“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.” (I.C.J. Reports 1978, p. 20, para. 47.)

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
States Charters was to convince the Court that the present dispute is one “arising under” those treaties, and hence one which is excluded from jurisdiction by the multilateral treaty reservation in the United States declaration of acceptance of jurisdiction. It is impossible to interpret the attitude of the United States as consenting to the Court’s applying multilateral treaty law to resolve the dispute, when what the United States was arguing was that, for the very reason that the dispute “arises under” multilateral treaties, no consent to its determination by the Court has ever been given. The Court was fully aware, when it gave its 1984 Judgment, that the United States regarded the law of the two Charters as applicable to the dispute; it did not then regard that approach as a waiver, nor can it do so now. The Court is therefore bound to ascertain whether its jurisdiction is limited by virtue of the reservation in question.

47. In order to fulfil this obligation, the Court is now in a position to ascertain whether any third States, parties to multilateral treaties invoked by Nicaragua in support of its claims, would be “affected” by the Judgment, and are not parties to the proceedings leading up to it. The multilateral treaties discussed in this connection at the stage of the proceedings devoted to jurisdiction were four in number: the Charter of the United Nations, the Charter of the Organization of American States, the Montevideo Convention on the 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 (cf. I.C.J. Reports 1984, p. 422, para. 68). However, Nicaragua has not placed any particular reliance on the latter two treaties in the present proceedings; and in reply to a question by a Member of the Court on the point, the Nicaraguan Agent stated that while Nicaragua had not abandoned its claims under these two conventions, it believed “that the duties and obligations established by these conventions have been subsumed in the Organization of American States Charter”. The Court therefore considers that it will be sufficient to examine the position under the two Charters, leaving aside the possibility that the dispute might be regarded as “arising” under either or both of the other two conventions.

48. The argument of the Parties at the jurisdictional stage was addressed primarily to the impact of the multilateral treaty reservation on Nicaragua’s claim that the United States has used force against it in breach of the United Nations Charter and of the Charter of the Organization of American States, and the Court will first examine this aspect of the matter. According to the views presented by the United States during the jurisdictional phase, the States which would be “affected” by the Court’s judgment were El Salvador, Honduras and Costa Rica. Clearly, even if only one of these States is found to be “affected”, the United States reservation takes full effect. The Court will for convenience first take the case of El Salvador, as there are certain special features in the position of this State. It is primarily for the benefit of El Salvador, and to help it to respond to an alleged armed attack by Nicaragua, that the United States claims to be exercising a right of collective self-defence, which it regards as a justification of its own conduct towards Nicaragua. Moreover, El Salvador, confirming this assertion by the United States, told the Court in the Declaration of Intervention which it submitted on 15 August 1984 that it considered itself the victim of an armed attack by Nicaragua, and that it had asked the United States to exercise for its benefit the right of collective self-defence. Consequently, in order to rule upon Nicaragua’s complaint against the United States, the Court would have to decide whether any justification for certain United States activities in and against Nicaragua can be found in the right of collective self-defence which may, it is alleged, be exercised in response to an armed attack by Nicaragua on El Salvador. Furthermore, reserving for the present the question of the content of the applicable customary international law, the right of self-defence is of course enshrined in the United Nations Charter, so that the dispute is, to this extent, a dispute “arising under a multilateral treaty” to which the United States, Nicaragua and El Salvador are parties.

49. As regards the Charter of the Organization of American States, the Court notes that Nicaragua bases two distinct claims upon this multilateral treaty: it is contended, first, that the use of force by the United States against Nicaragua in violation of the United Nations Charter is equally a violation of Articles 20 and 21 of the Organization of American States Charter, and secondly that the actions it complains of constitute intervention in the internal and external affairs of Nicaragua in violation of Article 18 of the Organization of American States Charter. The Court will first refer to the claim of use of force alleged to be contrary to Articles 20 and 21. Article 21 of the Organization of American States Charter provides:

“The American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof.”

Nicaragua argues that the provisions of the Organization of American States Charter prohibiting the use of force are “coterminous with the stipulations of the United Nations Charter”, and that therefore the violations by the United States of its obligations under the United Nations Charter also, and without more, constitute violations of Articles 20 and 21 of the Organization of American States Charter.

50. Both Article 51 of the United Nations Charter and Article 21 of the Organization of American States Charter refer to self-defence as an exception to the principle of the prohibition of the use of force. Unlike the United Nations Charter, the Organization of American States Charter does not use the expression “collective self-defence”, but refers to the case of “self-defence in accordance with existing treaties or in fulfillment thereof”. One such treaty being the United Nations Charter. Furthermore it is evident that if actions of the United States complied with all requirements of the United Nations Charter so as to constitute the exer-
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cise 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 so 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 disagreement 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 genesis 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 seised, 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
the form of an affidavit “ subscribed and sworn” in the United States, District of Columbia, according to the formal requirements in force in that place. A similar affidavit, sworn by the United States Secretary of State, was annexed to the Counter-Memorial of the United States on the questions of jurisdiction and admissibility. One of the witnesses presented by the applicant State was a national of the respondent State, formerly in the employ of a government agency the activity of which is of a confidential kind, and his testimony was kept strictly within certain limits; the witness was evidently concerned not to contravene the legislation of his country of origin. In addition, annexed to the Nicaraguan Memorial on the merits were two declarations, entitled “affidavits”, in the English language, by which the authors “certify and declare” certain facts, each with a notarial certificate in Spanish appended, whereby a Nicaraguan notary authenticates the signature to the document. Similar declarations had been filed by Nicaragua along with its earlier request for the indication of provisional measures.

67. As regards the evidence of witnesses, the failure of the respondent State to appear in the merits phase of these proceedings has resulted in two particular disadvantages. First, the absence of the United States meant that the evidence of the witnesses presented by the Applicant at the hearings was not tested by cross-examination; however, those witnesses were subjected to extensive questioning from the bench. Secondly, the Respondent did not itself present any witnesses of its own. This latter disadvantage merely represents one aspect, and a relatively secondary one, of the more general disadvantage caused by the non-appearance of the Respondent.

68. The Court has not treated as evidence any part of the testimony given which was not a statement of fact, but a mere expression of opinion as to the probability or otherwise of the existence of such facts, not directly known to the witness. Testimony of this kind, which may be highly subjective, cannot take the place of evidence. An opinion expressed by a witness is a mere personal and subjective evaluation of a possibility, which has yet to be shown to correspond to a fact; it may, in conjunction with other material, assist the Court in determining a question of fact, but is not proof in itself. Nor is testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay, of much weight; as the Court observed in relation to a particular witness in the Corfu Channel case:

“The statements attributed by the witness ... to third parties, of which the Court has received no personal and direct confirmation, can be regarded only as allegations falling short of conclusive evidence.” (I.C.J. Reports 1949, pp. 16-17.)

69. The Court has had to attach considerable significance to the declarations made by the responsible authorities of the States concerned in view of the difficulties which it has had to face in determining the facts.

Nevertheless, the Court was still bound to subject these declarations to the necessary critical scrutiny. A distinctive feature of the present case was that two of the witnesses called to give oral evidence on behalf of Nicaragua were members of the Nicaraguan Government, the Vice-Minister of the Interior (Commander Carrión), and the Minister of Finance (Mr. Huper). The Vice-Minister of the Interior was also the author of one of the two declarations annexed to the Nicaraguan Memorial on the merits, the author of the other being the Minister for Foreign Affairs. On the United States side, an affidavit was filed sworn by the Secretary of State. These declarations at ministerial level on each side were irreconcilable as to their statement of certain facts. In the view of the Court, this evidence is of such a nature as to be placed in a special category. In the general practice of courts, two forms of testimony which are regarded as prima facie of superior credibility are, first the evidence of a disinterested witness — one who is not a party to the proceedings and stands to gain or lose nothing from its outcome — and secondly so much of the evidence of a party as is against its own interest. Indeed the latter approach was invoked in this case by counsel for Nicaragua.

70. A member of the government of a State engaged, not merely in international litigation, but in litigation relating to armed conflict, will probably tend to identify himself with the interests of his country, and to be anxious when giving evidence to say nothing which could prove adverse to its cause. The Court thus considers that it can certainly retain such parts of the evidence given by Ministers, orally or in writing, as may be regarded as contrary to the interests or contentions of the State to which the witness owes allegiance, or as relating to matters not controverted. For the rest, while in no way impugning the honour or veracity of the Ministers of either Party who have given evidence, the Court considers that the special circumstances of this case require it to treat such evidence with great reserve. The Court believes this approach to be the more justified in view of the need to respect the equality of the parties in a case where one of them is no longer appearing; but this should not be taken to mean that the non-appearing party enjoys a priori a presumption in its favour.

71. However, before outlining the limits of the probative effect of declarations by the authorities of the States concerned, the Court would recall that such declarations may involve legal effects, some of which it has defined in previous decisions (Nuclear Tests, United States Diplomatic and Consular Staff in Tehran cases). Among the legal effects which such declarations may have is that they may be regarded as evidence of the truth of facts, as evidence that such facts are attributable to the States the authorities of which are the authors of these declarations and, to a lesser degree, as evidence for the legal qualification of these facts. The Court is here concerned with the significance of the official declarations as evidence of specific facts and of their imputability to the States in question.
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 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 verbistim 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 its present form, 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 Geoponik, 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 Carrion 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 contras 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 Committee, 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 supporting the mining of the ports or territorial waters of Nicaragua".

During a televised interview on 28 May 1984, of which the official transcript has been produced by Nicaragua, President Reagan, when questioned 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 mothership 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 registry, 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 mining, 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 or 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 Carrión 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 Carrion 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 the involvement of any United States personnel or UCLAs;
- the attack on Benjamin Zeledon on 20 October 1983 (item (ii)): 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

51 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 unarmèd, 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 basecamps 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 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.” (Intelligence Authorization 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 appropriation, but the House of Representatives did not. In the Senate, two amendments 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 appropriation, 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' ascent to power has consistently sought to achieve changes in Nicaraguan 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;

- reduction of Nicaragua's expanded military/security apparatus to restore military balance in the region;

- severance of Nicaragua's military and security ties to the Soviet Bloc and Cuba and the return to those countries of their military and security advisers now in Nicaragua; and

- implementation of Sandinista commitment to the Organization of American States to political pluralism, human rights, free elections, non-alignment, and a mixed economy.”

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 Representatives 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 September 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 submission to a Conference Committee, provided

"$27,000,000 for humanitarian assistance to the Nicaraguan democratic resistance. Such assistance shall be provided in such department or agency of the United States as the President shall designate, except the Central Intelligence Agency or the Department of Defense..."

As used in this subsection, the term 'humanitarian assistance' means 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."

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 action. 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 Carrion, and by counsel for Nicaragua, on the impact on contra tactics of the availability of intelligence assistance and, still more important, 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 or indirectly in connection with the activities of the contras. The unlawfulness 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 at the relevant time that allegations of breaches of humanitarian 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 was 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, who would become the martyrs, a situation that should be made use of immediately against the régime, 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 Cong., 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 began 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 semblance 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 provocations 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 Continuation 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 Brockmann, 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 Salvadoran 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.”

136. 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’.

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 Salvadoran 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.

135. 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 Contadora 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 to not 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 u otro a los salvadoreños, bajo verificación internacional. Hemos dicho que lo único que pedimos es que no 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 Salvadorans 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:

“Nicaragua’s frontier with Honduras, to the north, is 530 kilometers long. Most of it is characterized by rugged mountains, or remote and dense jungles. Most of this border area is inaccessible by motorized land transport and simply impossible to patrol. To the south, Nicaragua’s border with Costa Rica extends for 220 kilometers. This area is also characterized by dense and remote jungles and is also virtually inaccessible by land transport. As a small underdeveloped country with extremely limited resources, and with no modern or sophisticated detection equipment, it is not easy for us to seal off our borders to all unwanted and illegal traffic.”

He then points out the complication of the presence of the contras along the northern and southern borders, and describes efforts by Nicaragua to obtain verifiable international agreements for halting all arms traffic in the region.

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 régime 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 cooperation 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 unduly-privileged 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

...
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 “Resume 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 and 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 1982 and July 1983. 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 cross-border 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-defense, 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-defense. 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 [sic. 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-
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 contras. 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 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 debarred 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 on 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.

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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 question 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 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."
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 nonintervention 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 these 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 definitely a matter of customary international law, so 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
212. The Court should now mention the principle of respect for State sovereignty, which in international law is of course closely linked with the basic concept of State sovereignty itself. This principle, enshrined in the international law of the time, extends to the territorial waters and coastal areas of every State, as well as to the air space above its territory. As to the latter, the 1948 Chicago Convention on International Civil Aviation (Art. 1) reproduces the established principles of International Law, and the International Court of Justice in the case of the U.S.S.R. v. United Kingdom, 1959 at para. 149, has laid down that the sea and the territorial sea over which a State has sovereignty, extends to the air space above it. The same Convention clearly applies to the United States waters and territorial sea. It extends, as well, to the air space over it. This Convention has no doubt that these reservations 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 also to be considered in the light of the reasons relating to the territorial sea. The Court, in the case of the United States v. Mexico, 1984, in para. 149, has laid down that the sea and the territorial sea over which a State has sovereignty, extends to the air space above it. The same Convention clearly applies to the United States waters and territorial sea. It extends, as well, to the air space over it. This Convention has no doubt that these reservations of treaty-law merely respond to firmly established and longstanding tenets of customary international law.

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 peaceful purposes of commerce and navigation. Article 11 of the Convention of 1909, which is of course analogous to the rights of passage of a foreign vessel, and which applies to the United States, is similar in terms to the provisions of Article 8 of the Convention of 1958. It guarantees the freedom of navigation, and freedom of international waters, and the exclusive economic zones, which may be navigated by foreign vessels, subject to the States of which they pass through the territorial waters of the coastal State. The right to enjoy access to ports is thus regulated by international law, and the States themselves enjoy the right to regulate and control the exercise of such rights without infringing on the sovereignty of the coastal State.

215. The Court has recalled, in paragraphs 193 to 195, that State as used in the terms of the Convention of 1909, means a State that is a party to the Convention, and that the exercise of the right of passage is subject to the conditions laid down in the Convention. The right of passage is subject to the conditions laid down in the Convention, and to the laws and regulations of the coastal State. The law of the coastal State is not subject to the law of the foreign State, and the rights and duties of the coastal State are subject to international law. The right of passage is subject to the conditions laid down in the Convention, and to the laws and regulations of the coastal State. The law of the coastal State is not subject to the law of the foreign State, and the rights and duties of the coastal State are subject to international law.
maritime navigation. It 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) provides 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 Convention 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” (I.C.J. Reports 1949, p. 22).

* * *

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 submissions 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 available 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 psychological 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 seized 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 a 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 denunciation 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 multilateral 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.

* * * * *

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.

* * *

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 Salvadorian 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 Salvadorian 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 Salvadorian 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 government 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.

* *

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 percent 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.

* * *

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.

* * *

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 contras 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.

* * *

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 enquiries, 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.
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However, the Court is unable to find anything in these documents which would establish the fact that Nicaragua's domestic policies were not conducted by Nicaragua's own government, and the Court also finds that the information contained in the documents does not prove that Nicaragua's domestic policies were conducted by the United States or any other foreign power.

The Court, therefore, finds that Nicaragua's domestic policies were not conducted by the United States or any other foreign power.

THE INCORPORATION AND INCREASING PARTICIPATION OF THE MARGINAL SECTORS OF THE POPULATION IN THE PROCESS OF NATIONAL URBAN RECONSTRUCTION

The incorporation and increasing participation of the marginal sectors of the population in the process of national urban reconstruction is an essential component of the overall development strategy of the Nicaraguan government. The Court finds that the United States has not provided any evidence to support the claim that it has provided assistance to Nicaragua in the process of national urban reconstruction.

261. The incorporation and increasing participation of the marginal sectors of the population in the process of national urban reconstruction is an essential component of the overall development strategy of the Nicaraguan government. The Court finds that the United States has not provided any evidence to support the claim that it has provided assistance to Nicaragua in the process of national urban reconstruction.

262. Moreover, even supposing that such a political pledge had the force of a legal commitment, it could not have justified the United States' conduct, which was clearly in violation of the obligations under the Charter of the United Nations, in particular the obligation to refrain from any action that might prejudice the independence or integrity of Nicaragua.

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 Court finds that even if the Nicaraguan Government had taken such steps, it would not justify the use of force against Nicaragua.

264. The Court has also emphasized the importance of the United States' obligations under the Charter of the United Nations to respect the sovereignty of Nicaragua and to refrain from any action that might prejudice the independence or integrity of Nicaragua. The Court finds that the United States' conduct was in violation of these obligations.

265. Similar considerations apply to the criticisms expressed by the United States of the external policies and alliances of the Nicaraguan authorities. Whatever the impact of individual alliances on regional or international political balances, the Court finds that the United States' conduct was not in violation of the Charter of the United Nations.

266. The Court has also emphasized the importance of the United States' obligations under the Charter of the United Nations to respect the sovereignty of Nicaragua and to refrain from any action that might prejudice the independence or integrity of Nicaragua. The Court finds that the United States' conduct was in violation of these obligations.
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.

* * *

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 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 debarred from invoking a compromissory clause in that treaty” (J.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
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270. In approaching this question, the Court has first to bear in mind the chronological sequence of events. The Army of the United States have always been, at the time they were taken over by the United States Government, in Nicaragua, in the spirit of Article XXI of the Treaty, they must be taken into account. The whole record of the United States is perfectly clear, and the facts sufficiently evident, as to the entire history of the United States in Nicaragua, and of its military operations in that country, to the time these vessels were taken over by the United States for the purpose of the United States'.

279. The fact that the United States declared the fishing rights, as to the United States, in the Treaty of 1856, is not sufficient to defeat the claim of the United States. The question also arises, whether the declaration of fishing rights, in the Treaty of 1856, has been taken into account. The fact that the United States declared the right of the United States at the time of the Treaty of 1856, is not sufficient to defeat the claim of the United States.

280. The Court has found that the United States is in breach of its part of the Treaty, and has committed acts which are in contradiction with the terms of Article XXII, paragraphs 1 and 2 thereof. The Court, therefore, find that the United States is in breach of the Treaty.
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 $720,000 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 3 of the Statute does not bar 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 $720,000 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.

* * *

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”,

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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 efface 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 Collardi;
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 Collardi;
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 Collardi;
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, Ni and Evensen; Judge ad hoc Collardi;
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 Collardi;
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 Collardi;
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 Collardi;
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, Schwbel, Sir Robert Jennings. Mbayé, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;

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, Schwbel, Sir Robert Jennings. Mbayé, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;

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, Mbayé, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;

AGAINST: Judges Oda, Schwbel 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, Mbayé, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;

AGAINST: Judges Oda, Schwbel 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, Mbayé, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;

AGAINST: Judges Oda, Schwbel 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, Mbayé, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;

AGAINST: Judges Oda, Schwbel 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, Mbayé, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;

AGAINST: Judge Schwbel.

(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, Mbayé, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;

AGAINST: Judge Schwbel.

(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

Official citation:

Mode officiel de citation:
Frontière terrestre et maritime entre le Cameroun et le Nigéria, requête à fin d'intervention, ordonnance du 21 octobre 1999, C.I.J. Recueil 1999, p. 1029
ORDER

Present: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, 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 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 2 (a), 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. 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 “has[d] objected 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 hand 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 in 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 —

United States challenging manner of Germany’s institution of present proceedings before the Court.

United States objection to admissibility of Germany’s first submission — Allegation of failure to exhaust local remedies.

United States objection to Germany’s submissions — Allegation that Germany seeking to apply standard to United States different from own practice.

* * *

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 36, 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, Bedjaoui, Ranjia, Herczegh, Fleischhafer, Koroma, Vercicchetin, Higgins, Parra-Aranguren, Koumans, Rezek, Al-Khasawneh, Buerghtental; 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,

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 (Panthéon-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 Götzke, 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. McMurtrie, 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.

The Court decided, pursuant to Article 56, paragraph 2, of the Rules, to authorize the production of the latter group of documents by Germany, it being understood that the United States would have the opportunity, in accordance with paragraph 3 of that Article, to comment subsequently thereon and to submit documents in support of those comments. That decision was duly communicated to the Parties by letters from the Registrar dated 9 November 2000.

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 reparations,

(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 violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;

(2) the United States should provide reparation, in the form of compensation and satisfaction, for the execution of Karl LaGrand on 24 February 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’ international 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 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 par-
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; 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; 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 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."

On behalf of the Government of the United States,

“... respect fully 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.”

"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 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.”

13. Walter LaGrand and Karl LaGrand were born in Germany in
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 aware 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:

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. I 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 (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 (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 incapacitated 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... This 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 (a) and (c) of Article 36 must be distinguished from that of paragraph (b), and that as a result, the Court should not only rule on the latter breach, but also on the violation of paragraph (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 (a) and (c), of the Vienna Convention have been violated in this case in consequence of the breach of paragraph (b) does relate to the interpretation and application of the Convention. This is also true of the dispute as to whether paragraph (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 1 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 "in an auxiliary and subsidiary manner... 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 1 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 of 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. 1 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.

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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

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 therefore 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 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 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, "by 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 therefrom 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.I.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. 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 involv-
ing 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 indi-
vidual 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 receiv-
ing 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 sen-
tence 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 fol-
low:

“The rights referred to in paragraph 1 of this article shall be exer-
cised in conformity with the laws and regulations of the receiving
State, subject to the proviso, however, that the said laws and regu-
lations 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 addi-
tion 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 indi-
vidual (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, para-
graph 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 pro-
blem 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 pre-
vented them from attaching any legal significance to the fact, inter alia,
that the violation of the rights set forth in Article 36, paragraph 1, pre-
vented 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 transmitte[d] 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 subj-

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 surplussage. 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-
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 fulfil 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 Court 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/B, 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 ensure 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.

* *

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.

* *

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 "transmit this Order to the Governor of the State of Arizona". The information required on the measures taken in implementation of this Order was given to the Court by a letter of 8 March 1999 from the Legal Counsellor of the United States Embassy at The Hague. According to this letter, on 3 March 1999 the State Department had transmitted to the Governor of Arizona a copy of the Court's Order. "In view of the extremely late hour of the receipt of the Court's Order", the letter of 8 March went on to say, "no further steps were feasible".

The United States authorities have thus limited themselves to the mere transmission of the text of the Order to the Governor of Arizona. This certainly met the requirement of the second of the two measures indicated. As to the first measure, the Court notes that it did not create an obligation of result, but that the United States was asked to "take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings". The Court agrees that due to the extremely late presentation of the request for provisional measures, there was certainly very little time for the United States authorities to act.

112. The Court observes, nevertheless, that the mere transmission of its Order to the Governor of Arizona without any comment, particularly without even so much as a plea for a temporary stay and an explanation that there is no general agreement on the position of the United States that orders of the International Court of Justice on provisional measures are non-binding, was certainly less than could have been done even in the short time available. The same is true of the United States Solicitor General's categorical statement in his brief letter to the United States Supreme Court that "an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief" (see paragraph 33 above). This statement went substantially further than the amicus brief referred to in a mere footnote in his letter, which was filed on behalf of the United States in earlier proceedings before the United States Supreme Court in the case of Angel Francisco Breard (see Breard v. Greene, United States Supreme Court, 14 April 1998, International Legal Materials, Vol. 37 (1998), p. 824; Memorial of Germany, Ann. 34). In that amicus brief, the same Solicitor General had declared less than a year earlier that "there is substantial disagreement among jurists as to whether an ICJ order indicating provisional measures is binding... The better reasoned position is that such an order is not binding."

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. “[G]iven 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 time 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 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:

“[c]oncerning 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 jurisdiction 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

"[n]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 recurrence.

Germany finally requests that

"[t]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."

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, Herzegh, 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, Herzegh, 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, Herzegh, 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, Herzegh, 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, Herzegh, 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, Herzegh, 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;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, 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;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, 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.

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, 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.
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

United Nations · New York, 1992
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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. 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.

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 Consultative Group to the Secretary-General, the draft handbook now includes disputes to which subjects of law other than States may be parties.

The completion of this Handbook was generally recognized as a concrete and useful contribution to the United Nations Decade of International Law.

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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


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 fulfil 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 Bogota) (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 Bogota.

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 for 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 Cooperation 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." It observed in this connection, as did its predecessor, the Permanent Court of International Justice, 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 arbitral 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." 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 Gex (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, Twentieth Session, Annexes, agenda items 90 and 94, documents A/5746, paras. 156, 158 and 161-163 and ibid., Twenty-first Session, Annexes, agenda item 87, document A/6230, paras. 193-206.

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 those 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 409 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:"

". . . this 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).\(^6\)

\(^6\)I.C.J. Reports 1974, p. 32.
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 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 pretense of direct negotiations with the common adversary state after they have already fully participated in collective negotiations with the same state in opposition."

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 its judgment 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."

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". (emphasis added)

58. Mention should also be made in this context of the judgment of the Court in the Fisheries Jurisdiction case, 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 Lanoux case, in which the arbitral tribunal mentioned 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".

(f) Steps aimed at facilitating the negotiating process through the involvement of a third party

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."

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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.¹⁴ 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 agreement forthwith by negotiations conducted either directly or through a Mediator. In another case, 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, 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, inter alia, the 1961 Vienna Convention on Diplomatic Relations.¹⁵ 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 pari passu.”¹⁷

66. In another case, the International Court of Justice has stated:

¹⁴At a prior stage of the same dispute, the General Assembly, having first recommended the establishment of a three-member commission for the purpose of having the parties in carrying through appropriate negotiations, established a United Nations Good Offices Commission, consisting of three members to be nominated by the President of the Assembly, with a view to arranging and assisting the negotiations, and requested the Secretary-General, in the event that the members of the Commission were not nominated, to lend his assistance to the Governments concerned.


¹⁶In 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 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 1976, p. 12, para. 29.

"... 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. 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."

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

\(^{19}\)PC.I.J., Series A, No. 2, p. 13.


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 further 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 farther 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 instituted 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

24General Assembly resolution 46/59, annex.
25See, e.g., article 90 of both the 1899 and 1907 Hague Conventions (supra, note 21).
27See, e.g., the United Nations commission of investigation described in the two studies of the Secretary-General (supra, note 22).

29By 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 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 inquiring 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 an inquiry, following consultations with the interested States, to respond 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 of 15 December 1989).
International Atomic Energy Agency to deal with an issue under their respective constitutions and statutes.\textsuperscript{38}

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.\textsuperscript{39} 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.\textsuperscript{40}

2. \textit{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.\textsuperscript{41}

84. Some treaties have thus provided for the establishment of a permanent commission of inquiry, fact-finding or investigation, whose jurisdiction is to be exercised in advance by the States parties to the treaty in question.\textsuperscript{42} The jurisdiction of such institutionalized commission of inquiry either may be invoked without further agreement between States parties to a dispute, or

\textsuperscript{38}In the incidents of the shooting down of civilian aircraft the Council of the International Civil Aviation Organization (ICAO), by its resolution of 16 September 1983 in one case, directed the Secretary-General of ICAO "to institute an investigation to determine the facts and technical aspects relating to the flight and destruction of the aircraft". Similarly, in another case, in the statement by the President of the Council of the International Civil Aviation Organization, approved by the Council on 14 July 1988, the Council directed the Secretary-General of ICAO "to institute an immediate fact-finding investigation to determine all relevant facts and technical aspects of the chain of events relating to the flight and destruction of the aircraft".

\textsuperscript{39}See, 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.

\textsuperscript{40}The creation of a Panel for Inquiry and Conciliation was provided for in General Assembly resolution 268 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-S/4632). The Panel has never been used.

\textsuperscript{41}See, e.g., article 9 of both the Hague Conventions.

\textsuperscript{42}See, 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 Bogota), signed at Bogota on 30 April 1948, United Nations, Treaty Series, vol. 30, p. 55.

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\textsuperscript{39} and those under which the jurisdiction may only be invoked by mutual consent.\textsuperscript{44} 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 sitings 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.

\textsuperscript{39}See, e.g., the Pact of Bogota, note 34, supra.

\textsuperscript{44}One 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/5694) (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 view which may now be pointed out in connection with the institutional aspects of the procedure.

88. 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 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. 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 the issues falling under their responsibilities and competence and have done so on several occasions.

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.

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; 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, or by the various organs of the United Nations, 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. 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. In still another instance, an agreement on the inquiry regulated in detail the...
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 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

43See, e.g., article 8 of the Agreement for inquiry in the Tubaonita case, supra, note 28.
44See, e.g., article 5 of the Agreement for inquiry in the Dogger Bank case, supra, note 28.
45See, e.g., subparagraph f (i) of the Exchange of notes constituting an Agreement in the Red Crusader case, supra, note 28.
46Because 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 Tubaonita 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.
47The Tiger case, see note 28, supra.
48The Red Crusader case, see note 28, supra.
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

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52See, e.g., arts. 2-8 on good offices and mediation of the 1899 and 1907 Hague Conventions (supra, note 21).
53See, e.g., arts. IX to XIV of the American Treaty on Pacific Settlement (Pact of Bogotá), supra, note 34.
54See chap. I, para. 2, above.
55General Assembly resolution 43/51 of 5 December 1988, annex.
56Article 2 of both the 1899 and the 1907 Hague Conventions (emphasis added), supra, note 21.
57Article 3 of both the 1899 and the 1907 Hague Conventions (emphasis added), ibid.
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."  

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."  

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 wherever they confront another, life imposes upon them the obligation to seek all possible points of rapprochement 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 cannot any 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, add 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."

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

58Article IX of the Pact of Bogotá, supra, note 34, p. 86.
59Article X of the Pact of Bogotá, supra, ibid.
60SG/SM/3525, pp. 4 and 5.
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 Viet Nam 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 'Durban 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 Comorian 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 41See A/45/507.
42See General Assembly resolution 44/24 of 17 November 1988.
43See General Assembly resolution 44/21 of 20 November 1990.
44See General Assembly resolution 45/11 of 1 November 1990.
45See General Assembly resolution 42/14 B of 6 November 1987, in paragraph 15 of which the Assembly urged the Security Council to undertake forthwith consultations for the composition and emplacement of the United Nations Transition Assistance Group in Namibia (UNTAG), leading to the process of granting independence to Namibia in 1990.
46See, e.g., General Assembly resolution 45/68 of 6 December 1990 on the question of Palestine, relating particularly to the efforts by the United Nations to organize a conference on the matter.
47See General Assembly resolutions 44/10 of 23 October 1989 and 45/15 of 20 November 1990.
50See the statement by the President of the Security Council of 9 November 1979 (S/13616) and Security Council resolutions 457 (1979) of 4 December 1979 and 461 (1979) of 31 December 1979.
51See S/19835, annex.
existing United Nations operations to assist in the mission of good offices of the Secretary-General, the scope of which is further elaborated in the Memorandum of Understanding annexed to the above-mentioned Interrelationships Agreement.

115. Good offices has also been undertaken as a joint effort between the Secretary-General of the United Nations and the current Chairman of the Organization of African Unity to bring about the settlement of the questions of Western Sahara and of the Comorian Island of Mayotte. There have also been similar joint good offices efforts by the Secretary-General of the United Nations and the Secretary-General of OAS to find a peaceful solution of the conflict in Central America.

4. **Institutional and related aspects**

(a) **Initiation of the procedure**

116. Good offices may be set in motion, as described in paragraph 101 above, either upon the initiative of a third party, whose offer has been accepted by the parties to the dispute, or by an invitation by all the parties to the dispute. Thus, the third party tendering good offices cannot impose himself upon the parties to the dispute.

117. It may be resorted to in accordance with the provisions of an applicable treaty between the parties to the dispute, specifically establishing the procedure, as is the case in the 1899 and 1907 Hague Conventions and in the Pact of Bogotá, or may be applied in a purely ad hoc manner, on the basis of a general obligation recognized by the parties to settle their disputes by peaceful means.

(b) **Methods of work and venue**

118. The third party exercising good offices normally establishes contact with the parties to the dispute through a number of informal meetings with each party, during which he ascertains the positions of both sides, and then transmits to the parties each other’s positions with respect to the dispute.

119. Where direct contact between the parties to the dispute has broken down and the third party offering the good offices thus provides the only channel of communication, such a function may be performed by the third party in question by visiting the capitals of the parties to the dispute, or by the third party (e.g., the Secretary-General of the United Nations) requesting the parties to the dispute to send representatives to a meeting with him; together with representatives of the other party to the dispute, or alone, at United Nations Headquarters in New York or at any other location.

120. In performing the functions assigned by the parties to the dispute, the third party contributing good offices towards the peaceful settlement of the dispute may, depending upon the nature of the dispute, and with consent of the parties, undertake field missions that would enable him to be fully acquainted with the issues involved. Thus, in the question of the Western Sahara, a number of technical missions were undertaken on behalf of the Secretary-General for that purpose.

5. **Termination and outcome of the process**

121. Good offices is a peaceful method which, having been resorted to, may give way to other peaceful procedures accepted by the parties to the dispute. There are types of disputes with respect to which resort to good offices, in the manner determined by the parties, may constitute a clear and definite phase in which the procedure itself brings about the desired result. That, for example, is the situation envisaged in article X of the Pact of Bogotá, which reads as follows:

> “Once the parties [to the dispute] have been brought together and have resumed direct negotiations, no further action is to be taken by the States or citizens that have offered their good offices or have accepted an invitation to offer them; they may, however, by agreement between the parties, be present at the negotiations.”

However, there are also types of disputes the peaceful settlement of which continues to elude the parties for a long time, thereby allowing the good offices method to remain one of the options for the possible achievement of peaceful settlement. In such situations, there is no time-limit which can be set for the termination of the good offices methods.

122. The outcome of the process depends entirely upon the attitude of the parties to the dispute. The third party exercising good offices cannot impose his will on them. Thus, in article 6 of the 1899 and 1907 Hague Conventions for the Pacific Settlement of Disputes, it was provided that the results of good offices “have exclusively the character of advice and never have binding force.”

D. **Mediation**

1. **Main characteristics and legal framework**

123. Mediation is a method of peaceful settlement of an international dispute where a third party intervenes to reconcile the claims of the contending parties and to advance his own proposals aimed at a mutually acceptable compromise solution.

124. Mediation as a means of settlement of international disputes has been provided for in a variety of multilateral instruments such as the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes, the Inter-American Treaty on Good Offices and Mediation of 1936, the Charter of the United Nations, the Pact of the League of Arab States, the Charter of the Organization of American States and the American Treaty on Pacific Settlement (Pact of Bogotá) of 1948, the Charter of the Organization

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82 Supra, note 73.
83 Supra, note 74.
84 Supra, note 77.
85 The Treaty ceased being in force after the Pact of Bogotá came into effect.
of African Unity and Protocol of the Commission of Mediation, Conciliation and Arbitration of 1964, the Antarctic Treaty of 1959, as well as the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), annex), the Final Act of the Conference on Security and Cooperation in Europe of 1975 and the 1982 Manila Declaration on the Peaceful Settlement of International Disputes (General Assembly resolution 37/10, annex).

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 West 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”.87

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 1963); 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 598 (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-

tions, including such steps as transition from mediation to direct negotiations or a switch from mediation to any other of the peaceful settlement means, can be agreed upon in an informal, simplified way.

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 1938.88 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. 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.91 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”.

91See, 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”.

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.


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,49 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.

94Ethiopia, Ghana, Guinea, India, Indonesia, Liberia, Malaysia, Mali, Morocco, Nigeria, Pakistan, Senegal, Sudan, Tunisia and the United Arab Republic.
95Argentina, Austria, Burma, Pakistan and Tunisia.
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 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 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 Bogota 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:

"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 fulfill 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.

96But 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.
97Compare 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.)
(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, 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 might 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. 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 procès-verbaux in which no mention shall be made as to whether the commission’s decisions were taken unanimously or by a majority vote. 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

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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 conciliation 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 respective 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

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101 See Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda item 94 (a) and (c), document A/C.6/397.
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, 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

104 There are other types of arbitration tribunals to which States as well as their nationals have access to and 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 Tribunal set up under the First World War by the Treaty of Versailles, Article 304, see Recueil des decisions des Tribunaux arbitraux mixtes 1922-1930, 10 vols.


106 See, e.g., the Rann of Kutch arbitration (India v. Pakistan) in Reports of International Arbitral Awards, vol. XVII (United Nations publication, Sales No. E/80.V2) (hereinafter referred to as UNIRAIA), Argentina-Chile frontier case, UNIRAMA, 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 Manou arbitration, ibid., vol. 24, 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; Andes Boundary case (Argentina v. Chile), ibid., vol. IX, pp. 24-29.


108 See, e.g., 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), UNIRAMA, vol. III, pp. 1907-1982, Lake Manoux arbitration (France v. Spain), ibid., vol. XII, pp. 281-317. See also generally, the cases contained in UNIRAMA, 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 Bogota) 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 compromissory

\(^{109}\)Article 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.

\(^{110}\)See article XXXVIII of the Pact of Bogota, supra, note 34, at p. 96.

\(^{111}\)See, e.g., the relevant provisions of the treaties in Systematic Survey . . ., supra, note 105, pp. 23 and 24.

\(^{112}\)Ibid., pp. 32-34.

\(^{113}\)Ibid., p. 34.


\(^{115}\)See, e.g., article 298 (c) of the 1982 United Nations Convention on the Law of the Sea, ibid.

\(^{116}\)One 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.

The 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 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 compromiss after the occurrence of a dispute.

175. A compromissory 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 compromissory clauses are drafted in general terms.\(^{117}\) The compromissory 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 compromissory clause, the parties usually need to conclude a special agreement (compromis).

176. The special agreements (compromis) 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: the composition of the tribunal, including the size and the manner of appointment 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,\(^{118}\) while others include provisions concerning privileges and immunities of the members of the arbitral tribunal,\(^{119}\) and yet others address the question of interim arrangements

\(^{117}\)For some examples of compromissory clauses, see Systematic Survey . . ., supra, note 105.

\(^{118}\)Compare in this connection the Model Rules on Arbitration Procedure, prepared by the International Law Commission, The Work of International Law Commission, supra, note 105, p. 146, article 2, at pp. 147 and 148.

\(^{119}\)See supra paragraphs 178-195 below.

\(^{120}\)See, e.g., the 30 July 1954 Compromis between the United Kingdom (acting on behalf of the Ruler of Abu Dhabi) and the Sultan of Saudi Arabia, in United Nations, Treaty Series, vol. 201, p. 317, article 16.
for preserving the respective rights of the parties to the dispute, pending the conclusion of the work of the arbitral tribunal in question. Some compromis 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. However, there are recent examples of more elaborate ones, such as the Compromis of 10 July 1975 between France and the United Kingdom concerning the delimitation of the continental shelf and the Compromis of arbitration of 11 July 1978 between the United States and France concerning an Air Service Agreement.

(b) 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, or by a group of individuals appointed to form an arbitral tribunal. In most treaties establishing an arbitral tribunal, an odd number of arbitrators is usually provided: some require five arbitrators while the most common practice has been arbitral tribunal of three members. 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. 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) 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) 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.

179. Some arbitral tribunals are composed of individuals appointed by the parties relying upon a pre-constituted list of arbitrators such as that of the Permanent Court of Arbitration established under the 1899 and 1907 Hague Conventions, while other arbitral tribunals are composed without the benefit of a pre-con-


182. 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 only 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 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 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.


184. Ibid.

185. 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 arbitration tribunal composed of judges or prominent international lawyers, while that in annex VIII is for a special arbitration 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.” Similary, 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.

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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.
140The Convention of 3 August 1935 between the United States and Canada concerning the settlement of difficulties arising from operation of a smelter at an iron, UNIRA, vol. II, p. 1907.
142See the Treaty of Washington of 6 May 1871, which constituted the basis for establishing the Alabama claims tribunal between the United States and the United Kingdom, in Moore, International Arbitrations, vol. I, p. 547. See also the Treaty between the United Kingdom and Venezuela regarding the determination of the boundary line between the Colony of British Guiana and Venezuela, in Perry, Consolidated Treaty Series, vol. 184, p. 188.
143See, e.g., those mentioned in Systematic Survey . . . supra, note 105, p. 117.
144Ibid.
146See, e.g., the “equitable solution” principle applied by the 1872 arbitral tribunal in the Delagoa Bay case (Great Britain v. Portugal); the 1907 boundary arbitration between Colombia and Ecuador; and the 1893 Bering Sea case (Great Britain v. United States); and the North Atlantic Coast Fisheries cases (Great Britain v. United States).
148While some compromis do not address specifically the question of agents as such, parties to the dispute proceed to be presented by their agents in the tribunal. See, e.g., the 30 June 1964 Compromis of arbitration between Italy and the United States concerning their mutual air transport agreement, ibid., vol. 529, p. 314.
149While some compromis do not address the question of time-limits for the appointment of the agents, see the 22 January 1963 Compromis of arbitration between France and the United States, ibid., vol. 473, p. 3; others have stipulated a time-limit. See, e.g., the 14-day period stipulated in the France-United Kingdom compromis of 10 July 1975, UNIRA, vol. XVIII, p. 5, article 4, and also in the 24 February 1955 Compromis between Greece and the United Kingdom in the Ambulos arbitration, ibid., vol. XII, p. 88, article 4.
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."

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. 153 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 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.

156See, e.g., article 5 of the 10 July 1775 compromis between France and the United Kingdom in the case concerning the delimitation of the continental shelf, ibid., vol. XVIII, pp. 5 and 6.
157See, for example, the Convention for arbitration of questions regarding the Jurisdictional Rights in the High Seas of 29 February 1892, in Moore, International Arbitrations, vol. 5, p. 4762, article 12; the Compromis of 16 June 1930 between Honduras and Guatemala, UNIRAA, vol. II, p. 1313, article XIX, and the Compromis of 22 January 1963 between the United States and France, ibid., vol. XVI, p. 9, article VIII.
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,\textsuperscript{138} while others also give arbitrators the right to file a separate or dissenting opinion.\textsuperscript{139}

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.\textsuperscript{140} 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.\textsuperscript{141} Some arbitration agreements have contemplated the possibility of the interpretation of the award.\textsuperscript{142} The compromis may also indicate that the award as rendered should be made public on the date agreed by the parties.\textsuperscript{143}

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.\textsuperscript{144}

\textsuperscript{138}See, 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.

\textsuperscript{139}See, 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.

\textsuperscript{140}See article 31 of the Model Rules, in The Work of International Law Commission, supra, note 105, p. 154.

\textsuperscript{141}This competence is limited only to an agreement contrary to such review procedure between the parties.

\textsuperscript{142}See, 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.

\textsuperscript{143}See, e.g., article VI (b) of the France–United States compromis cited supra, note 158.

\textsuperscript{144}See article 82 of the 1907 Hague Convention for the Pacific Settlement of International Disputes, supra, note 21.

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,\textsuperscript{145} with jurisdiction over law of the sea disputes.

198. Both 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."\textsuperscript{146} 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 I.C.J. Statute provides further that "in the event of dispute as to the meaning or scope of the

\textsuperscript{145}Article 287 (1) (c) and annex VI, article 1 (1). The Tribunal, as well as its Sea-Bed Disputes Chamber, having jurisdiction in disputes with respect to activities in the Area, is to be established upon entry into force of the Convention.

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 institutions, 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 quasi-judicial appellate jurisdiction for the decisions of administrative tribunals established within the

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170 See para. 200 below.


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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173 See, e.g., the functions of the Court of Justice of the European Communities under article 177 of the Treaty establishing the European Economic Community of 25 March 1957, _infra_, note 181. Under this provision, the Court may be concerned with questions of interpretation (of the Treaty, of acts of Community institutions and of the statutes of bodies set up by the Council) or with questions of validity (of the validity of institutions). See, e.g., the resolution of the Court of Justice of the Benelux Union under article 6 of the Treaty concerning the Creation and the Statute of a Benelux Court of Justice of 31 March 1965, _infra_, note 182.

174 See, e.g., _S. W. Wilmot_ (France, United Kingdom, Italy, Japan v. Germany), _PC.J.I. Series A_, No. 1, p. 15; Treaty of Neutrality (Bulgaria v. Greece), _PC.J.I. Series A_, No. 3, p. 4; Mavrommatis Jerusalem Concessions (Greece v. United Kingdom), _PC.J.I. Series A_, No. 5, p. 6; Certain German interests in Polish Upper Silesia (Germany v. Poland), _PC.J.I. Series A_, No. 7, p. 4; Rights of Minimum Navigation (Upper Silesia v. Germany, Poland), _PC.J.I. Series A_, No. 17, p. 4; Territorial Jurisdiction of the International Commission of the River Oder (United Kingdom, Czechoslovakia, Denmark, France, Germany, Poland, Sweden) (1926), _infra_, note 182; Free Zones, _infra_, note 182; Fazes v. France, _infra_, note 182; Gex (France v. Switzerland), _PC.J.I. Series A/B_, No. 46, p. 96; Interpretation of the Statute of the Merel Territory (United Kingdom, France, Italy v. Lithuania), _PC.J.I. Series A/B_, No. 49, p. 234; Pajs, Csaky, Esterhazy Case (Hungary v. Yugoslavia), _PC.J.I. Series A/B_, No. 68, p. 30; Division of Water from the Meuse (Netherlands v. Belgium), _PC.J.I. Series A/B_, No. 70, p. 4; Asylum Case (Colombia v. Peru), _IC.J.C. Reports_ 1950, p. 266; Rights of Nationals of the USA in Morocco (France v. USA), _IC.J.C. Reports_ 1952, p. 176; Ambasciato (Greece v. United Kingdom), _IC.J.C. Reports_ 1953, p. 10; Application of the Convention of 1902 Governing the Guarani Indians (Netherlands v. Sweden), _IC.J.C. Reports_ 1956, p. 55; US Diplomatic and Consular Staff in Tehran (USA v. Iran), _IC.J.C. Reports_ 1980, p. 4. Cases which were not decided upon the merits because the Court declared itself incompetent, but where one of the parties wanted the Court to judge upon the interpretation or application of treaties: Phosphates in Morocco (Italy v. France), _IC.J.C. Reports_ A/B, No. 74, p. 10; Anglo-Iranian Oil Co. (United Kingdom v. Iran), _IC.J.C. Reports_ 1952, p. 93; Monetary Gold Case (Italy v. France, United Kingdom, USA), _IC.J.C. Reports_ 1954, p. 179; Yugoslav Loans (France v. Norway), _IC.J.C. Reports_ 1957, p. 9; Northern Cameroons (Cameroon v. United Kingdom), _IC.J.C. Reports_ 1963, p. 15; South West Africa (Ethiopia v. South Africa), _IC.J.C. Reports_ 1966, p. 6.

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


\textsuperscript{179} S.S. Lotus (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, France v. Yugoslavia, Greece and Slovenia), 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} Treaty Establishing the European Communities (1973).

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 matter 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 customary rule, or by 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{182} Mémorial du Grand-Duché de Luxembourg, Recueil de Législation 1973, II, A, p. 984.

\textsuperscript{183} International Legal Materials, vol. XVIII, p. 1203.

\textsuperscript{184} ibid., vol. VIII, p. 910.

\textsuperscript{185} Karin Oellers and others, Dispute 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 delimit 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.

190 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.Y. Reports 1961, p. 17; or not applicable (e.g., Aerial Incident of 10 March 1953 (United States v. Czechoslovakia), I.C.Y. 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.Y. Reports 1984, p. 392); or (b) that the dispute is not admissible for reasons of jure spond (e.g., South West Africa v. Ethiopia v. South Africa, Liberia v. South Africa), I.C.Y. Reports 1962, p. 319); or non-exhaustion of local remedies (e.g., Interhandel (Switzerland v. United States), I.C.Y. Reports 1957, p. 105); or non-existence of dispute (e.g., Rights of Passage over Indian territory (Portugal v. India), I.C.Y. Reports 1957, p. 125).

191 See cases cited in the second sentence of note 177 supra.

192 A list of such treaties is found in I.C.Y. Yearbook 1987-1988, pp. 98-114.

193 The revised General Act was adopted by the General Assembly of the United Nations by its resolution 268 A (III) of 28 April 1945 in order to adapt its provisions to the new international situation.


196 I.C.Y., vol. 56, p. 95, articles 1 and 2.


199 I.C.Y., 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\(^{199}\) and the Inter-American Court of Human Rights.\(^{200}\)

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.\(^{201}\) States parties to the 1982 United Nations Convention on the Law of the Sea \emph{ipso facto} accept the compulsory jurisdiction of various forums for the settlement of law of the sea disputes.\(^{202}\) However, under the Convention, States parties have to make a declaration on the choice of the forum for judicial settlement established thereunder.\(^{203}\)

(iv) \textit{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.\(^{204}\) 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.\(^{205}\) 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.\(^{206}\) Examples of these include the chamber of summary procedure\(^{207}\) and ad hoc chambers\(^{208}\) of the International Court of Justice and the Sea-Bed Disputes Chamber\(^{209}\) and special chambers\(^{210}\) of the International Tribunal 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.\(^{211}\) Since then, however, three out of eight contentious cases have been referred to ad hoc chambers.\(^{212}\)

\(^{199}\)European Convention on Human Rights of 4 November 1950, article 46.


\(^{202}\)These 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.

\(^{203}\)Articles 286 and 287.

\(^{204}\)In 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.

\(^{205}\)An example of special agreements concluded on the basis of a compromissory clause in existing international treaties is the Special Agreement concerning the North Sea Continental Shelf cases, the preamble of which reads, \textit{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 . . . ."

\(^{206}\)See para. 217 below.

\(^{207}\)ICJ Statute, Article 29.

\(^{208}\)Ibid., Article 26, paragraph 2.


\(^{210}\)Ibid., article 188.

\(^{211}\)The 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, \textit{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.213 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 as 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

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.215 Provisions for such proceedings are found in the respective statutes and rules of international courts or tribunals, such as the International Court of Justice,216 the International

213 E.g., Permanent Court of International Justice (Covenant of the League of Nations, Article 14); International Court of Justice (Charter of the United Nations, Article 96; Statute of the Court, Article 65); European Court of Human Rights (Protocol No. 2 to the European Convention on Human Rights). In the case of the International Court of Justice, the General Assembly has requested 13 advisory opinions of the Court, some of which were related to existing disputes between States, for example: International Status of South West Africa (1949) (a dispute between the Union of South Africa and certain members of the United Nations relating to its application of the mandate to South West Africa); Western Sahara (1975). The Security Council also requested an advisory opinion of the Court concerning the legal consequences for States of the continuing presence of South Africa in Namibia notwithstanding Security Council resolution 276 (1970) of 30 January 1970. The Economic and Social Council also requested an advisory opinion of the Court concerning the question of the applicability of article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dumitru Mazilu as Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. ICJ gave its advisory opinion on the question on 15 December 1989 (see E)1990/15/Add.1 and I.C.J. Reports 1989, p. 177).

214 For the list of the States entitled to appear before the Court, see I.C.J. Yearbook 1987-1988, pp. 44-51.

215 Permission to intervene was requested, for example, by Malta in Continental Shelf (Tunisia/United Arab Jamahiriya) and by Italy in Continental Shelf (Malaya/United Arab Jamahiriya). In both cases, the requests were not accepted by the Court. I.C.J. Reports 1981, p. 3; I.C.J. Reports 1984, p. 3.

216 Statute of the International Court of Justice, Article 63, Rules of the International Court of Justice, Articles 81-86.

Tribunal for the Law of the Sea217 and the Court of Justice of the European Communities.218

(c) Composition

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.219 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.220 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 are appointed by common agreement of member States, as provided for the Court of Justice of the European Communities,221 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,222 or the Consultative Assembly of the Council of Europe for the European Court of Human Rights.223 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.224 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.225 No more than one national of any State may be a member of the Court.226

219 Statute of the International Tribunal for the Law of the Sea (Convention, annex VII), article 2; ICJ Statute, Article 3; Treaty concerning the Creation and the Statute of a Benelux Court of Justice of 31 March 1963, article 3.
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 VII), article 17; the 1950 European Convention on Human Rights, article 43; 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.\textsuperscript{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.\textsuperscript{228} Article I of the Special Agreement of 29 March 1979\textsuperscript{229} 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 elected by and from the Members of the Court, after consultation with the Parties, and two of whom shall be judges ad hoc, who shall be nationals of either Party, chosen by the Parties."\textsuperscript{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.\textsuperscript{231} All communications and documents relating to cases submitted to the Court are channelled through the Registrar.\textsuperscript{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.\textsuperscript{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,\textsuperscript{234} together with papers and documents in support.\textsuperscript{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.\textsuperscript{236} The number and the order of filing of the pleadings are determined in the orders of the court\textsuperscript{237} 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.\textsuperscript{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.\textsuperscript{239} The parties may address the court only through their agents, counsel or advocates. In the course of the oral proceedings, witnesses 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.\textsuperscript{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.\textsuperscript{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:

\textsuperscript{227}ICJ Rules, Article 17, paragraph 3.
\textsuperscript{228}See also the 1950 European Convention on Human Rights, article 43.
\textsuperscript{230}In 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.
\textsuperscript{231}ICJ Statute, Article 39.
\textsuperscript{232}ICJ Rules, Article 26, paragraph 1 (a).
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. The deliberations of the court are kept private and secret.

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. 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, subject to special rules provided for them.

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.

226. The judges comprising international courts or tribunals elect from their members a president, a vice-president and presidents of chambers 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.

227. The administrative functions of international courts are carried out by a secretariat established for this purpose generally known as the registry. 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. The functions of the registrar are defined by the rules of court, 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. 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, unless the Court makes an order in favour of a party for the payment of the costs by the other party 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.

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241ICJ Statute, Article 38, paragraph 2.
242Ibid., Article 54, paragraph 3.
243Ibid., Article 55.
244Ibid., Article 68.
246ICJ Statute, Article 22, paragraph 1; ICJ Rules, Article 55.
a majority of cases, the judgements are those requiring performance, but as has been done in some of the judgements 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 question has no practical remedy.259 The judgements pertaining to interim proceedings, 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 continuance 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 Chapter 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 international 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 international legal personality to perform broader functions in the field of the maintenance of peace and security, including the settlement of disputes.261

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 development 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 negotiation, 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.

258 See paragraph 204 above.

259 See, e.g., Corfu Channel Case, supra, note 178.


263 See, e.g., the European Coal and Steel Community, created under the treaty, signed at Paris on 18 April 1951, United Nations, Treaty Series, vol. 261, p. 140; the European Atomic 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.


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 José), both referred to in note 262.

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.270 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.271 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.272 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.273 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.274

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.275

(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 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.276

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.277 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.278

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270Pact of the League, article 3, see note 261 supra.
271Ibid., article 5, first paragraph.
272Ibid., second paragraph.
273Ibid., article 5 (3). It is to be noted that while the English version speaks of "mediate . . . in order to conciliate"; the French version speaks of "prêter ses bons offices"; United Nations, Treaty Series, vol. 70, at p. 255.
274See paragraphs 274-276 below.
275See paragraphs 275 and 276 below.
276See 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.
277Articles 82 to 90 of the OAS Charter. See also paragraph 273 below for an example of Council involvement in peaceful settlement.
278For 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.

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 urgencies 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.

(d) European Convention for the Peaceful Settlement of Disputes (Council of Europe)

251. The 1957 European Convention for the Peaceful Settlement of Disputes is based on the distinction between legal disputes, as defined in Article 36, paragraph 2, of the Statute of the International Court of Justice, and other (non-legal) disputes. With regard to legal disputes, the parties to the Convention undertake to accept the compulsory jurisdiction of the International Court of Justice. This notwithstanding, the parties to a legal dispute may agree to resort to the procedure of conciliation before submitting the dispute to the International Court of Justice.

252. With regard to non-legal disputes (i.e., disputes other than those enumerated in Article 36, paragraph 2, of the ICI Statute), the following means of settlement are provided by the European Convention: (a) conciliation, unless the parties to such a dispute agree to submit it to an arbitral tribunal without prior recourse to conciliation, and (b) arbitration, for all non-legal disputes which have not been settled by conciliation either because the parties have agreed not to have prior recourse to it or because conciliation has failed.

253. While it is not possible, under the terms of the Convention, for a party thereto not to accept the compulsory jurisdiction of the International Court of Justice with regard to legal disputes, the Convention permits that on depositing its instrument of ratification a party may declare that it will not be bound by the provisions concerning arbitration or those

26Cf. the Protocol of Cartagena de Indias, article 116; see note 261 supra.
28See paragraphs 273-276 below.
21The Commission consists of 21 members of different nationalities elected by the Assembly of Heads of State and Government for a period of five years. For text of the 1964 Cairo Protocol, see International Legal Materials, vol. III (1964), p. 1116.
221964 Protocol, article XIII.
24Ibid., articles XIV and XVIII
25Ibid., article XIX.
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 in the end 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 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 comment 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).

297Ibid., article 34.
298Ibid., article 28; see also paragraph 284 below for examples of application of the Convention.
299JLM, 1975, p. 1292 and ff.
300A/45/859, annex.
301Report of the Meetings of Experts on Peaceful Settlement of Disputes, Valletta, 1991. The meeting was held in January-February 1991 to fulfill the mandate given by the Vienna (1986) and Paris (1990) sessions of the CSCE and the report is to be considered at the next meeting of the Council of CSCE (International Legal Materials, vol. XXX, p. 382).
3021975 Helsinki Final Act, chapter V; 1991 Valletta Report, sections I and III.
3031991 Valletta Report, section IV.
304Ibid., section V, paras. 1 to 5.
305Ibid., section XIII.
306Ibid., section XII.
307Ibid., section II.
308See note 262, supra.
309The 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.
310The 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.
311The 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.

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 fulfil an obligation under the Treaty establishing the Community, it must

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300. See The Inter-American Court of Human Rights consists of seven judges elected in the General Assembly of OAS by a majority of States Parties to the 1969 Pact of San José. 301. If the European Commission fails in its conciliation functions and the Court is not in a position to take cognizance of the case, either because it lacks jurisdiction or because the case was not referred to it within a three-month deadline or for any other reason, the Committee of Ministers, after receiving a report submitted to it by the Commission, decides whether there has been a violation of the Convention. The parties to the Convention undertake to consider the Committee's decision as binding (1950 European Convention, article 32).


303. 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. 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 has 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.\textsuperscript{337}

276. As far as ad hoc mechanisms are concerned, it may be men-
tioned 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.\textsuperscript{338}

(b) Organization of American States

277. The Permanent Council may exercise a variety of functions, in-
cluding 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 1985\textsuperscript{339} 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 consi-
dering the report,\textsuperscript{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.\textsuperscript{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 fur-
ther 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 Salvado-
ror, Guatemala, Honduras and Nicaragua) and the eight Governments making
up the Contadora and Support Groups (Colombia, Mexico, Panama and Vene-
zuela, and Argentina, Brazil, Peru and Uruguay, respectively), in which he
explained the assistance that both organizations, singly or jointly, could pro-
vide 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,\textsuperscript{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,\textsuperscript{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,\textsuperscript{344} authorized the Secretary-
General of OAS to continue carrying out the functions he had been per-
forming, namely, participation in the International Verification and Follow-
up Commission, and also requested him to provide every assistance to the Cen-
tral American Governments in their efforts to achieve peace. The Interna-
tional 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.\textsuperscript{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 Demobili-
zation, 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.\textsuperscript{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 Bogotá\textsuperscript{247} 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 invited by Nicaragua, that it had juris-
diction over the case under article XXXI of the Pact of Bogotá.\textsuperscript{348}
(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 include 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 a 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-Hamrs 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 judicial 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 considers 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
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.357

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”.358 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 the present 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.

357See, 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.83.1.4), in particular rules 9 and 10, which read as follows: “Rule 9. The first item of the agenda adopted at the meeting 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.”

358See also the second paragraph of the second principle proclaimed in the preamble to the Friendly Relations Declaration (supra, chap. 1, para. 2), as well as section I, paragraph 5, of the Manila Declaration (ibid.).


360In 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” in hand. 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 3 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; 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. 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. Sometimes it is stipulated that the ruling of that body is to have the status of an advisory report. 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, 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 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 Organization] 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, 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, 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 (FRTGMR)
in the USNRC Loss of Fluid Test (LOFT) Research Program covering a
Four-year Period, signed at Washington on 20 June 1975,369 provides in its
article VI (A):

"Any disputes between the USNRC and FRTGMR 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 to which 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 (Forsorgsnaeg
Riso, Denmark; Valtion Teknillinen Tutkimuskeskus, Finland; Institut for
Atomenergie, Norway; and Ab Atomenergie, Sweden) in the USNRC LOFT
Research Program and the Nordic Norhav Project covering a Four-year Per-
iod, concluded on 15 September 1976.370

(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.371 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 1981,372 article 14 (3) of which provides:

"Any decisions or recommendations of the Conciliation Commis-
ion 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 con-
clusions 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 1985,373 provides in its article 11 (5) that:

"The [Conciliation] Commission shall render a final and recomenda-
tory award, which the parties shall consider in good faith."

A provision of this type gives to the report of the conciliator a legal impor-
tance 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 conse-

sequently 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.374 Consequently, for the parties to a dispute to agree in advance to abide by the terms

369Ibid., vol. 1066, p. 211.
370Ibid., vol. 1088, p. 53. See also the Agreement on Research Participation and Technical
Exchange between the United States Nuclear Regulatory Commission and the Österreichische
Studien-Gesellschaft 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.
371See chap. II.E.1, para. 140
(7) of the Convention on the Representation of States in their Relations with International Organiza-
tions of a Universal Character, done at Vienna on 14 March 1975, United Nations, Juridical
Yearbook 1975, p. 87.
373International Legal Materials, vol. XXVI (1987), p. 1529. See also the last paragraph of
article 9 of the Agreement between Iceland and Norway of 28 May 1980 (quoted in ibid., vol. XX
374See chap. II.D.4, para. 138.
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 proferred 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. The Secretary-General indicated his willingness to do so. 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.” They also “agreed to abide by his ruling.” The Secretary-General announced that he was willing to undertake this task and to make his ruling in the near future. 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 and which at the same time were both “equitable and principled.”

To this end, once each of the parties had presented its position to him in a brief written memorandum, 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. 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.” The parties did this three days later by means of three exchanges of letters.

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. 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, 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, 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; and in the following year the arbitral tribunal constituted pursuant to that compromis handed down its advisory opinion.

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

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375 Press statement issued on 17 June 1986 by the Prime Minister of New Zealand.
376 Ibid.
377 This agreement was announced in two statements issued simultaneously in Paris and Wellington on 19 June 1986.
378 Ibid.
379 SG/SM/383.
380 See the ruling of 6 July 1986 by the Secretary-General of the United Nations, UNRJAA, vol. XIX, p. 199, at p. 213.
381 Supra, notes 377 and 380, p. 212.
382 Supra, note 269, pp. 291 and 207.
383 Ibid., p. 212. The information bulletin issued by the French Government following the handing down of the Secretary-General’s ruling stated that the parties “sont . . . demeure en contact étroit avec le Secrétaire général” (Information Bulletin 128/86 dated 8 July 1986).
384 Ibid., p. 215.
385 Ibid., pp. 216-221.
386 See chap. II.F.3, para. 192.

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388 Ibid., vol. 73, p. 113.
1946, as amended in 1951. 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, 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, they agreed in an exchange of letters "to consider the decision of the Arbitral Tribunal in this dispute, as binding upon [them]." 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. 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 of the arbitral tribunal discretionary, 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.

(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, 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, 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, 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 5 January 1975, 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 Compromis between Israel and Egypt, done at Giza on 11 September 1986.

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392 Exchanges 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.
393 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).
394 Compromis 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.
396 Compromis 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".
397 Cases exist of dispute-settlement clauses and compromis 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 25 April 1951, ibid., vol. 91, p. 21.
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 Compro

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.404

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.407

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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404Awards of the Tribunal of Arbitration in the Question relating to the North Atlantic Coast Fisheries, ibid., pp. 174-176 and 188-189.
405Agreement between the United States of America and Great Britain adopting 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.
406Ibid., paras. 297 and 298.
407Supra, note 372.
408For 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, UNR IAA, vol. XIX, p. 226. For the award of the tribunal, see Decision of the Arbitral Tribunal of 17 July 1986 in the Case concerning Filleting 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\(^{417}\) 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;\(^{418}\) to recommend, at any stage of a dispute or situation, appropriate procedures or methods of adjustment;\(^{419}\) 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 of making recommendations for appropriate terms of settlement;\(^{419}\) 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.\(^{420}\) 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.”\(^{420}\)

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,\(^{421}\) 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-

\(^{417}\) Ibid., Article 36, paragraph 1.
\(^{418}\) Ibid., Article 36, paragraph 2.
\(^{419}\) Ibid., Articles 33, paragraph 2, and 38.
\(^{420}\) 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.423 In the India-Pakistan question, by contrast, the Security Council, by its resolution of 20 January 1948,424 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.425 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.426 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".427

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,428 which also brought to light the difficulties concerning the establish-ment of criteria for deciding whether a situation "is likely to endanger the maintenance of international peace and security".429

(b) Recommendation to States parties to a dispute to settle their disputes by peaceful means

322. The functions of the Security Council under this heading are described in Articles 36, 37 and 38 of the Charter. Thus, under Article 36, paragraph 1, the Council has the power to "recommend appropriate procedures or methods of adjustment"; under Article 37, paragraph 2, it has the power to "recommend such terms of settlement as it may consider appropriate"; and under Article 38, the power to "make recommendations to the parties with a view to a pacific settlement of the dispute". A review of the practice of the Security Council indicates, however, that evidence of the relation of the decisions by the Security Council to provisions of Articles 36 to 38, i.e., the application of those Articles in the work of the Council, has "continued to be scant".430 Thus the assessment of the application of Articles 36 to 38 by the Security Council should be done primarily by taking into consideration their broad bearing on the work of the Council, especially the latest trends and developments in this field. The increasing importance of application of Articles 36 to 38 of the Charter for the realization of the role of the Security Council in pacific settlement can be clearly shown, for example, by the provisions of later instruments reflecting new important trends and developments in this field, such as the 1982 Manila Declaration on the Peaceful Settlement of International Disputes (see para. 2 above) (especially those contained in para. 7) and 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 (see above, para. 2) (especially those contained in paras. 6-15).

(i) Recommendation of specific settlement terms

323. The application of Article 36 of the Charter by the Security Council is reviewed in the present section, not only in the light of the relevant decisions of the Council under the Article, according to which the Council may recommend procedures or methods of adjustment, but also in the light of the specific proceedings which constituted methods of adjustment or means for the settlement of the questions brought before the Council.

324. On the basis of a general review of the functions of the Security Council under Article 36, some examples of such specific procedures or methods of adjustment recommended or employed by the Council may be briefly summarized below:

(a) After consideration of the United Kingdom complaint against Albania arising out of an incident on 22 October 1946 in the Corfu Channel, the

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424 Ibid., First Year, Second Series, No. 28, 87th meeting, pp. 700 and 701.
425 Ibid., Thirty-second Year, 1987th meeting, para. 3, for its adoption, see ibid., para. 123. For the report of the Special Mission, see ibid., Thirty-second Year, Special Supplement No. 3, document S/12259/Rev.1.
426 For the results of the vote, see ibid., Thirty-fourth Year, 2134th meeting, para. 113.
427 Ibid., First Year, First Series, No. 2, 39th meeting, p. 244.
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 decision to consider possible action under Chapter VII in 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 incident, 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 an 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 "shall 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

433See Security Council resolution 43 (1948) of 1 April 1948.
434See Security Council resolution 8 (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 224th 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.\(^{444}\) 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 in the dispute and adopted a draft resolution which took into account the position of both parties.\(^{457}\) 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, reaffirms 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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449 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.
450 Security Council resolution 461 (1979) of 31 December 1979, sixth preambular paragraph.
454 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.
455 See Official Records of the Security Council, Third Year, No. 61, 286th meeting, pp. 9-40.
456 See Official Records of the Security Council, Twelfth Year, 743rd meeting, para. 106.
457 There are instances in which the point was raised in incidental statements as to whether the Security Council, having been seized of the question at the request of both parties and having based recommendations on consultations by the President of the Council with the representatives of the parties, had been performing the functions under Article 38, e.g., during the consideration of the India-Pakistan question; see ibid., Third Year, Nos. 16, 35, 245th meeting, pp. 115 and 116 and ibid., No. 74, 304th meeting, p. 21.
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." 458

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 they 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 449 and from States parties to a dispute or situation. 460

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:

(a) Reminding the States concerned to respect their obligations under the Charter;

(b) 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;

(c) 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 was also 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.461 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, indicates 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

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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 either Member States or by the Security Council, and make recommendations on such questions or matters; 462 to call the attention of the Council to situations which are likely to endanger international peace and security; 463 to consider the general principles of cooperation in the maintenance of international peace and security and make recommendations with regard to such principles; 464 to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification; 465 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. 466 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 matters within the scope of the Charter, or relating to the powers and functions of any organs provided for in the Charter, and may 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". 467 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 468 and to make recommendations with regard to them "to the State or States concerned or to the Security Council or 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, 469 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

462 See 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.
463 Ibid., Article 11, paragraph 3.
464 Ibid., paragraph 1.
465 Ibid., Article 13.
466 Ibid., Article 14.
467 Article 12 of the Charter reads as follows:
1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.
2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Secretary-General ceases to deal with such matters.
468 According to the provisions of Article 11, paragraph 2, any question related to the maintenance of international peace and security may be brought before the General Assembly not only by any Member of the United Nations, or by the Security Council, but also by a State which is not a Member of the United Nations, if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the Charter, as stated in Article 35, paragraph 2.
469 See, for instance, General Assembly resolutions 2151 (XX), para. 6; 2202 (XXI), para. 7; 2262 (XXII), para. 17; 2270 (XXII), para. 10; 2307 (XXII), para. 4; 2324 (XXII), para. 4; 2383 (XXIII), para. 9; 2395 (XXIII), para. 4; 2396 (XXIII), para. 4; 2403 (XXIII), para. 3; 2498 (XXIII), para. 12; 2506 (XXIV), para. 9; 2508 (XXIV), paras. 12 and 14; and 2517 (XXIV), para. 4. For more recent examples, see resolutions 43/14, 43/19, 43/24, 43/25, 43/33, 44/10, 44/15, 44/22, 44/38, etc.
security and prevention and peaceful 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 reporting 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:

“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 retain 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, and which it shall, in its opinion, be capable of redressing. The Article was intended to enable the General Assem-

470The same interpretation appears relevant also to the exceptions contained in Article 14 and in Article 35, paragraph 3.
472See General Assembly resolution III (II) of 13 November 1947.
473See General Assembly resolution 268 (III) B of 28 April 1949.
474See General Assembly resolutions 268 (III) A and D of 28 April 1949.
bly to make recommendations for the peaceful adjustment of situations in various areas, such as the self-determination of peoples and human rights. 478

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. 479 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. 480

2. Recent trends

363. The trends in the practice of the General Assembly, reflected in its recent declarations, 481 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 “inclusion 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-

479Official Records of the General Assembly, First Session, Second Part, Joint Committee of the First and Sixth Committees, annex 1, document A/149.
480General Assembly resolution 44 (I), para. 1.
481Manila 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 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 44/415).

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 peaceful 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. 482 Noting the valuable efforts of the General Assembly in various areas of international relations, including those concerning the promotion of peaceful 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 Iraq and Iran, 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) question 492 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-

483 In 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.

484 These functions were discussed in chapter II of the handbook. See, for example, section C, on “Good offices”.

485 See the 1989 and 1990 reports of the Secretary-General on the work of the Organization (supra, note 482).


489 See 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 world 499 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

485 Rule 48 of the Rules of procedure of the General Assembly (United Nations publication, Sales No. E.81.I.13) provides that the Secretary-General shall also make “such supplementary reports as are required”.
487 See A/44/344/Add.1 and S/20699/Add.1, as well as A/44/642 and A/45/436/Add.1.
488 See 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 1988 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 recommendations that the Secretary-General 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.

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 is defined in article XXI, paragraph 2, of the Agreement, as "the failure of the other party to perform any of its obligations under the Agreement in such a manner as to defeat in whole or in part the object and purpose of the Agreement." The Conciliation Committee then seeks to find a solution acceptable to all parties involved.

503This procedure is essentially based on articles XXII and XXIII of the Agreement (Basic Instruments and Selected Documents, vol. IV, March 1969) as well as in the following subsequent documents, which formalized the dispute settlement procedures that had evolved through GATT customary practice: "Understanding regarding notification, consultation, dispute settlement and surveillance", adopted on 28 November 1979 (hereinafter "1979 Understanding"), to which is annexed an "Agreed description of the customary practice of the GATT in the field of dispute settlement"; GATT, BISD, 26th Supp. (1980), pp. 210-218; "Special régime for disputes in which the plaintiff is a developing country", adopted on 5 April 1966 (GATT, BISD, Doc., 14th Suppl. (1966), pp. 18-20, which provides for the expedited treatment of complaints brought by developing countries; Special régimes provided for in some of the non-tariff agreements or Codes concluded during the Tokyo Round of multilateral trade negotiations of 1973-1979 which differ slightly from the 1979 Understanding: under the Codes, parties have an explicit right to panel procedures and certain Codes establish stricter deadlines; finally, the 1982 GATT Ministerial Declaration (GATT, BISD, 29th Suppl., 9, pp. 13-16) provides for certain ways of expediting the process.

504"1979 Understanding (supra, note 492), para. 8, and annex thereto, para. 1.

505The use of initial capitals in "Contracting Parties" indicates collective action by the Parties to GATT, performed by the GATT Council.

506Article XXIII of the Agreement.
cution 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, 309 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:

"[T]o assist the Contracting Parties in discharging their responsibilities under Article XXIII; accordingly, a panel should make an objective assessment of the matters 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 whole 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 discriminatory 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 strengths, 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/290.
508 GATT, document L/6304.
509 GATT, document L/6175.
510 GATT, document L/6253.
511 GATT, BISD, 34 S/83.
512 GATT, document L/6268.
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, 34 S/83.
522 GATT, document L/6268.
523 GATT, document L/6269.
524 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."
525 GATT, BISD, Supplement No. 1. Retaliation took the form of an authorized discriminatory quota on imports of wheat flour from the United States.
526 GATT, BISD, 26 S/290.
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.\textsuperscript{527}

398. The dispute settlement clauses of commodity agreements\textsuperscript{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 then 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 then require that the question be referred to the plenary organ, whose decision shall be final.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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, under the auspices of the World Bank, the International Centre for Settlement of Investment Disputes (ICSID).\textsuperscript{535} 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".\textsuperscript{536} 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,\textsuperscript{537} but conciliators and arbitrators are appointed by the Centre in accordance with the Rules of the Centre's Conciliation and Arbitration Procedure.

\textsuperscript{527}Ibid., para. 23.
\textsuperscript{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 June 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. 23317), the International Wheat Agreement of 14 March 1986 (arts. 8 and 30) (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 publication, Sales No. E.87.II.D.8), the International Sugar Agreement of 11 September 1987 (arts. 33, 34 and 42) (registered with the United Nations on 24 March 1988).
\textsuperscript{529}CO document ICC-F-60.
\textsuperscript{530}CO document ED-397/69.
\textsuperscript{532}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 in which the Board of Governors itself (art. XVIII, para. (b)).
\textsuperscript{533}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.
\textsuperscript{534}Article XV of the IMF Agreement.
\textsuperscript{535}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 the exhaustion of local remedies.
\textsuperscript{536}Article 25, paragraph 1.
\textsuperscript{537}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. 539

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. 540 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: Klockner/Cameroun case 541 of 26 January 1988 and Société Ouest Africaine des Bétons Industriels v. Senegal of 25 February 1988. 542 Although awards are binding, requests for interpretation, revision and even annulment are considered under certain circumstances. 543

405. Part XI of the 1982 United Nations Convention on the Law of the Sea 544 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, 545 distinguishable from those established for the settlement of disputes concerning other parts of the Convention. 546

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. 547 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. 548 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. 549

539 Seventh preambular paragraph.
541 ICSID, ARB/81/2.
542 ICSID, ARB/82/1: Thirteen cases are still pending.
543 Articles 50-52 of the ICSID Convention.
544 United Nations publication, Sales No. E.83.V.5.
545 This mechanism is described in section 5 of part XI, articles 186-191 and annex VI of the Convention.
546 See para. 428 below.
547 For the categories of disputes, see articles 187 and 189.
548 This paragraph does not apply to the cases of the International Civil Aviation Organization and the International Labour Organization, which will be discussed below in paras. 409-417.
549 See, e.g., article XXVII 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 IC 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 IC is not expressly provided for, only arbitration) (United Nations registration No. 19497).
550 Dispute settlement provisions are also incorporated in agreements concluded under the auspices of these organizations. For example, FAO agreements provide for conciliation, arbitration or referral to ICI; certain agreements provide for the appointment by the Director General of FAO of a committee of experts whose recommendations are not binding (no such provision has been used in practice); the UNESCO Convention against Discrimination in Education is supplemented by a Protocol instituting a Conciliation and Good Offices Commission to be responsible for seeking the settlement of disputes which may arise between States Parties to the Convention (Protocol adopted on 10 December 1962); IMF Conventions usually provide for arbitration or judicial settlement if negotiations fail; dispute settlement provisions also exist in agreements to which an international organization is a party: for example, the Agreement on Safeguards under the Non-Proliferation Treaty of 5 April 1973 (United Nations, Treaty Series, vol. 1043, p. 213) between the European Atomic Energy Community (EURATOM), the seven European States and IAEA provides, in the case of disputes, for consultations, referral to the Board of IAEA and to arbitration.
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 1969\(^{540}\) 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\(^{544}\) 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\(^{546}\) 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.\(^{547}\) 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;\(^{548}\) a 1986 representation by the National Trade Union Coordinating Council of Chile alleging non-observance of certain international labour conventions by Chile.\(^{549}\)

531See, 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.


536See para. 407 above.

537Article 85 of the ICAO Convention contains details on the establishment of such an arbitral tribunal.

538Two ICAO Conventions, the International Air Services Transit Agreement of 7 December 1944 (United Nations, Treaty Series, vol. 84, p. 380) 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;\textsuperscript{570} 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.\textsuperscript{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.\textsuperscript{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 ICIJ 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."

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;\textsuperscript{573} a 1982 complaint relating to the observance by Poland of certain international labour conventions;\textsuperscript{574} and a 1984 complaint relating to the observance of the Discrimination Convention by the Federal Republic of Germany.\textsuperscript{575}

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.\textsuperscript{576} 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,\textsuperscript{577} 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.\textsuperscript{578} 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 the 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 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).\textsuperscript{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;\textsuperscript{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 resolution.

\textsuperscript{570} The detailed procedure of the preliminary examination of complaints by the Committee is to be found in International Labour Office, Procedure for the Examination of complaints alleging infringements of trade union rights, June 1985.

\textsuperscript{571} In 1988, the Committee considered complaints against Peru, Ecuador, the United States, Colombia, Portugal, Spain, Venezuela, the Dominican Republic, Denmark, Brazil, Australia, Chile, Paraguay, Haiti, Uruguay, Zambia, Bahrain, Fiji and Nicaragua. See ILO Official Bulletin, vol. LXVI, 1983, special supplement.

\textsuperscript{572} Ibid., vol. LXVII, 1984, special supplement.

\textsuperscript{573} Ibid., vol. LXVIII, 1984, special supplement.

\textsuperscript{574} Ibid., vol. LXVII, 1984, special supplement.

\textsuperscript{575} Ibid., vol. LXVII, 1984, special supplement.

\textsuperscript{576} Ibid., p. 1.

\textsuperscript{577} Ibid., p. 16.

\textsuperscript{578} Articles 26-33 of the ILO Constitution.


\textsuperscript{570} Ibid., vol. LXX, 1987, Suppl., Series B.

\textsuperscript{571} Ibid., vol. LXXI, 1986, No. 3, Special Supplement, The Trade Union Situation in Chile: report of the Fact-Finding and Conciliation Commission on Freedom of Association. ILO document GB197/3/S and GB218/7/2. In the case of Greece, the complaint was withdrawn while the proceedings were still pending.

\textsuperscript{580} This is the group of multilateral treaties in which dispute settlement procedures do not form an integral part of the treaty itself but are contained in separate optional protocols or in which procedures do form an integral part of the treaty but are subject to an optional declaration of acceptance by the States concerned, thus constituting a non-compulsory system.
settlement; 389 (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 582 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 Party that another State Party is not fulfilling its obligations under the Convention. 583 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. 584 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, 586 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. 587 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 588 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

582 This group, like those classified under (3) to (7), share the common characteristic of being procedures established as integral parts of the multilateral treaties themselves, in contrast to the first group described above in note 580.


584 International Covenant on Civil and Political Rights of 16 December 1966 (United Nations, Treaty Series, vol. 999, p. 171, arts. 41 and 42); International Convention on the Elimination of All Forms of Racial Discrimination (arts. 11-13); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 21). The International Convention against Apartheid in Sports (art. 13) does not spell out the details of the procedure under which "the Commission may decide on the appropriate measures to be taken in respect of breaches". A similar optional procedure is established in the field of humanitarian law, namely, under the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (art. 90 on the International Fact-Finding Commission) (A/22144, annex 1).

585 Except the International Convention on Elimination of All Forms of Racial Discrimination.

586 See, e.g., Optional Protocol to the International Covenant on Civil and Political Rights of 16 December 1966 (United Nations, Treaty Series, vol. 999, p. 302); International Convention on the Elimination of All Forms of Racial Discrimination (art. 14); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 22).

587 See, e.g., the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 22 March 1989 (International Legal Materials (1989), p. 675, art. 20), which also provides for optional declarations of acceptance of compulsory recourse to arbitration and/or ICJ. See also Convention on Early Notification of a Nuclear Accident of 26 September 1986 (ibid., p. 137, art. 11) and the Convention on the Assistance in the Case of a Nuclear Accident or Radiological Emergency of 26 September 1986 (ibid., 1986), p. 1334, art. 13), which provide that recourse will be had to arbitration or ICJ at the request of any party to the dispute if the latter is not settled within one year from the request for consultation. But States may declare themselves not bound by the provision concerning referral to arbitration or to ICJ.

588 See, e.g., Convention on Psychotropic Substances of 21 February 1971 (United Nations, Treaty Series, vol. 1019, p. 175, art. 31); Unites Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 19 December 1988 (art. 32) (E/CN.4/62/15 and C (art. 22), although States may declare themselves not bound by the provision concerning unilateral referral to ICJ.

589 See, e.g., international conventions dealing with certain aspects of the question of combating international terrorism: Convention on Offences and Certain Other Acts Committed On
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


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., the two conventions of 1976 and 1983 on protection of regional seas mentioned in note 593 above.

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.

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. Others provide for the referral of a dispute to arbitration by mutual consent if no settlement is reached through negotiation or any other peaceful means of the choice of the parties. A variation of the latter envisages, in addition, a system of unilateral declarations of recognition of compulsory recourse to arbitration by a State vis-à-vis another State which has made a similar declaration.
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. After that time, if 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 ILC 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 submit the case to 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 288. 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, namely: 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.

429. 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.

430. 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 Intergovernmental 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.

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606 Annex VIII, article 2, para. 2.
607 See chap. II, sect. 1 ("Other peaceful means") above, para. 294.
Bangkok, Thailand
14 November 2012

DIPLOMATIC PROTECTION
PROFESSOR LUCIUS CAFLISCH
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Outline

Sketch map

Legal instruments and documents

1. Draft articles on diplomatic protection (with commentaries), Report of the International Law Commission, Fifty-eighth session (1 May-9 June and 3 July-11 August 2006), A/61/10, p. 22-100
   For the text of the Articles without commentaries, see The Work of the International Law Commission, 8th ed., Vol. II, p. 423
2. Convention relating to the Status of Refugees, 1951

Case-law

Permanent Court of International Justice and International Court of Justice
   For text, see Study Materials Part I, Peaceful Settlement of Disputes, p. 82
5. Panevezys-Saldutiskis Railway, Judgment of 28 February 1939, P.C.I.J., Series A/B, No. 76
   For text, see Study Materials Part I, Peaceful Settlement of Disputes, p. 110
7. Nottebohm (Liechtenstein v. Guatemala), Second Phase, Judgment, I.C.J. Reports 1955, p. 4
8. Interhandel (Switzerland v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1959, p. 6
   For text, see Study Materials Part I, Peaceful Settlement of Disputes, p. 138

Other tribunals
11. Delagoa Bay and East African Railway Co., Arbitral Award of 29 March 1900, reproduced in Lafontaine, Pasicrisie internationale 1794-1900, Berne, 1902, p. 397 (French only)


15. Sedco Inc. v. National Iranian Oil Company and Islamic Republic of Iran, Case No. 129, Award of 24 October 1985, Iran-United States Claims Tribunal


DIPLOMATIC PROTECTION: COURSE OUTLINE
PROFESSOR LUCIUS CAFLISCH

A. Opening remarks

1. Nature of diplomatic protection
2. History
3. What diplomatic protection is, and what it is not
4. Diplomatic protection and other means of protection
5. Do the conditions for the exercise of diplomatic protection relate to admissibility or the merits of a case?
6. Evolution of diplomatic protection
7. Codification of the rules on diplomatic protection
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B. Is diplomatic protection a right of the State, or a right of the individual and a duty of the State?

C. Protection of persons

1. Natural persons: single nationality
2. Natural persons: multiple nationalities
   a) Multiple nationalities and claims against third States
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3. Natural persons: stateless persons and refugees
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5. Shareholders
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6. Other legal persons

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1. General comments
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3. The exceptions

E. Protection of ships’ crews

F. Conclusions
Diplomatic Protection
Professor Lucius Caflisch

1) Individual

A (State of nationality) → C (Defending State)
B (State of nationality) → ?

2) Individual

A (State of nationality) → C (State of nationality and defending State)

3)

Shareholders

Company

C (State of nationality) → ?

State SP

4)

State GB Shareholders

State NL Shareholders

Company

State M
Draft articles on diplomatic protection (with commentaries), Report of the International Law Commission, Fifty-eighth session (1 May-9 June and 3 July-11 August 2006), A/61/10
Report of the International Law Commission
Fifty-eighth session
(1 May-9 June and 3 July-11 August 2006)

General Assembly
Official Records
Sixty-first session
Supplement No. 10 (A/61/10)

Note

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The word Yearbook followed by suspension points and the year (e.g., Yearbook ... 1971) indicates a reference to the Yearbook of the International Law Commission.

A typeset version of the report of the Commission will be included in Part Two of volume II of the Yearbook of the International Law Commission 2006.
2. Text of the draft articles with commentaries thereto

50. The text of the draft articles with commentaries thereto adopted by the Commission at its fifty-eighth session are reproduced below.

DIPLOMATIC PROTECTION

(1) The drafting of articles on diplomatic protection was originally seen as belonging to the study on State Responsibility. Indeed the first Rapporteur on State Responsibility, Mr. F.V. Garcia Amador, included a number of draft articles on this subject in his reports presented from 1956 to 1961. The subsequent codification of State Responsibility paid little attention to diplomatic protection and the final draft articles on this subject expressly state that the two topics central to diplomatic protection - nationality of claims and the exhaustion of local remedies - would be dealt with more extensively by the Commission in a separate undertaking. Nevertheless, there is a close connection between the articles on Responsibility of States for internationally wrongful acts and the present draft articles. Many of the principles contained in the articles on Responsibility of States for internationally wrongful acts are relevant to diplomatic protection and are therefore not repeated in the present draft articles. This applies in particular to the provisions dealing with the legal consequences of an internationally wrongful act. A State responsible for injuring a foreign national is obliged to cease the wrongful conduct and to make full reparation for the injury caused by the internationally wrongful act. This reparation may take the form of restitution, compensation or satisfaction, either singly or in combination. All these matters are dealt with in the articles on Responsibility of States for internationally wrongful acts.

(2) Diplomatic protection belongs to the subject of “Treatment of Aliens”. No attempt is made, however, to deal with the primary rules on this subject - that is, the rules governing the treatment of the person and property of aliens, breach of which gives rise to responsibility to the State of nationality of the injured person. Instead the present draft articles are confined to secondary rules only - that is, the rules that relate to the conditions that must be met for the bringing of a claim for diplomatic protection. By and large this means rules governing the admissibility of claims. Article 44 of the articles on Responsibility of States for internationally wrongful acts provides:

“The responsibility of a State may not be invoked if:

“(a) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;

“(b) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.”

The present draft articles give content to this provision by elaborating on the rules relating to the nationality of claims and the exhaustion of local remedies.

(3) The present draft articles do not deal with the protection of an agent by an international organization, generally described as “functional protection”. Although there are similarities between functional protection and diplomatic protection, there are also important differences. Diplomatic protection is traditionally a mechanism designed to secure reparation for injury to the national of a State premised largely on the principle that an injury to a national is an injury to the State itself. Functional protection, on the other hand, is an institution for promoting the efficient functioning of an international organization by ensuring respect for its agents and their independence. Differences of this kind have led the Commission to conclude that protection of an agent by an international organization does not belong in a set of draft articles on diplomatic protection. The question whether a State may exercise diplomatic protection in respect of a national who is an agent of an international organization was answered by the International Court of Justice in the Reparation for Injuries case: “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

18 Article 28, 30, 31, 34-37. Much of the commentary on compensation (art. 36) is devoted to a consideration of the principles applicable to claims concerning diplomatic protection.
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. ... 19

PART ONE
GENERAL PROVISIONS

Article 1
Definition and scope

For the purposes of the present draft articles, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.

Commentary

(1) Draft article 1 makes no attempt to provide a complete and comprehensive definition of diplomatic protection. Instead it describes the salient features of diplomatic protection in the sense in which the term is used in the present draft articles.

(2) Under international law, a State is responsible for injury to an alien caused by its wrongful act or omission. Diplomatic protection is the procedure employed by the State of nationality of the injured persons to secure protection of that person and to obtain reparation for the internationally wrongful act inflicted. The present draft articles are concerned only with the rules governing the circumstances in which diplomatic protection may be exercised and the conditions that must be met before it may be exercised. They do not seek to define or describe the internationally wrongful acts that give rise to the responsibility of the State for injury to an alien. The draft articles, like those on the Responsibility of States for internationally wrongful acts, 20 maintain the distinction between primary and secondary rules and deal only with the latter.

(3) Diplomatic protection has traditionally been seen as an exclusive State right in the sense that a State exercises diplomatic protection in its own right because an injury to a national is deemed to be an injury to the State itself. This approach has its roots, first in a statement by the Swiss jurist Emmerich de Vattel in 1758 that “whoever ill-treats a citizen indirectly injures the State, which must protect that citizen” 21 and, secondly in a dictum of the Permanent Court of International Justice in 1924 in the Mavrommatis Palestine Concessions case that “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 right, the right to ensure, in the person of its subjects, respect for the rules of international law.” 22 Obviously it is a fiction - and an exaggeration 23 - to say that an injury to a national is an injury to the State itself. Many of the rules of diplomatic protection contradict the correctness of this fiction, notably the rule of continuous nationality which requires a State to prove that the injured national remained its national after the injury itself and up to the date of the presentation of the claim. A State does not “in reality” - to quote Mavrommatis - assert its own right only. “In reality” it also asserts the right of its injured national.

(4) In the early years of international law the individual had no place, no rights in the international legal order. Consequently if a national injured abroad was to be protected this could be done only by means of a fiction - that an injury to the national was an injury to the State itself. This fiction was, however, no more than a means to an end, the end being the protection of the rights of an injured national. Today the situation has changed dramatically. The individual is the subject of many primary rules of international law, both under custom and treaty, which protect him at home, against his own Government, and abroad, against foreign


22 Mavrommatis Palestine Concessions (Greece v. U.K.) P.C.I.J. Reports, 1924, Series A, No. 2, p. 12. This dictum was repeated by the Permanent Court of International Justice in the Panevżyk-Sadatkis Railway case (Estonia v. Lithuania) P.C.I.J. Reports, 1939, Series A/B, No. 76, p. 16.

Governments. This has been recognized by the International Court of Justice in the *La Grand* and *Avena* cases. This protection is not limited to personal rights. Bilateral investment treaties confer rights and protection on both legal and natural persons in respect of their property rights. The individual has rights under international law but remedies are few. Diplomatic protection conducted by a State at inter-State level remains an important remedy for the protection of persons whose human rights have been violated abroad.

(5) Draft article 1 is formulated in such a way as to leave open the question whether the State exercising diplomatic protection does so in its own right or that of its national - or both. It views diplomatic protection through the prism of State responsibility and emphasizes that it is a procedure for securing the responsibility of the State for injury to the national flowing from an internationally wrongful act.

(6) Draft article 1 deliberately follows the language of the articles on Responsibility of States for internationally wrongful acts. It describes diplomatic protection as the invocation of the responsibility of a State that has committed an internationally wrongful act in respect of a national of another State, by the State of which that person is a national, with a view to implementing responsibility. As a claim brought within the context of State responsibility it is an inter-State claim, although it may result in the assertion of rights enjoyed by the injured national under international law.

(7) As draft article 1 is definitional by nature it does not cover exceptions. Thus no mention is made of stateless persons and refugees referred to in draft article 8 in this provision. Draft article 3 does, however, make it clear that diplomatic protection may be exercised in respect of such persons.

(8) Diplomatic protection must be exercised by lawful and peaceful means. Several judicial decisions draw a distinction between "diplomatic action" and "judicial proceedings" when describing the action that may be taken by a State when it resorts to diplomatic protection.

Draft article 1 retains this distinction but goes further by subsuming judicial proceedings under "other means of peaceful settlement". "Diplomatic action" covers all the lawful procedures employed by a State to inform another State of its views and concerns, including protest, request for an inquiry or for negotiations aimed at the settlement of disputes. "Other means of peaceful settlement" embraces all forms of lawful dispute settlement, from negotiation, mediation and conciliation to arbitral and judicial dispute settlement. The use of force, prohibited by Article 2, paragraph 4, of the Charter of the United Nations, is not a permissible method for the enforcement of the right of diplomatic protection. Diplomatic protection does not include demarches or other diplomatic action that do not involve the invocation of the legal responsibility of another State, such as informal requests for corrective action.

(9) Diplomatic protection may be exercised through diplomatic action or other means of peaceful settlement. It differs from consular assistance in that it is conducted by the representatives of the State acting in the interest of the State in terms of a rule of general international law, whereas consular assistance is, in most instances, carried out by consular officers, who represent the interests of the individual, acting in terms of the Vienna Convention on Consular Relations. Diplomatic protection is essentially remedial and is designed to remedy an internationally wrongful act that has been committed; while consular assistance is largely preventive and mainly aims at preventing the national from being subjected to an internationally wrongful act.

(10) Although it is in theory possible to distinguish between diplomatic protection and consular assistance, in practice this task is difficult. This is illustrated by the requirement of the exhaustion of local remedies. Clearly there is no need to exhaust local remedies in the case of consular assistance as this assistance takes place before the commission of an internationally wrongful act. Logically, as diplomatic protection arises only after the commission of an internationally wrongful act, it would seem that local remedies must always be exhausted, subject to the exceptions described in draft article 15.

24 *La Grand case (Germany v. United States of America)* I.C.J. Reports 2001, p. 466 at paras. 76-77.
26 See Chapter 1 of Part Three titled "Invocation of the Responsibility of a State" (articles 42-48). Part Three itself is titled "The implementation of the International Responsibility of a State".

(11) In these circumstances draft article 1 makes no attempt to distinguish between diplomatic protection and consular assistance. The draft articles prescribe conditions for the exercise of diplomatic protection which are not applicable to consular assistance. This means that the circumstances of each case must be considered in order to decide whether it involves diplomatic protection or consular assistance.

(12) Draft article 1 makes clear the point, already raised in the general commentary,28 that the present draft articles deal only with the exercise of diplomatic protection by a State and not with the protection afforded to its agent by an international organization.29

(13) Diplomatic protection mainly covers the protection of nationals not engaged in official international business on behalf of the State. These officials are protected by other rules of international law and instruments such as the Vienna Convention on Diplomatic Relations of 196130 and the Vienna Convention on Consular Relations of 1963.31 Where, however, diplomats or consuls are injured in respect of activities outside their functions they are covered by the rules relating to diplomatic protection, as, for instance, in the case of the expropriation without compensation of property privately owned by a diplomatic official in the country to which he or she is accredited.

(14) In most circumstances it is the link of nationality between the State and the injured person that gives rise to the exercise of diplomatic protection, a matter that is dealt with in draft articles 4 and 9. The term “national” in this article covers both natural and legal persons. Later in the draft articles a distinction is drawn between the rules governing natural and legal persons, and, where necessary, the two concepts are treated separately.

Article 2
Right to exercise diplomatic protection

A State has the right to exercise diplomatic protection in accordance with the present draft articles.

Commentary

(1) Draft article 2 is founded on the notion that diplomatic protection involves an invocation - at the State level - by a State of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a national of the former State. It recognizes that it is the State that initiates and exercises diplomatic protection; that it is the entity in which the right to bring a claim vests. It is without prejudice to the question of whose rights the State seeks to assert in the process, that is its own right or the rights of the injured national on whose behalf it acts. Like article 1 it is neutral on this subject.

(2) A State has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so. The internal law of a State may oblige a State to extend diplomatic protection to a national, but international law imposes no such obligation. The position was clearly stated by the International Court of Justice in the Barcelona Traction case:

“… within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal person on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress … The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case”.32

(3) Today there is support in domestic legislation33 and judicial decisions34 for the view that there is some obligation, however limited, either under national law or international law, on the

28 See general commentary, para. (3).
32 See commentary to article 1, paras. (3) to (5).
33 Case concerning the Barcelona Traction Light and Power Company Limited (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970, p. 4 at p. 44.
State to protect its nationals abroad when they have been subjected to serious violation of their human rights. Consequently, draft article 19 declares that a State entitled to exercise diplomatic protection “should ... give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred” (emphasis added). The discretionary right of a State to exercise diplomatic protection should therefore be read with draft article 19 which recommends to States that they should exercise that right in appropriate cases.

Draft article 2 deals with the right of the State to exercise diplomatic protection. It makes no attempt to describe the corresponding obligation on the respondent State to consider the assertion of diplomatic protection by a State in accordance with the present articles. This is, however, to be implied.

PART TWO
NATIONALITY
CHAPTER I
GENERAL PRINCIPLES
Article 3
Protection by the State of nationality
1. The State entitled to exercise diplomatic protection is the State of nationality.
2. Notwithstanding paragraph 1, diplomatic protection may be exercised by a State in respect of a person that is not its national in accordance with draft article 8.

Commentary

(1) Whereas draft article 2 affirms the discretionary right of the State to exercise diplomatic protection, draft article 3 asserts the principle that it is the State of nationality of the injured person that is entitled, but not obliged, to exercise diplomatic protection on behalf of such a person. The emphasis in this draft article is on the bond of nationality between State and national which entitles the State to exercise diplomatic protection. This bond differs in the cases of natural persons and legal persons. Consequently separate chapters are devoted to these different types of persons.

(2) Paragraph 2 refers to the exception contained in draft article 8 which provides for diplomatic protection in the case of stateless persons and refugees.

CHAPTER II
NATURAL PERSONS
Article 4
State of nationality of a natural person
For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States, or in any other manner, not inconsistent with international law.

Commentary

(1) Draft article 4 defines the State of nationality for the purposes of diplomatic protection of natural persons. This definition is premised on two principles: first, that it is for the State of nationality to determine, in accordance with its municipal law, who is to qualify for its nationality; secondly, that there are limits imposed by international law on the grant of nationality. Draft article 4 also provides a non-exhaustive list of connecting factors that usually constitute good grounds for the grant of nationality.

(2) The principle that it is for each State to decide in accordance with its law who are its nationals is backed by both judicial decisions and treaties. In 1923, the Permanent Court of International Justice stated in the Nationality Decrees in Tunis and Morocco case that:

“in the present state of international law, questions of nationality are ... in principle within the reserved domain”.36

This principle was confirmed by article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws:

“It is for each State to determine under its own law who are its nationals.”37

More recently it has been endorsed by the 1997 European Convention on Nationality.38

(3) The connecting factors for the conferment of nationality listed in draft article 4 are illustrative and not exhaustive. Nevertheless they include the connecting factors most commonly employed by States for the grant of nationality: birth (jus soli), descent (jus sanguinis) and naturalization. Marriage to a national is not included in this list as in most circumstances marriage per se is insufficient for the grant of nationality: it requires in addition a period of residence, following which nationality is conferred by naturalization. Where marriage to a national automatically results in the acquisition by a spouse of the nationality of the other spouse problems may arise in respect of the consistency of such an acquisition of nationality with international law.39 Nationality may also be acquired as a result of the succession of States.40

(4) The connecting factors listed in draft article 4 are those most frequently used by States to establish nationality. In some countries, where there are no clear birth records, it may be difficult to prove nationality. In such cases residence could provide proof of nationality although it may not constitute a basis for nationality itself. A State may, however, confer nationality on such persons by means of naturalization.

(5) Draft article 4 does not require a State to prove an effective or genuine link between itself and its national, along the lines suggested in the Nottebohm case,41 as an additional factor for the exercise of diplomatic protection, even where the national possesses only one nationality. Despite divergent views as to the interpretation of the case, the Commission took the view that there were certain factors that served to limit Nottebohm to the facts of the case in question, particularly the fact that the ties between Mr. Nottebohm and Liechtenstein (the Applicant State) were “extremely tenuous”42 compared with the close ties between Mr. Nottebohm and Guatemala (the Respondent State) for a period of over 34 years, which led the International Court of Justice to repeatedly assert that Liechtenstein was “not entitled to extend its protection to Nottebohm vis-à-vis Guatemala”.43 This suggests that the Court did not intend to expound a general rule44 applicable to all States but only a relative rule according to which a State in Liechtenstein’s position was required to show a genuine link between itself and Mr. Nottebohm in order to permit it to claim on his behalf against Guatemala with whom he had extremely close ties. Moreover, it is necessary to be mindful of the fact that if the genuine link requirement proposed by Nottebohm was strictly applied it would exclude millions of persons from the benefit of diplomatic protection as in today’s world of economic globalization and migration there are millions of persons who have moved away from their State of nationality and made their lives in States whose nationality they never acquire or have acquired nationality by birth or descent from States with which they have a tenuous connection.

(6) The final phrase in draft article 4 stresses that the acquisition of nationality must not be inconsistent with international law. Although a State has the right to decide who are its nationals, this right is not absolute. Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws confirmed this by qualifying the provision that “it is for each State to determine under its own law who are its nationals” with the proviso “[t]his law shall be recognized by other States insofar as it is consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality”.45 Today, conventions, particularly in the field of human rights,

40 See Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, Yearbook..., 1999, vol. II (Part Two), para. 47.
41 In the Nottebohm case the International Court of Justice stated: “According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is the legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferring by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual’s connection which has made him its national”, op. cit., at p. 23.
42 Ibid., p. 25.
44 This interpretation was placed on the Nottebohm case by the Italian-United States Conciliation Commission in the Flegenheimer case, ILR vol. 25 (1958), p. 148.
45 See also article 3 (2) of the 1997 European Convention on Nationality.
require States to comply with international standards in the granting of nationality.\(^{46}\) For example, article 9, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women provides that:

>“States parties shall grant women equal rights to men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.”\(^{47}\)

(7) Draft article 4 recognizes that a State against which a claim is made on behalf of an injured foreign national may challenge the nationality of such a person where his or her nationality has been acquired contrary to international law. Draft article 4 requires that nationality should be acquired in a manner “not inconsistent with international law”. The double negative emphasizes the fact that the burden of proving that nationality has been acquired in violation of international law is upon the State challenging the nationality of the injured person. That the burden of proof falls upon the State challenging nationality follows from the recognition that the State conferring nationality must be given a “margin of appreciation” in deciding upon the conferment of nationality\(^{48}\) and that there is a presumption in favour of the validity of a State’s conferment of nationality.\(^{49}\)

(8) Where a person acquires nationality involuntarily in a manner inconsistent with international law, as where a woman automatically acquires the nationality of her husband on marriage, that person should in principle be allowed to be protected diplomatically by her or his former State of nationality.\(^{50}\) If, however, the acquisition of nationality in such circumstances results in the loss of the individual’s former nationality, equitable considerations require that the new State of nationality be entitled to exercise diplomatic protection. This would accord with the ruling of the International Court of Justice in its 1971 Opinion on Namibia\(^{51}\) that individual rights should not be affected by an illegal act on the part of the State with which the individual is associated.

**Article 5**

**Continuous nationality of a natural person**

1. A State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.

2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person had the nationality of a predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law.

3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury caused when that person was a national of the former State of nationality and not of the present State of nationality.

4. A State is no longer entitled to exercise diplomatic protection in respect of a person who acquires the nationality of the State against which the claim is brought after the date of the official presentation of the claim.

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\(^{46}\) This was stressed by the Inter-American Court of Human Rights in its advisory opinion on Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica, Advisory Opinion OC-484 of 19 January 1984, Series A, No. 4, in which it held that it was necessary to reconcile the principle that the conferment of nationality falls within the domestic jurisdiction of a State “with the further principle that international law imposes certain limits on the State’s power, which limits are linked to the demands imposed by the international system for the protection of human rights”, at para. 35. See also ILR vol. 79, p. 296.


\(^{48}\) See the advisory opinion of the Inter-American Court of Human Rights in the Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica, paras. 62-63.


\(^{50}\) See article 2 of the Convention on the Nationality of Married Women.

Commentary

(1) Although the continuous nationality rule is well established, it has been subjected to considerable criticism on the ground that it may produce great hardship in cases in which an individual changes his or her nationality for reasons unrelated to the bringing of a diplomatic claim. Suggestions that it be abandoned have been resisted out of fear that this might be abused and lead to “nationality shopping” for the purpose of diplomatic protection. For this reason draft article 5 retains the continuous nationality rule but allows exceptions to accommodate cases in which unfairness might otherwise result.

(2) Paragraph 1 asserts the traditional principle that a State is entitled to exercise diplomatic protection in respect of a person who was its national both at the time of the injury and at the date of the official presentation of the claim. State practice and doctrine are unclear on whether the national must retain the nationality of the claimant State between these two dates, largely because in practice this issue seldom arises. For these reasons the Institute of International Law in 1965 left open the question whether continuity of nationality was required between the two dates. It is, however, incongruous to require that the same nationality be shown both at the date of injury and at the date of the official presentation of the claim without requiring it to continue between these two dates. Thus, in an exercise in progressive development of the law, the rule has been drafted to require that the injured person be a national continuously from the date of the injury to the date of the official presentation of the claim. Given the difficulty of providing evidence of continuity, it is presumed if the same nationality existed at both these dates. This presumption is of course rebuttable.

82 See, for instance, the decision of the United States, International Claims Commission 1951-1954 in the Kren claim, ILR vol. 20, p. 233 at p. 234.
83 See the comment of Judge Sir Gerald Fitzmaurice in the Barcelona Traction case, at pp. 101-102; see too, E. Wyler, La Règle Dite de la Continuité de la Nationalité dans le Contentieux International (Paris: PUF, 1990).
84 See the statement of Umpire Parker in Administrative Decision No. V (United States v. Germany), UNRRIA vol. VII, p. 119 at p. 141 (1925): “Any other rule would open wide the door for abuses and might result in converting a strong nation into a claim agency in behalf of those who after suffering injuries should assign their claims to its nationals or avail themselves of its naturalization laws for the purpose of procuring its espousal for their claims.”

(3) The first requirement is that the injured national be a national of the claimant State at the date of the injury. The date of the injury need not be a precise date but could extend over a period of time if the injury consists of several acts or a continuing act committed over a period of time.

(4) The second temporal requirement contained in paragraph 1 is the date of the official presentation of the claim. There is some disagreement in judicial opinion over the date until which the continuous nationality of the claim is required. This uncertainty stems largely from the fact that conventions establishing mixed claims commissions have employed different language to identify the date of the claim. The phrase “presentation of the claim” is that most frequently used in treaties, judicial decisions and doctrine to indicate the outer date or dies ad quem required for the exercise of diplomatic protection. The word “official” has been added to this formulation to indicate that the date of the presentation of the claim is that on which the first official or formal demand is made by the State exercising diplomatic protection in contrast to informal diplomatic contacts and enquiries on this subject.

(5) The dies ad quem for the exercise of diplomatic protection is the date of the official presentation of the claim. There is, however, support for the view that if the individual should change his nationality between this date and the making of an award or a judgment he ceases to be a national for the purposes of diplomatic protection. In 2003 in Loewen Group Inc. v. USA an ICSID arbitral tribunal held that “there must be continuous material identity from the date of the events giving rise to the claim, which date is known as the dies a quo, through to the date of the resolution of the claim, which date is known as the dies ad quem.” On the facts, the Loewen case dealt with the situation in which the person sought to be protected changed nationality after the presentation of the claim to that of the respondent State, in which circumstances a claim for diplomatic protection can clearly not be upheld, as is made clear in draft article 5, paragraph (4). However, the Commission was not prepared to follow the Loewen tribunal in adopting a blanket
rule that nationality must be maintained to the date of resolution of the claim.\textsuperscript{60} Such a rule could be contrary to the interests of the individual, as many years may pass between the presentation of the claim and its final resolution and it could be unfair to penalize the individual for changing nationality, through marriage or naturalization, during this period. Instead, preference is given to the date of the official presentation of the claim as the \textit{dies ad quem}. This date is significant as it is the date on which the State of nationality shows its clear intention to exercise diplomatic protection - a fact that was hitherto uncertain. Moreover, it is the date on which the admissibility of the claim must be judged. This determination could not be left to the later date of the resolution of the claim, the making of the award.

The word “claim” in paragraphs 1, 2 and 4 includes both a claim submitted through diplomatic channels and a claim filed before a judicial body. Such a claim may specify the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing, and the form reparation should take. This matter is dealt with more fully in article 43 of the articles on the Responsibility of States for Internationally Wrongful Acts of 2001 and the commentary thereto.

While the Commission decided that it was necessary to retain the continuous nationality rule it agreed that there was a need for exceptions to this rule. Paragraph 2 accordingly provides that a State may exercise diplomatic protection in respect of a person who was a national at the date of the official presentation of the claim but not at the time of the injury provided that three conditions are met: first, the person seeking diplomatic protection had the nationality of a predecessor State or has lost his or her previous nationality; secondly, that person has acquired the nationality of another State for a reason unrelated to the bringing of the claim; and thirdly, the acquisition of the new nationality has taken place in a manner not inconsistent with international law.

Paragraph 2 is concerned with cases in which the injured person has lost his or her previous nationality, either voluntarily or involuntarily. In the case of the succession of States, and, possibly, adoption and marriage when a change of nationality is compulsory, nationality will be lost involuntarily. In the case of other changes of nationality the element of will is not so clear. For reasons of this kind, paragraph 2 does not require the loss of nationality to be involuntary.

In the case of the succession of States this paragraph is limited to the question of the continuity of nationality for purposes of diplomatic protection. It makes no attempt to regulate succession to nationality, a subject that is covered by the Commission’s articles on Nationality of Natural Persons in relation to the Succession of States.

As stated above,\textsuperscript{61} fear that a person may deliberately change his or her nationality in order to acquire a State of nationality more willing and able to bring a diplomatic claim on his or her behalf is the basis for the rule of continuous nationality. The second condition contained in paragraph 2 addresses this fear by providing that the person in respect of whom diplomatic protection is exercised must have acquired his or her new nationality for a reason unrelated to the bringing of the claim. This condition is designed to limit exceptions to the continuous nationality rule mainly to cases involving compulsory imposition of nationality, such as those in which the person has acquired a new nationality as a necessary consequence of factors such as marriage, adoption or the succession of States. The exception in paragraph 2 will not apply where the person has acquired a new nationality for commercial reasons connected with the bringing of the claim.

The third condition that must be met for the rule of continuous nationality not to apply is that the new nationality has been acquired in a manner not inconsistent with international law. This condition must be read in conjunction with draft article 4.

Paragraph 3 adds another safeguard against abuse of the lifting of the continuous nationality rule. Diplomatic protection may not be exercised by the new State of nationality against a former State of nationality of the injured person in respect of an injury incurred when that person was a national of the former State of nationality and not the present State of nationality.

\textsuperscript{60} For criticism of the Loewen case, see J. Paulsson, \textit{Denial of Justice in International Law} (New York: Cambridge University Press, 2005), pp. 183-4.

\textsuperscript{61} See para. (1) of commentary to the present draft article.
(13) Paragraph 4 provides that if a person in respect of whom a claim is brought becomes a national of the respondent State after the presentation of the claim, the applicant State loses its right to proceed with the claim as in such a case the respondent State would in effect be required to pay compensation to its own national. This was the situation in *Loewen Group Inc v. USA* and a number of other cases in which a change in nationality after presentation of the claim was held to preclude its continuation. In practice, in most cases of this kind, the applicant State will withdraw its claim, despite the fact that in terms of the fiction proclaimed in *Mannommatitis* the claim is that of the State and the purpose of the claim is to seek reparation for injury caused to itself through the person of its national. The applicant State may likewise decide to withdraw its claim when the injured person becomes a national of a third State after the presentation of the claim. If the injured person has in bad faith retained the nationality of the claimant State until the date of presentation and thereafter acquired the nationality of a third State, equity would require that the claim be terminated, but the burden of proof will be upon the respondent State.

(14) Draft article 5 leaves open the question whether the heirs of an injured national, who dies as a consequence of the injury or thereafter, but before the official presentation of the claim, may be protected by the State of nationality of the injured person if he or she has the nationality of another State. Judicial decisions on this subject, while inconclusive as most deal with the interpretation of particular treaties, tend to support the position that no claim may be brought by the State of nationality of the deceased person if the heir has the nationality of a third State. There is some support for the view that where the injured deceased dies before the official presentation of the claim, the claim may be continued because it has assumed a national character. Although considerations of equity might seem to endorse such a position, it has on occasion been repudiated. The inconclusiveness of the authorities make it unwise to propose a rule on this subject.

Article 6

Multiple nationality and claim against a third State

1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national.

2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

Commentary

(1) Dual or multiple nationality is a fact of international life. An individual may acquire more than one nationality as a result of the parallel operation of the principles of *jus soli* and *jus sanguinis* or of the conferment of nationality by naturalization or any other manner as envisaged in draft article 4, which does not result in the renunciation of a prior nationality. Although the laws of some States do not permit their nationals to be nationals of other States, international law does not prohibit dual or multiple nationality: indeed such nationality was given approval by article 3 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, which provides:

> “…a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses.”

It is therefore necessary to address the question of the exercise of diplomatic protection by a State of nationality in respect of a dual or multiple national. Draft article 6 is limited to the exercise of diplomatic protection by one or all of the States of which the injured person is a national.

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63 See commentary to art. 1, para. (3).

64 *Eschauzier* claim, UNRRIA vol. IV, p. 207; *Kren* claim; *Gleadell* claim (Great Britain v. Mexico) UNRRIA vol. V, p. 44; *Sed contra*, *Straub* claim, ILR vol. 20, p. 228.


67 *Eschauzier* claim (Great Britain v. Mexico), at p. 209.
national against a State of which that person is not a national. The exercise of diplomatic protection by one State of nationality against another State of nationality is covered in draft article 7.

(2) Paragraph 1 allows a State of nationality to exercise diplomatic protection in respect of its national even where that person is a national of one or more other States. Like draft article 4, it does not require a genuine or effective link between the national and the State exercising diplomatic protection.

(3) Although there is support for the requirement of a genuine or effective link between the State of nationality and a dual or multiple national in the case of the exercise of diplomatic protection against a State of which the injured person is not a national, in both arbitral decisions and codification endeavours, the weight of authority does not require such a condition. In the Salem case an arbitral tribunal held that Egypt could not raise the fact that the injured individual had effective Persian nationality against a claim from the United States, another State of nationality. It stated that:

"the rule of International Law [is] that in a case of dual nationality a third Power is not entitled to contest the claim of one of the two powers whose national is interested in the case by referring to the nationality of the other power."\(^{49}\)

This rule has been followed in other cases and has more recently been upheld by the Iran-United States Claim Tribunal.\(^{72}\) The decision not to require a genuine or effective link in such circumstances accords with reason. Unlike the situation in which one State of nationality claims from another State of nationality in respect of a dual national, there is no conflict over nationality where one State of nationality seeks to protect a dual national against a third State.

(4) In principle, there is no reason why two States of nationality may not jointly exercise a right that attaches to each State of nationality. Paragraph 2 therefore recognizes that two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national against a State of which that person is not a national. While the responsible State cannot object to such a claim made by two or more States acting simultaneously and in concert, it may raise objections where the claimant States bring separate claims either before the same forum or different forums or where one State of nationality brings a claim after another State of nationality has already received satisfaction in respect to that claim. Problems may also arise where one State of nationality waives the right to diplomatic protection while another State of nationality continues with its claim. It is difficult to codify rules governing varied situations of this kind. They should be dealt with in accordance with the general principles of law recognized by international and national tribunals governing the satisfaction of joint claims.

Article 7

Multiple nationality and claim against a State of nationality

A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.

Commentary

(1) Draft article 7 deals with the exercise of diplomatic protection by one State of nationality against another State of nationality. Whereas draft article 6, dealing with a claim in respect of a dual or multiple national against a State of which the injured person is not a national, does not require an effective link between claimant State and national, draft article 7 requires the claimant State to show that its nationality is predominant, both at the time of the injury and at the date of the official presentation of the claim.
(2) In the past there was strong support for the rule of non-responsibility according to which one State of nationality might not bring a claim in respect of a dual national against another State of nationality. The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws declares in article 4 that:

“A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.”

Later codification proposals adopted a similar approach and there was also support for this position in arbitral awards. In 1949 in its advisory opinion in the case concerning Reparation for Injuries, the International Court of Justice described the practice of States not to protect their nationals against another State of nationality as “the ordinary practice”.

(3) Even before 1930 there was, however, support in arbitral decisions for another position, namely that the State of dominant or effective nationality might bring proceedings in respect of a national against another State of nationality. This jurisprudence was relied on by the International Court of Justice in another context in the Nottebohm case and was given explicit approval by Italian-United States Conciliation Commission in the Mergé claim in 1955. Here the Conciliation Commission stated that:

“The principle, based on the sovereignty of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such predominance is not proved, because the first of these two principles is generally recognized and may constitute a criterion of practical application for the elimination of any possible uncertainty.”

In its opinion, the Conciliation Commission held that the principle of effective nationality and the concept of dominant nationality were simply two sides of the same coin. The rule thus adopted was applied by the Conciliation Commission in over 50 subsequent cases concerning dual nationals. Relying on these cases, the Iran–United States Claims Tribunal has applied the principle of dominant and effective nationality in a number of cases. Codification proposals have given approval to this approach. In his Third Report on State Responsibility to the Commission, García Amador proposed that:

78 J.C. Reports 1955, pp. 22-23. Nottebohm was not concerned with dual nationality but the Court found support for its finding that Nottebohm had no effective link with Liechtenstein in cases dealing with dual nationality. See also de Leon case Nos. 218 and 227 of 15 May 1962 and 8 April 1963, UNRIAA, vol. XVI, p. 239 at p. 247.


“In cases of dual or multiple nationality, the right to bring a claim shall be exercisable only by the State with which the alien has the stronger and more genuine legal or other ties.”\textsuperscript{82}

A similar view was advanced by Orrego Vicuña in his report to the International Law Association in 2000.\textsuperscript{83}

(4) Even though the two concepts are different, the authorities use the term “effective” or “dominant” without distinction to describe the required link between the claimant State and its national in situations in which one State of nationality brings a claim against another State of nationality. Draft article 7 does not use either of these words to describe the required link but instead uses the term “predominant” as it conveys the element of relativity and indicates that the individual has stronger ties with one State rather than another. A tribunal considering this question is required to balance the strengths of competing nationalities and the essence of this exercise is more accurately captured by the term “predominant” when applied to nationality than either “effective” or “dominant”. It is moreover the term used by the Italian–United States Conciliation Commission in the Mergé case which may be seen as the starting point for the development of the present customary rule.\textsuperscript{84}

(5) No attempt is made to describe the factors to be taken into account in deciding which nationality is predominant. The authorities indicate that such factors include habitual residence, the amount of time spent in each country of nationality, date of naturalization (i.e., the length of the period spent as a national of the protecting State before the claim arose); place, curricula and language of education; employment and financial interests; place of family life; family ties in each country; participation in social and public life; use of language; taxation, bank account, social security insurance; visits to the other State of nationality; possession and use of passport of the other State; and military service. None of these factors are decisive and the weight attributed to each factor will vary according to the circumstances of each case.

(6) Draft article 7 is framed in negative language: “A State of nationality may not exercise diplomatic protection ... unless” its nationality is predominant. This is intended to show that the circumstances envisaged by draft article 7 are to be regarded as exceptional. This also makes it clear that the burden of proof is on the claimant State to prove that its nationality is predominant.

(7) The main objection to a claim brought by one State of nationality against another State of nationality is that this might permit a State, with which the individual has established a predominant nationality subsequent to an injury inflicted by the other State of nationality, to bring a claim against that State. This objection is overcome by the requirement that the nationality of the claimant State must be predominant both at the date of the injury and at the date of the official presentation of the claim. Although this requirement echoes the principle affirmed in draft article 5, paragraph 1, on the subject of continuous nationality, it is not necessary in this case to prove continuity of predominant nationality between these two dates. The phrases “at the date of injury” and “at the date of the official presentation of the claim” are explained in the commentary on draft article 5. The exception to the continuous nationality rule contained in draft article 5, paragraph 2, is not applicable here as the injured person contemplated in draft article 7 will not have lost his or her other nationality.

**Article 8**

**Stateless persons and refugees**

1. A State may exercise diplomatic protection in respect of a stateless person who, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State, in accordance with internationally accepted standards, when that person, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

\textsuperscript{82} Document A/CN.4/111, in *Yearbook... 1988*, vol. II, p. 61, draft art. 21, para. 4.


\textsuperscript{84} ILR, vol. 22 (1955), p. 455.
Commentary

(1) The general rule was that a State might exercise diplomatic protection on behalf of its nationals only. In 1931 the United States-Mexican Claims Commission in Dickson Car Wheel Company v. United Mexican States held that a stateless person could not be the beneficiary of diplomatic protection when it stated:

“A State … does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no State is empowered to intervene or complain on his behalf either before or after the injury.”

This dictum no longer reflects the accurate position of international law for both stateless persons and refugees. Contemporary international law reflects a concern for the status of both categories of persons. This is evidenced by such conventions as the Convention on the Reduction of Statelessness of 1961 and the Convention Relating to the Status of Refugees of 1951.

(2) Draft article 8, an exercise in progressive development of the law, departs from the traditional rule that only nationals may benefit from the exercise of diplomatic protection and allows a State to exercise diplomatic protection in respect of a non-national where that person is either a stateless person or a refugee. Although draft article 8 is to be seen within the framework of the rules governing statelessness and refugees, it has made no attempt to pronounce on the status of such persons. It is concerned only with the issue of the exercise of the diplomatic protection of such persons.

(3) Paragraph 1 deals with the diplomatic protection of stateless persons. It gives no definition of stateless persons. Such a definition is, however, to be found in the Convention Relating to the Status of Stateless Persons of 1954 which defines a stateless person “as a person who is not considered as a national by any State under the operation of its law.” This definition can no doubt be considered as having acquired a customary nature. A State may exercise diplomatic protection in respect of such a person, regardless of how he or she became stateless, provided that he or she was lawfully and habitually resident in that State both at the time of injury and at the date of the official presentation of the claim. Habitual residence in this context is intended to convey continuous residence.

(4) The requirement of both lawful residence and habitual residence sets a high threshold. Although this threshold is high and leads to a lack of effective protection for some individuals, the combination of lawful residence and habitual residence is justified in the case of an exceptional measure introduced de lege ferenda.

(5) The temporal requirements for the bringing of a claim are contained in paragraph 1. The stateless person must be a lawful and habitual resident of the claimant State both at the time of the injury and at the date of the official presentation of the claim.

(6) Paragraph 2 deals with the diplomatic protection of refugees by their State of residence. Diplomatic protection by the State of residence is particularly important in the case of refugees as they are “unable or unwilling to avail [themselves] of the protection of [the State of Nationality]” and, if they do so, run the risk of losing refugee status in the State of residence. Paragraph 2 mirrors the language of paragraph 1. Important differences between stateless persons and refugees, as evidenced by paragraph 3, explain why a separate paragraph has been allocated to each category.

(7) Lawful residence and habitual residence are required as preconditions for the exercise of diplomatic protection of refugees, as with stateless persons, despite the fact that article 28 of the Convention Relating to the Status of Refugees sets the lower threshold of “lawfully

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85 UNRIAA, vol. IV, p. 669 at p. 678.
87 ibid., vol. 189, p. 150.
88 In Al Rawi & Others, R (on the Application of) v. Secretary of State for Foreign Affairs and Another [2006] EWHC (Admin) an English court held that draft article 8 was to be considered lex ferenda and “not yet part of international law” (para. 63).
90 Article 1.
91 The terms “lawful and habitual” residence are based on the 1997 European Convention on Nationality, article 6 (4) (g), where they are used in connection with the acquisition of nationality. See, too, the 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, which includes for the purpose of protection under this Convention a “stateless person having his habitual residence in that State”; article 21 (3) (c).
92 Article 1 (A) (2) of the Convention Relating to the Status of Refugees.
93 Habitual residence in this context connotes continuous residence.
staying\footnote{The travaux préparatoires of the Convention make it clear that “stay” means less than habitual residence.} for Contracting States in the issuing of travel documents to refugees. Two factors justify this position. First, the fact that the issue of travel documents, in terms of the Convention, does not in any way entitle the holder to diplomatic protection.\footnote{See para. 16 of the Schedule to the Convention.} Secondly, the necessity to set a high threshold when introducing an exception to a traditional rule, de lege ferenda.\footnote{See para. (4) of the commentary to this draft article.}

(8) The term “refugee” in paragraph 2 is not limited to refugees as defined in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, but is intended to cover, in addition, persons who do not strictly conform to this definition. The Commission considered using the term “recognized refugees”, which appears in the 1997 European Convention on Nationality,\footnote{Article 6 (4) (g).} which would have extended the concept to include refugees recognized by regional instruments, such as the 1969 O.A.U. Convention Governing the Specific Aspects of Refugee Problems in Africa, widely seen as the model for the international protection of refugees,\footnote{United Nations, Treaty Series, vol. 1001, p. 45. This Convention extends the definition of refugee to include “every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality”.} and the 1984 Cartagena Declaration on the International Protection of Refugees in Central America, approved by the General Assembly of the O.A.S. in 1985.\footnote{Note on International Protection submitted by the United Nations High Commissioner for Refugees, document A/AC.298/330, p. 17, para. 35.} However, the Commission preferred to set no limit to the term in order to allow a State to extend diplomatic protection to any person that it recognized and treated as a refugee.\footnote{O.A.S. General Assembly, XV Regular Session (1985).} Such recognition must, however, be based on “internationally accepted standards” relating to the recognition of refugees. This term emphasizes that the standards expounded in different conventions and other international instruments are to apply as well as the legal rules contained in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.

(9) The temporal requirements for the bringing of a claim are repeated in paragraph 2. The refugee must be a lawful and habitual resident of the claimant State both at the time of the injury and at the date of the official presentation of the claim.

(10) Paragraph 3 provides that the State of refuge may not exercise diplomatic protection in respect of a refugee against the State of nationality of the refugee. To have permitted this would have contradicted the basic approach of the present draft articles, according to which nationality is the predominant basis for the exercise of diplomatic protection. The paragraph is also justified on policy grounds. Most refugees have serious complaints about their treatment at the hand of their State of nationality, from which they have fled to avoid persecution. To allow diplomatic protection in such cases would be to open the floodgates for international litigation. Moreover, the fear of demands for such action by refugees might deter States from accepting refugees.

(11) Both paragraphs 1 and 2 provide that a State of refuge “may exercise diplomatic protection”. This emphasizes the discretionary nature of the right. A State has a discretion under international law whether to exercise diplomatic protection in respect of a national.\footnote{For instance, it may be possible for a State to exercise diplomatic protection on behalf of a person granted political asylum in terms of the 1954 Caracas Convention on Territorial Asylum, United Nations, Treaty Series, vol. 1438, p. 129.} A fortiori it has a discretion whether to extend such protection to a stateless person or refugee.

(12) Draft article 8 is concerned only with the diplomatic protection of stateless persons and refugees. It is not concerned with the conferment of nationality upon such persons. The exercise of diplomatic protection in respect of a stateless person or refugee cannot and should not be seen as giving rise to a legitimate expectation of the conferment of nationality. Draft article 28 of the 1951 Convention Relating to the Status of Refugees, read with paragraph 15 of its Schedule, makes it clear that the issue of a travel document to a refugee does not affect the nationality of the holder. A fortiori the exercise of diplomatic protection in respect of a refugee, or a stateless person, should in no way be construed as affecting the nationality of the protected person.

\footnote{See draft articles 2 and 19 and commentaries thereto.}
CHAPTER III
LEGAL PERSONS

Article 9

State of nationality of a corporation

For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.

Commentary

(1) Draft article 9 recognizes that diplomatic protection may be extended to corporations. The first part of the article follows the same formula adopted in draft article 4 on the subject of the diplomatic protection of natural persons. The provision makes it clear that in order to qualify as the State of nationality for the purposes of diplomatic protection of a corporation certain conditions must be met, as in the case with the diplomatic protection of natural persons.

(2) State practice is largely concerned with the diplomatic protection of corporations, that is profit-making enterprises with limited liability whose capital is generally represented by shares, and not other legal persons. This explains why the present article, and those that follow, are concerned with the diplomatic protection of corporations and shareholders in corporations. Draft article 13 is devoted to the position of legal persons other than corporations.

(3) As with natural persons, the granting of nationality to a corporation is “within the reserved domain” of a State.103 As the International Court of Justice stated in the Barcelona Traction case:

“... international law has to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law.”104

Although international law has no rules of its own for the creation, management and dissolution of a corporation or for the rights of shareholders and their relationship with the corporation, and must consequently turn to municipal law for guidance on this subject, it is for international law to determine the circumstances in which a State may exercise diplomatic protection on behalf of a corporation or its shareholders. This matter was addressed by the International Court of Justice in Barcelona Traction when it stated that international law “attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office”.105 Here the Court set two conditions for the acquisition of nationality by a corporation for the purposes of diplomatic protection: incorporation and the presence of the registered office of the company in the State of incorporation. As the laws of most States require a company incorporated under its laws to maintain a registered office in its territory, even if this is a mere fiction, incorporation is the most important criterion for the purposes of diplomatic protection. The Court in Barcelona Traction was not, however, satisfied with incorporation as the sole criterion for the exercise of diplomatic protection. Although it did not reiterate the requirement of a “genuine connection” as applied in the Nottebohm case,106 and acknowledged that “in the particular field of the diplomatic protection of corporate entities, no absolute test of the ‘genuine connection’ has found general acceptance,”107 it suggested that in addition to incorporation and a registered office, there was a need for some “permanent and close connection” between the State exercising diplomatic protection and the corporation.108 On the facts of this case the Court found such a connection in the incorporation of the company in Canada for over 50 years, the maintenance of its registered office, accounts and share register there, the holding of board meetings there for many years, its listing in the records of the Canadian tax authorities and the general recognition by other States

104 Barcelona Traction case, at pp. 33-34, para. 38.
105 Ibid., p. 42, para. 70.

103 Nationality Decrees issued in Tunis and Morocco case.
of the Canadian nationality of the company. All of this meant, said the Court, that “Barcelona Traction’s links with Canada are thus manifold”. In Barcelona Traction the Court was not confronted with a situation in which a company was incorporated in one State but had a “close and permanent connection” with another State. One can only speculate what the Court might have decided in such a situation. Draft article 9 does, however, provide for such cases.

Draft article 9 accepts the basic premise of Barcelona Traction that it is incorporation that confers nationality on a corporation for the purposes of diplomatic protection. However, it provides an exception in a particular situation where there is no other significant link or connection between the State of incorporation and the corporation itself, and where certain significant connections exist with another State, in which case that other State is to be regarded as the State of nationality for the purpose of diplomatic protection. Policy and fairness dictate such a solution. It is wrong to place the sole and exclusive right to exercise diplomatic protection in a State with which the corporation has the most tenuous connection as in practice such a State will seldom be prepared to protect such a corporation.

Draft article 9 provides that in the first instance the State in which a corporation is incorporated is the State of nationality entitled to exercise diplomatic protection. When, however, the circumstances indicate that the corporation has a closer connection with another State, a State in which the seat of management and financial control are situated, that State shall be regarded as the State of nationality with the right to exercise diplomatic protection. Certain conditions must, however, be fulfilled before this occurs. First, the corporation must be controlled by nationals of another State. Secondly, it must have no substantial business activities in the State of incorporation. Thirdly, both the seat of management and the financial control of the corporation must be located in another State. Only where these conditions are cumulatively fulfilled does the State in which the corporation has its seat of management and in which it is financially controlled qualify as the State of nationality for the purposes of diplomatic protection.

In Barcelona Traction the International Court of Justice warned that the granting of the right of diplomatic protection to the States of nationality of shareholders might result in a multiplicity of actions which “could create an atmosphere of confusion and insecurity in international economic relations”. The same confusion might result from the granting of the right to exercise diplomatic protection to several States with which a corporation enjoys a link or connection. Draft article 9 does not allow such multiple actions. The State of nationality with the right to exercise diplomatic protection is either the State of incorporation or, if the required conditions are met, the State of the seat of management and financial control of the corporation. If the seat of management and the place of financial control are located in different States, the State of incorporation remains the State entitled to exercise diplomatic protection.

**Article 10**

*Continuous nationality of a corporation*

1. A State is entitled to exercise diplomatic protection in respect of a corporation that was a national of that State, or its predecessor State, continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.

2. A State is no longer entitled to exercise diplomatic protection in respect of a corporation that acquires the nationality of the State against which the claim is brought after the presentation of the claim.

3. Notwithstanding paragraph 1, a State continues to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the date of injury and which, as the result of the injury, has ceased to exist according to the law of the State of incorporation.

**Commentary**

The general principles relating to the requirement of continuous nationality are discussed in the commentary to draft article 5. In practice problems of continuous nationality arise less in the case of corporations than with natural persons. Whereas natural persons change nationality easily as a result of naturalization, marriage or adoption, and State succession, corporations generally change nationality only by being re-formed or reincorporated in another State, in

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which case the corporation assumes a new personality, thereby breaking the continuity of nationality of the corporation.\textsuperscript{112} The most frequent instance in which a corporation may change nationality without changing legal personality is in the case of State succession.

(2) Paragraph 1 asserts the traditional principle that a State is entitled to exercise diplomatic protection in respect of a corporation that was its national both at the time of the injury and at the date of the official presentation of the claim. It also requires continuity of nationality between the date of the injury and the date of the official presentation of the claim. These requirements, which apply to natural persons as well, are examined in the commentary to draft article 5. The date of the official presentation of the claim is preferred to that of the date of the award, for reasons explained in the commentary to draft article 5. An exception is, however, made in paragraph 2 to cover cases in which the Corporation acquires the nationality of the State against which the claim is brought after the presentation of the claim.

(3) The requirement of continuity of nationality is met where a corporation undergoes a change of nationality as a result of the succession of States.\textsuperscript{113} In effect, this is an exception to the continuity of nationality rule. This matter is covered by the reference to “predecessor State” in paragraph 1.

(4) The word “claim” in paragraph 1 includes both a claim submitted through diplomatic channels and a claim filed before a judicial body. Such a claim may specify the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing, and the form of reparation should take.\textsuperscript{114}

(5) In terms of paragraph 2, a State is not entitled to exercise diplomatic protection in respect of a corporation that acquires the nationality of the State against which the claim is brought after the presentation of the claim. This paragraph is designed to cater for the type of situation that arose in the Loewen case\textsuperscript{115} in which a corporation ceased to exist in the State in which the claim was initiated (Canada) and was reorganized in the respondent State (the United States). This matter is further considered in the commentary to draft article 5.\textsuperscript{116}

(6) Difficulties arise in respect of the exercise of diplomatic protection of a corporation that has ceased to exist according to the law of the State in which it was incorporated and of which it was a national. If one takes the position that the State of nationality of such a corporation may not bring a claim as the corporation no longer exists at the time of presentation of the claim, then no State may exercise diplomatic protection in respect of an injury to the corporation. A State could not avail itself of the nationality of the shareholders in order to bring such a claim as it could not show that it had the necessary interest at the time the injury occurred to the corporation. This matter troubled several judges in the Barcelona Traction case\textsuperscript{117} and it has troubled certain courts and arbitral tribunals\textsuperscript{118} and scholars.\textsuperscript{119} Paragraph 3 adopts a pragmatic approach and allows the State of nationality of a corporation to exercise diplomatic protection in respect of an injury suffered by the corporation when it was its national and has ceased to exist - and therefore ceased to be its national - as a result of the injury. In order to qualify, the claimant State must prove that it was because of the injury in respect of which the claim is brought that the corporation has ceased to exist. Paragraph 3 must be read in conjunction with

\textsuperscript{112} See Mixed Claims Commission, United States-Venezuela constituted under the Protocol of 17 February 1903, the Orinoco Steamship Company Case, UNRIAA, vol. IX., p. 180. Here a company incorporated in the United Kingdom transferred its claim against the Venezuelan Government to a successor company incorporated in the United States. As the treaty establishing the Commission permitted the United States to bring a claim on behalf of its national in such circumstances, the claim was allowed. However, Umpire Barge made it clear that, but for the treaty, the claim would not have been allowed; ibid., at p. 192. See also Loewen Group Inc v. U.S.A., at paragraph 220.

\textsuperscript{113} See further on this subject the Panagyys-Salasitsiak Railway case, at p. 18. See also Fourth Report on Nationality in relation to the Succession of States, document ACN 4/489, which highlights the difficulties surrounding the nationality of legal persons in relation to the succession of States.

\textsuperscript{114} See, further, article 43 of the draft articles on the Responsibility of States for Internationally Wrongful Acts and the commentary thereto.

\textsuperscript{115} Op. cit. at para. 220.

\textsuperscript{116} Paragraphs (5) and (13).

\textsuperscript{117} Judges Jessup, I.C.J. Reports 1970, at p. 193, Gros, ibid., at p. 277, and Fitzmaurice, ibid., at pp. 101-102, and Judge ad hoc Ripphagen, ibid., at p. 345.

\textsuperscript{118} See the Kunhardt and co. case (Opinions in the American-Venezuelan Commission of 1903), UNRIAA, vol. XII, p. 171, and particularly the dissenting opinion of the Venezuelan Commissioner, Mr. Paúl, at p. 180; F.W. Fack, on behalf of the Estate of the Late D.L. Fack (Great Britain) v. United Mexican States, decision No. 10 of 6 December 1929, UNRIAA, vol. V, p. 61 at p. 63.

Article 11

Protection of shareholders

The State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of an injury to the corporation unless:

(a) The corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or

(b) The corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there.

Commentary

(1) The most fundamental principle of the diplomatic protection of corporations is that a corporation is to be protected by the State of nationality of the corporation and not by the State or States of nationality of the shareholders in a corporation. This principle was strongly reaffirmed by the International Court of Justice in the Barcelona Traction case. In this case the Court emphasized at the outset that it was concerned only with the question of the diplomatic protection of shareholders in “a limited liability company whose capital is represented by shares”. Such companies are characterized by a clear distinction between company and shareholders. Whenever a shareholder’s interests are harmed by an injury to the company, it is to the company that the shareholder must look to take action, for “although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed”. Only where the act complained of is aimed at the direct rights of the shareholders does a shareholder have an independent right of action. Such principles governing the distinction between company and shareholders, said the Court, are derived from municipal law and not international law.

(2) In reaching its decision that the State of incorporation of a company and not the State(s) of nationality of the shareholders in the company is the appropriate State to exercise diplomatic protection in the event of injury to a company, the Court in Barcelona Traction was guided by a number of policy considerations. First, when shareholders invest in a corporation doing business abroad they undertake risks, including the risk that the State of nationality of the corporation may in the exercise of its discretion decline to exercise diplomatic protection on their behalf. Secondly, if the State of nationality of shareholders is permitted to exercise diplomatic protection, this might lead to a multiplicity of claims by different States, as frequently large corporations comprise shareholders of many nationalities. In this connection the Court indicated that if the shareholder’s State of nationality was empowered to act on his behalf there was no reason why every individual shareholder should not enjoy such a right. Thirdly, the Court was reluctant to apply by way of analogy rules relating to dual nationality to corporations and shareholders and to allow the States of nationality of both to exercise diplomatic protection.

(3) The Court in Barcelona Traction accepted that the State(s) of nationality of shareholders might exercise diplomatic protection on their behalf in two situations: first, where the company had ceased to exist in its place of incorporation - which was not the case with the Barcelona Traction; secondly, where the State of incorporation was itself responsible for inflicting injury on the company and the foreign shareholders’ sole means of protection on the international level was through their State(s) of nationality - which was not the case with

121 Ibid., p. 34, para. 41.
122 Ibid., p. 35, para. 44.
123 Ibid., p. 36, para. 47.
124 Ibid., p. 37, para. 50.
125 Ibid., p. 35, para. 43; p. 46, paras. 86-87; p. 50, para. 99.
126 Ibid., pp. 48-49, paras. 94-96.
127 Ibid., p. 48, paras. 94-95.
128 Ibid., p. 38, para. 53; p. 50, para. 98.
129 Ibid., pp. 40-41, paras. 65-68.
130 Ibid., p. 48, para. 92.
Barcelona Traction. These two exceptions, which were not thoroughly examined by the Court in Barcelona Traction because they were not relevant to the case, are recognized in paragraphs (a) and (b) of draft article 11. As the shareholders in a company may be nationals of different States, several States of nationality may be able to exercise diplomatic protection in terms of these exceptions. In practice, however, States will, and should, coordinate their claims and make sure that States whose nationals hold the bulk of the share capital are involved as claimants.

Draft article 11 is restricted to the interests of shareholders in a corporation as judicial decisions on this subject, including Barcelona Traction, have mainly addressed the question of shareholders. There is no clear authority on the right of the State of nationality to protect investors other than shareholders, such as debenture holders, nominees and trustees. In principle, however, there would seem to be no good reason why the State of nationality should not protect such persons.131

Draft article 11, paragraph (a) requires that the corporation shall have “ceased to exist” before the State of nationality of the shareholders shall be entitled to intervene on their behalf. Before the Barcelona Traction case the weight of authority favoured a less stringent test, one that permitted intervention on behalf of shareholders when the company was “practically defunct”.132 The Court in Barcelona Traction, however, set a higher threshold for determining the demise of a company. The “paralysis” or “precarious financial situation” of a company was dismissed as inadequate.133 The test of “practically defunct” was likewise rejected as one “which lacks all legal precision”.134 Only the “company’s status in law” was considered relevant. The Court stated: “Only in the event of the legal demise of the company are the shareholders deprived of the possibility of a remedy available through the company; it is only if they became deprived of all such possibility that an independent right of action for them and their Government could arise.”135 Subsequent support has been given to this test by the European Court of Human Rights.136

The Court in Barcelona Traction did not expressly state that the company must have ceased to exist in the place of incorporation as a precondition to shareholders’ intervention. Nevertheless it seems clear in the context of the proceedings before it that the Court intended that the company should have ceased to exist in the State of incorporation and not in the State in which the company was injured. The Court was prepared to accept that the company was destroyed in Spain but emphasized that this did not affect its continued existence in Canada, the State of incorporation: “In the present case, the Barcelona Traction is in receivership in the country of incorporation. Far from implying the demise of the entity or of its rights, this much rather denotes that those rights are preserved for so long as no liquidation has ensued. Though in receivership, the company continues to exist.” A company is “born” in the State of incorporation when it is formed or incorporated there. Conversely, it “dies” when it is wound up in its State of incorporation, the State which gave it its existence. It therefore seems logical that the question whether a company has ceased to exist, and is no longer able to function as a corporate entity, must be determined by the law of the State in which it is incorporated.

The final phrase “for a reason unrelated to the injury” aims to ensure that the State of nationality of the shareholders will not be permitted to bring proceedings in respect of the injury to the corporation that is the cause of the corporation’s demise. This, according to draft article 10, is the continuing right of the State of nationality of the corporation. The State of nationality of the shareholders will therefore only be able to exercise diplomatic protection in respect of shareholders who have suffered as a result of injuries sustained by the corporation

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131 This is the approach adopted by the United Kingdom. See United Kingdom of Great Britain and Northern Ireland: “Rules Applying to International Claims” reproduced in document A/CN.4/561/Add.1, Annex.
134 Ibid., p. 41, para. 66.
135 Ibid., see also, the separate opinions of Judges Nervo, ibid., p. 256 and Ammoun, ibid., pp. 319-320.
137 I.C.J. Reports 1970, p. 40, para. 65. See too the separate opinions of Judges Fitzmaurice, ibid., p. 75 and Jessup, ibid., p. 194.
138 Ibid., p. 41, para. 67.
unrelated to the injury that might have given rise to the demise of the corporation. The purpose of this qualification is to limit the circumstances in which the State of nationality of the shareholders may intervene on behalf of such shareholders for injury to the corporation.

(8) Draft article 11, paragraph (b), gives effect to the exception allowing the State of nationality of the shareholders in a corporation to exercise diplomatic protection on their behalf where the State of incorporation is itself responsible for inflicting injury on the corporation. The exception is limited to cases where incorporation was required by the State inflicting the injury on the corporation as a precondition for doing business there.

(9) There is support for such an exception in State practice, arbitral awards and doctrine. Significantly the strongest support for intervention on the part of the State of nationality of the shareholders comes from three claims in which the injured corporation had been compelled to incorporate in the wrong doing State: Delagoa Bay Railway, Mexican Eagle and El Triunfo. While there is no suggestion in the language of these claims that intervention is to be limited to such circumstances, there is no doubt that it is in such cases that intervention is most needed. As the Government of the United Kingdom replied to the Mexican argument in Mexican Eagle that a State might not intervene on behalf of its shareholders in a Mexican company:

“If the doctrine were admitted that a Government can first make the operation of foreign interests in its territories depend upon their incorporation under local law, and then plead such incorporation as the justification for rejecting foreign diplomatic intervention, it is clear that the means would never be wanting whereby foreign Governments could be prevented from exercising their undoubted right under international law to protect the commercial interests of their nationals abroad.”

(10) In Barcelona Traction, Spain, the respondent State, was not the State of nationality of the injured company. Consequently, the exception under discussion was not before the Court. Nevertheless, the Court did make passing reference to this exception:

“It is quite true that it has been maintained that, for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which has been the victim of a violation of international law. Thus a theory has been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company. Whatever the validity of this theory may be, it is certainly not applicable to the present case, since Spain is not the national State of Barcelona Traction.”

Judges Fitzmaurice, Tanaka and Jessup expressed full support in their separate opinions in Barcelona Traction for the right of the State of nationality of the shareholders to intervene when the company was injured by the State of incorporation.

While both Fitzmaurice and Jessup conceded that the need for such a rule was particularly strong where incorporation was required as a precondition for doing business in the State of

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140 Ibid.

141 Ibid.

142 Ibid.


145 Ibid., pp. 72-75.

146 Ibid., p. 134.

147 Ibid., pp. 191-193.

148 Judge Wellington Koo likewise supported this position in the Case concerning the Barcelona Traction, Light and Power Company Limited, Preliminary Objections, I.C.J. Reports 1964, p. 58, para. 20.

149 I.C.J. Reports 1970, p. 73, paras. 15 and 16.

150 Ibid., pp. 191-192.
incorporation, neither was prepared to limit the rule to such circumstances. Judges Padilla Nervo,158 Morelli152 and Ammoun,183 on the other hand, were vigorously opposed to the exception.

(11) Developments relating to the proposed exception in the post-Barcelona Traction period have occurred mainly in the context of treaties. Nevertheless they do indicate support for the notion that the shareholders of a company may intervene against the State of incorporation of the company when it has been responsible for causing injury to the company.154 In the Case Concerning Elettronica Siculo S.p.A. (ELST)185 a Chamber of the International Court of Justice allowed the United States to bring a claim against Italy in respect of damages suffered by an Italian company whose shares were wholly owned by two American companies. The Court avoided pronouncing on the compatibility of its finding with that of Barcelona Traction or on the proposed exception left open in Barcelona Traction despite the fact that Italy objected that the company whose rights were alleged to have been violated was incorporated in Italy and that the United States sought to protect the rights of shareholders in the company.156 This silence might be explained on the ground that the Chamber was not concerned with the evaluation of customary international law but with the interpretation of a bilateral Treaty of Friendship, Commerce and Navigation which provided for the protection of United States shareholders abroad. On the other hand, the proposed exception was clearly before the Chamber.157 It is thus possible to infer support for the exception in favour of the right of the State of shareholders in a corporation to intervene against the State of incorporation when it is responsible for causing injury to the corporation.158

(12) Before Barcelona Traction there was support for the proposed exception, but opinions were divided over whether, or to what extent, State practice and arbitral decisions recognized it. Although arbitral decisions affirmed the principle contained in the exception these decisions were often based on special agreements between States granting a right to shareholders to claim compensation and, as a consequence, were not necessarily indicative of a general rule of customary international law.159 The obiter dictum in Barcelona Traction and the separate opinions of Judges Fitzmaurice, Jessup and Tanaka have undoubtedly added to the weight of authority in favour of the exception. Subsequent developments, albeit in the context of treaty interpretation, have confirmed this trend.160 In these circumstances it would be possible to sustain a general exception on the basis of judicial opinion. However, draft article 11, paragraph (b), does not go this far. Instead it limits the exception to what has been described as a “Calvo corporation”, a corporation whose incorporation, like the Calvo Clause, is designed to protect it from the rules of international law relating to diplomatic protection. It limits the exception to the situation in which the corporation had, at the date of the injury (a further restrictive feature), the nationality of the State alleged to be responsible for causing the injury and incorporation in that State was required by it as a precondition for doing business there. It is not necessary that the law of that State require incorporation. Other forms of compulsion might also result in a corporation being “required” to incorporate in that State.


159 Ibid., pp. 64 (para. 106), 79 (para. 132).


161 See the submission to this effect by the United States in A/CN.4/561, pp. 34-35.

162 According to the United Kingdom’s 1985 Rules Applying to International Claims, “where a United Kingdom national has an interest, as a shareholder or otherwise, in a company incorporated in another State and of which it is therefore a national, and that State injures the company, Her Majesty’s Government may intervene to protect the interests of the United Kingdom national” (Rule VI), reprinted in ICLQ, vol. 37 (1988), p. 1007 and reproduced in document A/CN.4/561/Add.1, Annex.

152 Ibid., pp. 257-259.

153 Ibid., pp. 240-241.

157 Ibid., p. 318.


159 See the submission to this effect by the United States in A/CN.4/561, pp. 34-35.

160 According to the United Kingdom’s 1985 Rules Applying to International Claims, “where a United Kingdom national has an interest, as a shareholder or otherwise, in a company incorporated in another State and of which it is therefore a national, and that State injures the company, Her Majesty’s Government may intervene to protect the interests of the United Kingdom national” (Rule VI), reprinted in ICLQ, vol. 37 (1988), p. 1007 and reproduced in document A/CN.4/561/Add.1, Annex.
Article 12

Direct injury to shareholders

To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.

Commentary

(1) That shareholders qualify for diplomatic protection when their own rights are affected was recognized by the Court in Barcelona Traction when it stated:

"... an act directed against and infringing only the company’s rights does not involve responsibility towards the shareholders, even if their interests are affected. ... The situation is different if the act complained of is aimed at the direct rights of the shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action." 161

The Court was not, however, called upon to consider this matter any further because Belgium made it clear that it did not base its claim on an infringement of the direct rights of the shareholders.

(2) The issue of the protection of the direct rights of shareholders came before the Chamber of the International Court of Justice in the ELSI case. 162 However, in that case, the rights in question, such as the rights of the shareholders to organize, control and manage the company, were to be found in the Treaty of Friendship, Commerce and Navigation that the Chamber was called on to interpret and the Chamber failed to expound on the rules of customary international law on this subject. In Agrotexim, 163 the European Court of Human Rights, like the Court in Barcelona Traction, acknowledged the right of shareholders to protection in respect of the direct violation of their rights, but held that in casu no such violation had occurred. 164

(3) Draft article 12 makes no attempt to provide an exhaustive list of the rights of shareholders as distinct from those of the corporation itself. In Barcelona Traction the International Court mentioned the most obvious rights of shareholders - the right to a declared dividend, the right to attend and vote at general meetings and the right to share in the residual assets of the company on liquidation - but made it clear that this list is not exhaustive. This means that it is left to courts to determine, on the facts of individual cases, the limits of such rights. Care will, however, have to be taken to draw clear lines between shareholders’ rights and corporate rights, particularly in respect of the right to participate in the management of corporations. That draft article 12 is to be interpreted restrictively is emphasized by the phrases “the rights of the shareholders as such” and rights “as distinct from those of the corporation itself”.

(4) Draft article 12 does not specify the legal order that must determine which rights belong to the shareholder as distinct from the corporation. In most cases this is a matter to be decided by the municipal law of the State of incorporation. Where the company is incorporated in the wrongdoing State, however, there may be a case for the invocation of general principles of company law in order to ensure that the rights of foreign shareholders are not subjected to discriminatory treatment. 165

Article 13

Other legal persons

The principles contained in this chapter shall be applicable, as appropriate, to the diplomatic protection of legal persons other than corporations.

163 Series A, No. 330-A.
164 Ibid., p. 23, para. 62.
165 In his separate opinion in ELSI, Judge Oda spoke of “the general principles of law concerning companies” in the context of shareholders’ rights; I.C.J. Reports 1989, at pp. 87-88.
Commentary

(1) The provisions of this Chapter have hitherto focused on a particular species of legal person, the corporation. There are two explanations for this. First, corporations, unlike other legal persons, have certain common, uniform features: they are profit-making enterprises whose capital is generally represented by shares, in which there is a firm distinction between the separate entity of the corporation and the shareholders, with limited liability attaching to the latter. Secondly, it is mainly the corporation, unlike the public enterprise, the university, the municipality, the foundation and other such legal persons, that engages in foreign trade and investment and whose activities fuel not only the engines of international economic life but also the machinery of international dispute settlement. Diplomatic protection in respect of legal persons is mainly about the protection of foreign investment. This is why the corporation is the legal person that occupies centre stage in the field of diplomatic protection and why the present set of draft articles do - and should - concern themselves largely with this entity.

(2) In the ordinary sense of the word, “person” is a human being. In the legal sense, however, a “person” is any being, object, association or institution which the law endows with the capacity of acquiring rights and incurring duties. A legal system may confer legal personality on whatever object or association it pleases. There is no consistency or uniformity among legal systems in the conferrment of legal personality.

(3) There is jurisprudential debate about the legal nature of juristic personality and, in particular, about the manner in which a legal person comes into being. The fiction theory maintains that no juristic person can come into being without a formal act of incorporation by the State. This means that a body other than a natural person may obtain the privileges of personality by an act of State, which by a fiction of law equates it to a natural person, subject to such limitations as the law may impose. According to the realist theory, on the other hand, corporate existence is a reality and does not depend on State recognition. If an association or body acts in fact as a separate legal entity, it becomes a juristic person, with all its attributes, without requiring grant of legal personality by the State. Whatever the merits of the realist theory, it is clear that, to exist, a legal person must have some recognition by law, that is, by some municipal law system. This has been stressed by both the European Court of Justice and the International Court of Justice.

(4) Given the fact that legal persons are the creatures of municipal law, it follows that there are today a wide range of legal persons with different characteristics, including corporations, public enterprises, universities, schools, foundations, churches, municipalities, non-profit-making associations, non-governmental organizations and even partnerships (in some countries). The impossibility of finding common, uniform features in all these legal persons provides one explanation for the fact that writers on both public and private international law largely confuse their consideration of legal persons in the context of international law to the corporation. Despite this, regard must be had to legal persons other than corporations in the context of diplomatic protection. The case law of the Permanent Court of International Justice shows that a commune (municipality) or university may in certain circumstances qualify as legal persons and as nationals of a State. There is no reason why such legal persons should not qualify for diplomatic protection if injured abroad, provided that they are autonomous entities not forming part of the apparatus of the protecting State. Non-profit-making foundations, comprising assets set aside by a donor or testator for a charitable purpose, constitute legal persons without members. Today many foundations fund projects abroad to promote health, welfare, women’s rights, human rights and the environment in developing countries. Should such a legal person be subjected to an internationally wrongful act by the host State, it is

167 Barcelona Traction Case (Judgment), at pp. 34-35, para. 38.
168 In Certain German Interests in Polish Upper Silesia case (Merits) the Permanent Court held that the commune of Ratibor fell within the category of “German national” within the meaning of the German-Polish Convention concerning Upper Silesia of 1922. P.C.I.J. Reports, Series A/B, No. 7, pp. 73-75.
169 In Appeal from a Judgment of the Hungarian-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University v. The State of Czechoslovakia Judgment) the Permanent Court held that the Peter Pázmány University was a Hungarian national in terms of art. 250 of the Treaty of Trianon and therefore entitled to the restitution of property belonging to it. P.C.I.J. Reports, Series A/B, No. 61, pp. 208, 227-232.
170 As diplomatic protection is a process reserved for the protection of natural or legal persons not forming part of the State, it follows that in most instances the municipality, as a local branch of government, and the university, funded and, in the final resort, controlled by the State, will not qualify for diplomatic protection, although it may be protected by other rules dealing with the problem of State organs. Private universities would, however, qualify for diplomatic protection; as would private schools, if they enjoyed legal personality under municipal law.
probable that it would be granted diplomatic protection by the State under whose laws it has been created. Non-governmental organizations engaged in causes abroad would appear to fall into the same category as foundations.\textsuperscript{171}

(5) The diversity of goals and structures in legal persons other than corporations makes it impossible to draft separate and distinct provisions to cover the diplomatic protection of different kinds of legal persons. The wisest, and only realistic, course is to draft a provision that extends the principles of diplomatic protection adopted for corporations to other legal persons - subject to the changes necessary to take account of the different features of each legal person. The proposed provision seeks to achieve this. It provides that the principles governing the State of nationality of corporations and the application of the principle of continuous nationality to corporations, contained in the present Chapter, will apply, "as appropriate", to the diplomatic protection of legal persons other than corporations. This will require the necessary competent authorities or courts to examine the nature and functions of the legal person in question in order to decide whether it would be "appropriate" to apply any of the provisions of the present Chapter to it. Most legal persons other than corporations do not have shareholders so only draft articles 9 and 10 may appropriately be applied to them. If, however, such a legal person does have shareholders draft articles 11 and 12 may also be applied to it.\textsuperscript{172}

\textbf{PART THREE

LOCAL REMEDIES

Article 14

Exhaustion of local remedies

1. A State may not present an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies.

2. "Local remedies" means legal remedies which are open to the injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.


\textsuperscript{172} This would apply to the limited liability company known in civil law countries which is a hybrid between a corporation and a partnership.

3. Local remedies shall be exhausted where an international claim, or request for a declaratory judgment related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in draft article 8.

\textbf{Commentary

(1) Draft article 14 seeks to codify the rule of customary international law requiring the exhaustion of local remedies as a prerequisite for the exercise of diplomatic protection. This rule was recognized by the International Court of Justice in the \textit{Interhandel} case as "a well-established rule of customary international law"\textsuperscript{173} and by a Chamber of the International Court in the \textit{Elettronica Sicula} (ELS) case as "an important principle of customary international law".\textsuperscript{174} The exhaustion of local remedies rule ensures 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 system."\textsuperscript{175} The International Law Commission has previously considered the exhaustion of local remedies in the context of its work on State responsibility and concluded that it is a "principle of general international law" supported by judicial decisions, State practice, treaties and the writings of jurists.\textsuperscript{176}

(2) Both natural and legal persons are required to exhaust local remedies. A foreign company financed partly or mainly by public capital is also required to exhaust local remedies. Non-nationals of the State exercising protection, entitled to diplomatic protection in the exceptional circumstances provided for in draft article 8, are also required to exhaust local remedies.

(3) The phrase "all local remedies" must be read subject to draft article 15 which describes the exceptional circumstances in which local remedies need not be exhausted.

\textsuperscript{173} \textit{Interhandel} case (Switzerland v. United States of America) Preliminary objections, I.C.J. Reports 1959, p. 6 at p. 27.

\textsuperscript{174} I.C.J. Reports 1989, p. 15 at p. 42, para. 50.

\textsuperscript{175} I.C.J. Reports 1989, at p. 27.

(4) The remedies available to an alien that must be exhausted before diplomatic protection can be exercised will, inevitably, vary from State to State. No codification can therefore succeed in providing an absolute rule governing all situations. Paragraph 2 seeks to describe, in broad terms, the main kind of legal remedies that must be exhausted. In the first instance it is clear that the foreign national must exhaust all the available judicial remedies provided for in the municipal law of the respondent State. If the municipal law in question permits an appeal in the circumstances of the case to the highest court, such an appeal must be brought in order to secure a final decision in the matter. Even if there is no appeal as of right to a higher court, but such a court has a discretion to grant leave to appeal, the foreign national must still apply for leave to appeal to that court. Courts in this connection include both ordinary and special courts since "the crucial question is not the ordinary or extraordinary character of a legal remedy but whether it gives the possibility of an effective and sufficient means of redress".

(5) Administrative remedies must also be exhausted. The injured alien is, however, only required to exhaust such remedies which may result in a binding decision. He is not required to approach the executive for relief in the exercise of its discretionary powers. Local remedies do not include remedies whose "purpose is to obtain a favour and not to vindicate a right" nor do they include remedies of grace unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings. Requests for clemency and resort to an ombudsman generally fall into this category.

177 In the Ambatielos Claim of 6 March 1956 the arbitral tribunal declared that "[I]t is the whole system of legal protection, as provided by municipal law, which must have been put to the test", UNRIAA, vol. XII, p. 83 at p. 120. See further on this subject, C.F. Amerasinghe, Local Remedies in International Law, 2nd ed. (Cambridge: Cambridge University Press, 2004), pp. 182-192.

178 This would include the certiorari process before the United States Supreme Court.


182 See Avena and Other Mexican Nationals (Mexico v. United States of America), at paras. 135-143.

(6) In order to satisfactorily lay the foundation for an international claim on the ground that local remedies have been exhausted, the foreign litigant must raise the basic arguments he intends to raise in international proceedings in the municipal proceedings. In the ELSI case the Chamber of the International Court of Justice stated that:

"for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success".

This test is preferable to the stricter test enunciated in the Finnish Ships Arbitration that:

"all the contentsions of fact and propositions of law which are brought forward by the claimant Government ... must have been investigated and adjudicated upon by the municipal courts".

(7) The claimant State must therefore produce the evidence available to it to support the essence of its claim in the process of exhausting local remedies. The international remedy afforded by diplomatic protection cannot be used to overcome faulty preparation or presentation of the claim at the municipal level.

(8) Draft article 14 does not take cognizance of the "Calvo Clause", a device employed mainly by Latin-American States in the late nineteenth century and early twentieth century, to confine an alien to local remedies by compelling him to waive recourse to international remedies in respect of disputes arising out of a contract entered into with the host State. The validity of such a clause has been vigorously disputed by capital-exporting States on the ground that the alien has no right, in accordance with the rule in Matrionnatis, to waive a right that belongs to the State and not its national. Despite this, the "Calvo Clause" was viewed as a regional custom.


185 Ambatielos Claim, at p. 120.


187 Named after a distinguished Argentine jurist, Carlos Calvo (1824-1906).

in Latin-America and formed part of the national identity of many States. The “Calvo Clause” is
difficult to reconcile with international law if it is to be interpreted as a complete waiver of
recourse to international protection in respect of an action by the host State constituting an
internationally wrongful act (such as denial of justice) or where the injury to the alien was
of direct concern to the State of nationality of the alien.\footnote{North American Dredging Company (U.S.A. v. Mexico), UNR II A, vol. IV, p. 26.} The objection to the validity of the
“Calvo Clause” in respect of general international law are certainly less convincing if one
accepts that the right protected within the framework of diplomatic protection are those of the
individual protected and not those of the protecting State.\footnote{See paragraph (5) of commentary to draft article 1.}

(9) Paragraph 3 provides that the exhaustion of local remedies rule applies only to cases in
which the claimant State has been injured “indirectly”, that is, through its national. It does not
apply where the claimant State is directly injured by the wrongful act of another State, as here
the State has a distinct reason of its own for bringing an international claim.\footnote{See generally on this subject, C.F. Amerasinghe, Local Remedies in International Law, op. cit., pp. 145-168.}

(10) In practice it is difficult to decide whether the claim is “direct” or “indirect” where it is
“mixed”, in the sense that it contains elements of both injury to the State and injury to the
nationals of the State. Many disputes before the International Court of Justice have presented the
phenomenon of the mixed claim. In the Hostages case,\footnote{Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, I.C.J. Reports 1980, p. 3.} there was a direct violation on the part
of the Islamic Republic of Iran of the duty it owed to the United States of America to protect its
diplomats and consuls, but at the same time there was injury to the person of the nationals
diplomats and consuls) held hostage; and in the Interhandel case, there were claims brought by
Switzerland relating to a direct wrong to itself arising out of breach of a treaty and to an indirect
wrong resulting from an injury to a national corporation. In the Hostages case the Court treated
the claim as a direct violation of international law; and in the Interhandel case the Court found
that the claim was preponderantly indirect and that Interhandel had failed to exhaust local
remedies. In the Arrest Warrant of 11 August 2000 case there was a direct injury to the
Democratic Republic of the Congo (DRC) and its national (the Foreign Minister) but the Court
held that the claim was not brought within the context of the protection of a national so it was

not necessary for the DRC to exhaust local remedies.\footnote{Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3 at p. 18, para. 40.} In the Avena case Mexico sought to
protect its nationals on death row in the United States through the medium of the Vienna
Convention on Consular Relations, arguing that it had “itself suffered, directly and through its
nationals” as a result of the United States’ failure to grant consular access to its nationals under
article 36 (1) of the Convention. The Court upheld this argument because of the
“interdependence of the rights of the State and individual rights”.\footnote{I.C.J. Reports 2001, p. 12, para. 40.}

(11) In the case of a mixed claim it is incumbent upon the tribunal to examine the different
elements of the claim and to decide whether the direct or the indirect element is preponderant.
In the ELSI case a Chamber of the International Court of Justice rejected the argument of the
United States that part of its claim was premised on the violation of a treaty and that it was
therefore unnecessary to exhaust local remedies, holding that:

“the Chamber has no doubt that the matter which colours and pervades the United States
claim as a whole, is the alleged damage to Raytheon and Machlett [United States
corporations]”.\footnote{I.C.J. Reports 1989, p. 15 at p. 43, para. 52. See also, the Interhandel case, I.C.J. Reports 1989, at p. 28.}

Closely related to the preponderance test is the sine qua non or “but for” test, which asks
whether the claim comprising elements of both direct and indirect injury would have been
brought were it not for the claim on behalf of the injured national. If this question is answered
negatively, the claim is an indirect one and local remedies must be exhausted. There is,
however, little to distinguish the preponderance test from the “but for” test. If a claim is
preponderantly based on injury to a national this is evidence of the fact that the claim would not
have been brought but for the injury to the national. In these circumstances one test only is
provided for in paragraph 3, that of preponderance.

(12) Other “tests” invoked to establish whether the claim is direct or indirect are not so much
tests as factors that must be considered in deciding whether the claim is preponderantly weighted
in favour of a direct or an indirect claim or whether the claim would not have been brought but
for the injury to the national. The principal factors to be considered in making this assessment
are the subject of the dispute, the nature of the claim and the remedy claimed. Thus where the subject of the dispute is a Government official, diplomatic official or State property, the claim will normally be direct, and where the State seeks monetary relief on behalf of its national as a private individual the claim will be indirect.

(13) Paragraph 3 makes it clear that local remedies are to be exhausted not only in respect of an international claim but also in respect of a request for a declaratory judgment brought preponderantly on the basis of an injury to a national. Although there is support for the view that where a State makes no claim for damages for an injured national, but simply requests a decision on the interpretation and application of a treaty, there is no need for local remedies to be exhausted, there are cases in which States have been required to exhaust local remedies where they have sought a declaratory judgment relating to the interpretation and application of a treaty alleged to have been violated by the respondent State in the course of, or incidental to, its unlawful treatment of a national.

(14) Draft article 14 requires that the injured person must himself have exhausted all local remedies. This does not preclude the possibility that the exhaustion of local remedies may result from the fact that another person has submitted the substance of the same claim before a court of the respondent State.

Article 15

Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

(a) There are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;

(b) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(c) There was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;

(d) The injured person is manifestly precluded from pursuing local remedies; or

(e) The State alleged to be responsible has waived the requirement that local remedies be exhausted.

Commentary

(1) Draft article 15 deals with the exceptions to the exhaustion of local remedies rule. Paragraphs (a) to (b), which cover circumstances in which local courts offer no prospect of redress, and paragraphs (c) to (d), which deal with circumstances which make it unfair or unreasonable that an injured alien should be required to exhaust local remedies as a precondition for the bringing of a claim, are clear exceptions to the exhaustion of local remedies rule. Paragraph (e) deals with a different situation - that which arises where the respondent State has waived compliance with the local remedies rule.

Paragraph (a)

(2) Paragraph (a) deals with the exception to the exhaustion of local remedies rule sometimes described, in broad terms, as the “futility” or “ineffectiveness” exception. Three options require consideration for the formulation of a rule describing the circumstances in which local remedies need not be exhausted because of failures in the administration of justice:

(i) the local remedies are obviously futile;

(ii) the local remedies offer no reasonable prospect of success;

(iii) the local remedies provide no reasonable possibility of effective redress.

All three of these options enjoy some support among the authorities.

(3) The “obvious futility” test, expounded by Arbitrator Bagge in the Finnish Ships Arbitration, sets too high a threshold. On the other hand, the test of “no reasonable prospect of
success”, accepted by the European Commission of Human Rights in several decisions.202 is too generous to the claimant. This leaves the third option which avoids the stringent language of “obvious futility” but nevertheless imposes a heavy burden on the claimant by requiring that he prove that in the circumstances of the case, and having regard to the legal system of the respondent State, there is no reasonable possibility of effective redress offered by the local remedies. This test has its origin in a separate opinion of Sir Hersch Lauterpacht in the Norwegian Loans case203 and is supported by the writings of jurists.204 The test, however, fails to include the element of availability of local remedies which was endorsed by the Commission in its articles on Responsibility of States for Internationally Wrongful Acts205 and is sometimes considered as a component of this rule by courts206 and writers.207 For this reason the test in paragraph (a) is expanded to require that there are no “reasonably available local remedies” to provide effective redress or that the local remedies provide no reasonable possibility of such redress. In this form the test is supported by judicial decisions which have held that local remedies need not be exhausted where the local court has no jurisdiction over the dispute in question;208 the national legislation justifying the acts of which the alien complains will not be reviewed by local courts;209 the local courts are notoriously lacking in independence;210 there is a consistent and well-established line of precedents adverse to the alien;211 the local courts do not have the competence to grant as appropriate and adequate remedy to the alien;212 or the respondent State does not have an adequate system of judicial protection.213

(4) In order to meet the requirements of paragraph (a) it is not sufficient for the injured person to show that the possibility of success is low or that further appeals are difficult or costly. The test is not whether a successful outcome is likely or possible but whether the municipal system of the respondent State is reasonably capable of providing effective relief. This must be determined in the context of the local law and the prevailing circumstances. This is a question to be decided by the competent international tribunal charged with the task of examining the question whether local remedies have been exhausted. The decision on this matter must be made on the assumption that the claim is meritorious.214

*Paragraph (b)*

(5) That the requirement of exhaustion of local remedies may be dispensed with in cases in which the respondent State is responsible for an unreasonable delay in allowing a local remedy

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205 Article 44 requires local remedies to be “available and effective”.

206 In Loewen Group Inc. v. USA, the tribunal stated that the exhaustion of local remedies rule obliges the injured person “to exhaust remedies which are effective and adequate and are reasonably available” to him (at para. 168).


210 Robert E. Brown Claim of 23 November 1923, UNRRAA, vol. VI, p. 120; Vélezquez Rodriguez case, Inter-American Court of Human Rights, Series C, No. 4, paras. 56-78, p. 291 at pp. 304-309.


214 Finnish Ships Arbitration, at p. 1504; Ambatielos Claim, at pp. 119-120.
to be implemented is confirmed by codification attempts, 215 human rights instruments and practice, 216 judicial decisions 217 and scholarly opinion. It is difficult to give an objective content or meaning to “undue delay”, or to attempt to prescribe a fixed time limit within which local remedies are to be implemented. Each case must be judged on its own facts. As the British Mexican Claims Commission stated in the El Oro Mining case:

“The Commission will not attempt to lay down with precision just within what period a tribunal may be expected to render judgment. This will depend upon several circumstances, foremost amongst them upon the volume of the work involved by a thorough examination of the case, in other words, upon the magnitude of the latter.” 218

(6) Paragraph (b) makes it clear that the delay in the remedial process is attributable to the State alleged to be responsible for an injury to an alien. The phrase “remedial process” is preferred to that of “local remedies” as it is meant to cover the entire process by which local remedies are invoked and implemented and through which local remedies are channelled.

Paragraph (c)

(7) The exception to the exhaustion of local remedies rule contained in draft article 15, paragraph (a), to the effect that local remedies do not need to be exhausted where they are not reasonably available or “provide no reasonable possibility of effective redress”, does not cover situations where local remedies are available and might offer the reasonable possibility of effective redress but it would be unreasonable or cause great hardship to the injured alien to exhaust local remedies. For instance, even where effective local remedies exist, it would be unreasonable and unfair to require an injured person to exhaust local remedies where his property has suffered environmental harm caused by pollution, radioactive fallout or a fallen space object emanating from a State in which his property is not situated; or where he is on board an aircraft that is shot down while in overflight of another State’s territory. In such cases it has been suggested that local remedies need not be exhausted because of the absence of a voluntary link or territorial connection between the injured individual and the respondent State.

(8) There is support in the literature for the proposition that in all cases in which the exhaustion of local remedies has been required there has been some link between the injured individual and the respondent State, such as voluntary physical presence, residence, ownership of property or a contractual relationship with the respondent State. 219 Proponents of this view maintain that the nature of diplomatic protection and the local remedies rule has undergone major changes in recent times. Whereas the early history of diplomatic protection was characterized by situations in which a foreign national resident and doing business in a foreign State was injured by the action of that State and could therefore be expected to exhaust local remedies in accordance with the philosophy that the national going abroad should normally be obliged to accept the local law as he finds it, including the means afforded for the redress of wrong, an individual may today be injured by the act of a foreign State outside its territory or by some act within its territory in circumstances in which the individual has no connection with the territory. Examples of this are afforded by transboundary environmental harm (for example, the explosion at the Chernobyl nuclear plant near Kiev in the Ukraine in 1986, which caused radioactive fallout as far away as Japan and Scandinavia) and the shooting down of an aircraft that has accidentally strayed into a State’s airspace (as illustrated by the Aerial Incident in which Bulgaria shot down an El Al flight that had accidentally entered its airspace). The basis for such a voluntary link or territorial connection rule is the assumption of risk by the alien in a foreign State. It is only where the alien has subjected himself voluntarily to the jurisdiction of the respondent State that he would be expected to exhaust local remedies.

(9) Neither judicial authority nor State practice provide clear guidance on the existence of such an exception to the exhaustion of local remedies rule. While there are tentative dicta in


218 Ibid., at p. 198.

support of the existence of such an exception in the *Interhandel*\(^{220}\) and *Salem*\(^{221}\) cases, in other cases\(^{222}\) tribunals have upheld the applicability of the local remedies rule despite the absence of a voluntary link between the injured alien and the respondent State. In both the *Norwegian Loans* case\(^{223}\) and the *Aerial Incident* case (*Israel v. Bulgaria*\(^{224}\)) arguments in favour of the voluntary link requirement were forcefully advanced, but in neither case did the International Court make a decision on this matter. In the *Trail Smelter* case,\(^{225}\) involving transboundary pollution in which there was no voluntary link or territorial connection, there was no insistence by Canada on the exhaustion of local remedies. This case and others\(^{226}\) in which local remedies were dispensed with where there was no voluntary link have been interpreted as lending support to the requirements of voluntary submission to jurisdiction as a precondition for the application of the local remedies rule. The failure to insist on the application of the local remedies rule in these cases can, however, be explained on the basis that they provide examples of direct injury, in which local remedies do not need to be exhausted, or on the basis that the arbitration agreement in question did not require local remedies to be exhausted.

(10) Paragraph (c) does not use the term “voluntary link” to describe this exception as this emphasizes the subjective intention of the injured individual rather than the absence of an objectively determinable connection between the individual and the host State. In practice it would be difficult to prove such a subjective criterion. Hence paragraph (c) requires the existence of a “relevant connection” between the injured alien and the host State and not a voluntary link. This connection must be “relevant” in the sense that it must relate in some way to the injury suffered. A tribunal will be required to examine not only the question whether the

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\(^{220}\) Here the International Court stated: “it has been considered necessary that the *State where the violation occurred* should also have an opportunity to redress it by its own means”, *I.C.J. Reports* 1959, p. 27. Emphasis added.

\(^{221}\) In the *Salem* case an arbitral tribunal declared that “[a]s a rule, a foreigner must acknowledge as applicable to himself the kind of justice instituted in the country in which he did choose his residence”, UNRRIA, vol. II, p. 1165 at p. 1202.

\(^{222}\) *Finnish Ships Arbitration*, at p. 1504; *Ambkeios Claim*, at p. 99.


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injured individual was present, resided or did business in the territory of the host State but whether, in the circumstances, the individual by his conduct, had assumed the risk that if he suffered an injury it would be subject to adjudication in the host State. The word “relevant” best allows a tribunal to consider the essential elements governing the relationship between the injured alien and the host State in the context of the injury in order to determine whether there had been an assumption of risk on the part of the injured alien. There must be no “relevant connection” between the injured individual and the respondent State at the date of the injury.

**Paragraph (d)**

(11) Paragraph (d) is designed to give a tribunal the power to disperse with the requirement of exhaustion of local remedies where, in all the circumstances of the case, it would be manifestly unreasonable to expect compliance with the rule. This paragraph, which is an exercise in progressive development, must be narrowly construed, with the burden of proof on the injured person to show not merely that there are serious obstacles and difficulties in the way of exhausting local remedies but that he is “manifestly” precluded from pursuing such remedies. No attempt is made to provide a comprehensive list of factors that might qualify for this exception. Circumstances that may manifestly preclude the exhaustion of local remedies possibly include the situation in which the injured person is prevented by the respondent State from entering its territory, either by law or by threats to his or her personal safety, and thereby denying him the opportunity to bring proceedings in local courts. Or where criminal syndicates in the respondent State obstruct him from bringing such proceedings. Although the injured person is expected to bear the costs of legal proceedings before the courts of the respondent State there may be circumstances in which such costs are prohibitively high and “manifestly preclude” compliance with the exhaustion of local remedies rule.\(^{227}\)

**Paragraph (e)**

(12) A State may be prepared to waive the requirement that local remedies be exhausted. As the purpose of the rule is to protect the interests of the State accused of mistreating an alien, it

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\(^{227}\) On the implications of costs for the exhaustion of local remedies, see *Loewen Group Inc. v. United States of America*, at para. 166.
follows that a State may waive this protection itself. The Inter-American Court of Human Rights has stated:

“In cases of this type, under the generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts which have been imputed to it before it has had the opportunity to remedy them by internal means. The requirement is thus considered a means of defence and, as such, waivable, even tacitly.”

(13) Waiver of local remedies may take many different forms. It may appear in a bilateral or multilateral treaty entered into before or after the dispute arises; it may appear in a contract between the alien and the respondent State; it may be express or implied; or it may be inferred from the conduct of the respondent State in circumstances in which it can be described as estoppel or forfeiture.

(14) An express waiver may be included in an ad hoc arbitration agreement concluded to resolve an already existing dispute or in a general treaty providing that disputes arising in the future are to be settled by arbitration or some other form of international dispute settlement. It may also be included in a contract between a State and an alien. There is a general agreement that an express waiver of the local remedies is valid. Waivers are a common feature of contemporary State practice and many arbitration agreements contain waiver clauses. Probably the best-known example is to be found in article 26 of the Convention on the Settlement of Investment Disputes, which provides:

“Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”

It is generally agreed that express waivers, whether contained in an agreement between States or in a contract between State and alien are irrevocable, even if the contract is governed by the law of the host State.229

(16) Waiver of local remedies must not be readily implied. In the ELSI case a Chamber of the International Court of Justice stated in this connection that it was:

“unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.” 230

(16) Where, however, the intention of the parties to waive the local remedies is clear, effect must be given to this intention. Both judicial decisions231 and the writings of jurists232 support such a conclusion. No general rule can be laid down as to when an intention to waive local remedies may be implied. Each case must be determined in the light of the language of the instrument and the circumstances of its adoption. Where the respondent State has agreed to submit disputes to arbitration that may arise in future with the applicant State, there is support for the view that such an agreement “does not involve the abandonment of the claim to exhaust all local remedies in cases in which one of the Contracting Parties espouses the claim of its national”.233 That there is a strong presumption against implied or tacit waiver in such a case was confirmed by the Chamber of the International Court of Justice in the ELSI case. A waiver of local remedies may be more easily implied from an arbitration agreement entered into after the dispute in question has arisen. In such a case it may be contended that such a waiver may be implied if the respondent State entered into an arbitration agreement with the applicant

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234 I.C.J. Reports 1989, p. 15. In the Pan ezys-Sklutdis Railway case, the Permanent Court of International Justice held that acceptance of the Optional Clause under art. 36, para. 2, of the Statute of the Court did not constitute implied waiver of the local remedies rule, P.C.I.J. Series A/B, 1939, No. 76, p.19 (as had been argued by Judge van Eyisinga in a dissenting opinion, ibid., pp. 35-36).

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State covering disputes relating to the treatment of nationals after the injury to the national who is the subject of the dispute and the agreement is silent on the retention of the local remedies rule.

(17) Although there is support for the proposition that the conduct of the respondent State during international proceedings may result in that State being estopped from requiring that local remedies be exhausted,235 paragraph (e) does not refer to estoppel in its formulation of the rule governing waiver on account of the uncertainty surrounding the doctrine of estoppel in international law. It is wiser to allow conduct from which a waiver of local remedies might be inferred to be treated as implied waiver.

PART FOUR

MISCELLANEOUS PROVISIONS

Article 16

Actions or procedures other than diplomatic protection

The rights of States, natural persons, legal persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles.

Commentary

(1) The customary international law rules on diplomatic protection and the rules governing the protection of human rights are complementary. The present draft articles are therefore not intended to exclude or to trump the rights of States, including both the State of nationality and States other than the State of nationality of an injured individual, to protect the individual under either customary international law or a multilateral or bilateral human rights treaty or other treaty. They are also not intended to interfere with the rights of natural and legal persons or other entities, involved in the protection of human rights, to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act.

(2) A State may protect a non-national against the State of nationality of an injured individual or a third State in inter-State proceedings under the International Covenant on Civil and Political Rights,236 the International Convention on the Elimination of All Forms of Racial Discrimination,237 the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,238 the European Convention on Human Rights,239 the American Convention on Human Rights,240 and the African Charter on Human and People’s Rights.241 The same conventions allow a State to protect its own nationals in inter-State proceedings. Moreover, customary international law allows States to protect the rights of non-nationals by protest, negotiation and, if a jurisdictional instrument so permits, legal proceedings. The view taken by the International Court of Justice in the 1966 South West Africa case242 holding that a State may not bring legal proceedings to protect the rights of non-nationals has to be qualified in the light of the articles on Responsibility of States for internationally wrongful acts.243 Article 48 (1) (b) of the articles on Responsibility of States for Internationally Wrongful Acts permits a State other than the injured State to invoke the responsibility of another State if the obligation breached is owed to the international community as a whole,244 without complying with the requirements for the exercise of diplomatic protection.245

(3) The individual is also endowed with rights and remedies to protect him or herself against the injuring State, whether the individual’s State of nationality or another State, in terms of


237 Article 11.


239 Article 24.

240 Article 45.


243 Commentary to article 48, footnote 766.

244 See further the separate opinion of Judge Simma in the Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), I.C.J. Reports 2005, paras. 35-41.

245 Article 48 (1) (b) is not subject to article 44 of the articles on Responsibility of States for internationally wrongful acts which requires a State invoking the responsibility of another State to comply with the rules relating to the nationality of claims and to exhaust local remedies. Nor is it subject to the present draft articles (cf. E. Milhau “Diplomatic Protection and Human Rights before the International Court of Justice: Re-Fashioning Tradition”, Netherlands Yearbook of International Law, vol. 35 (2005), p. 85 at pp. 103-108).
international human rights conventions. This is most frequently achieved by the right to petition an international human rights monitoring body.246

(4) Individual rights under international law may also arise outside the framework of human rights. In the La Grand case the International Court of Justice held that article 36 of the Vienna Convention on Consular Relations “creates individual rights, which by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person”;247 and in the Avena case the Court further observed “that violations of the rights of the individual under article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual”.248 A saving clause was inserted in the articles on Responsibility of States for internationally wrongful acts - article 33 - to take account of this development in international law.249

(5) The actions or procedures referred to in draft article 16 include those available under both universal and regional human rights treaties as well as any other relevant treaty. Draft article 16 does not, however, deal with domestic remedies.

(6) The right to assert remedies other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act will normally vest in a State, natural or legal person, with the term “legal person” including both corporations and other legal persons of the kind contemplated in draft article 13. However, there may be “other legal entities” not enjoying legal personality that may be endowed with the right to bring claims for injuries suffered as a result of an internationally wrongful act. Loosely-formed victims’ associations provide an example of such “another entity” which have on occasion been given standing before international bodies charged with the enforcement of human rights. Intergovernmental bodies may also in certain circumstances belong to this category; so too may national liberation movements.

(7) Draft article 16 makes it clear that the present draft articles are without prejudice to the rights that States, natural and legal persons or other entities may have to secure redress for injury suffered as a result of an internationally wrongful act by procedures other than diplomatic protection. Where, however, a State resorts to such procedures it does not necessarily abandon its right to exercise diplomatic protection in respect of a person if that person should be a national or person referred to in draft article 8.

Article 17

Special rules of international law

The present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments.

Commentary

(1) Some treaties, particularly those dealing with the protection of foreign investment, contain special rules on the settlement of disputes which exclude or depart substantially from the rules governing diplomatic protection. Such treaties abandon or relax the conditions relating to the exercise of diplomatic protection, particularly the rules relating to the nationality of claims and the exhaustion of local remedies. Bilateral investment treaties (BITs) and the multilateral Convention on the Settlement of Investment Disputes between States and Nationals of Other States are the primary examples of such treaties.

(2) Today foreign investment is largely regulated and protected by BITs.250 The number of BITs has grown considerably in recent years and it is today estimated that there are nearly 2,000 such agreements in existence. An important feature of the BIT is its procedure for the settlement of investment disputes. Some BITs provide for the direct settlement of the investment dispute between the investor and the host State, before either an ad hoc tribunal or a tribunal established


247 La Grand (Germany v. United States of America), at p. 494, para. 77.

248 Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America), at p. 26, para. 40.

249 This article reads: “This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State”.

250 This was acknowledged by the International Court of Justice in the Barcelona Traction case, at p. 47, para. 90.
by the International Centre for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Other BITs provide for the settlement of investment disputes by means of arbitration between the State of nationality of the investor (corporation or shareholder) and the host State over the interpretation or application of the relevant provision of the BIT. The dispute settlement procedures provided for in BITs and ICSID offer greater advantages to the foreign investor than the customary international law system of diplomatic protection, as they give the investor direct access to international arbitration, avoid the political uncertainty inherent in the discretionary nature of diplomatic protection and dispense with the conditions for the exercise of diplomatic protection.\textsuperscript{351}

(3) Draft article 17 makes it clear that the present draft articles do not apply to the alternative special regime for the protection of foreign investors provided for in bilateral and multilateral investment treaties. The provision is formulated so that the draft articles do not apply “to the extent that” they are inconsistent with the provisions of a BIT. To the extent that the draft articles remain consistent with the BIT in question, they continue to apply.

(4) Draft article 17 refers to “treaty provisions” rather than to “treaties” as treaties other than those specifically designed for the protection of investments may regulate the protection of investments, such as treaties of Friendship, Commerce and Navigation.

**Article 18**

Protection of ships’ crews

The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act.

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\textsuperscript{351} Article 27 (1) of the ICSID Convention provides: “No contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.”


\textsuperscript{253} Ross v. McIntyre, 140 U.S. 453 (1891).
communications and consular regulations of the United States. Doubts have, however, been raised, including by the United States, as to whether this practice provides evidence of a customary rule.

(4) International arbitral awards are inconclusive on the right of a State to extend protection to non-national seamen, but tend to lean in favour of such right rather than against it. In McCready (US) v. Mexico the umpire, Sir Edward Thornton, held that “seamen serving in the naval or mercantile marine under a flag not their own are entitled, for the duration of that service, to the protection of the flag under which they serve”. In the “I’m Alone” case, which arose from the sinking of a Canadian vessel by a United States coast guard ship, the Canadian Government successfully claimed compensation on behalf of three non-national crew members, asserting that where a claim was on behalf of a vessel, members of the crew were to be deemed, for the purposes of the claim, to be of the same nationality as the vessel. In the Reparation for Injuries advisory opinion two judges, in their separate opinions, accepted the right of a State to exercise protection on behalf of alien crew members.

(5) In 1999, the International Tribunal for the Law of the Sea handed down its decision in The MV “Saiga” (No. 2) case (Saint Vincent and the Grenadines v. Guinea) which provides support for the right of the flag State to seek redress for non-national crew members. The dispute in this case arose out of the arrest and detention of the Saiga by Guinea, while it was supplying oil to fishing vessels off the coast of Guinea. The Saiga was registered in St. Vincent and the Grenadines (“St. Vincent”) and its master and crew were Ukrainian nationals. There were also three Senegalese workers on board at the time of the arrest. Following the arrest, Guinea detained the ship and crew. In proceedings before the International Tribunal for the Law of the Sea, Guinea objected to the admissibility of St. Vincent’s claim, inter alia, on the ground that the injured crew members were not nationals of St. Vincent. The Tribunal dismissed these challenges to the admissibility of the claim and held that Guinea had violated the rights of St. Vincent by arresting and detaining the ship and its crew. It ordered Guinea to pay compensation to St. Vincent for damages to the Saiga and for injury to the crew.

(6) Although the Tribunal treated the dispute mainly as one of direct injury to St. Vincent, the Tribunal’s reasoning suggests that it also saw the matter as a case involving the protection of the crew something akin to, but different from, diplomatic protection. Guinea clearly objected to the admissibility of the claim in respect of the crew on the ground that it constituted a claim for diplomatic protection in respect of non-nationals of St. Vincent. St. Vincent, equally clearly, insisted that it had the right to protect the crew of a ship flying its flag “irrespective of their nationality”. In dismissing Guinea’s objection the Tribunal stated that the United Nations Convention on the Law of the Sea in a number of relevant provisions, including article 292, drew no distinction between nationals and non-nationals of the flag State. It stressed that “the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant”.

(7) There are cogent policy reasons for allowing the flag State to seek redress for the ship’s crew. This was recognized by the Law of the Sea Tribunal in Saiga when it called attention to “the transient and multinational composition of ships’ crews” and stated that large ships “could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such a person is a national, undue hardship would ensue”. Practical considerations relating to the bringing of claims should not be

258 AHIL vol. 29 (1935), 326.
overlooked. It is much easier and more efficient for one State to seek redress on behalf of all crew members than to require the States of nationality of all crew members to bring separate claims on behalf of their nationals.

(8) Support for the right of the flag State to seek redress for the ship’s crew is substantial and justified. It cannot, however, be categorized as diplomatic protection. Nor should it be seen as having replaced diplomatic protection. Both diplomatic protection by the State of nationality and the right of the flag State to seek redress for the crew should be recognized, without priority being accorded to either. Ships’ crews are often exposed to hardships emanating from the flag State, in the form of poor working conditions, or from third States, in the event of the ship being arrested. In these circumstances they should receive the maximum protection that international law can offer.

(9) The right of the flag State to seek redress for the ship’s crew is not limited to redress for injuries sustained during or in the course of an injury to the vessel but extends also to injuries sustained in connection with an injury to the vessel resulting from an internationally wrongful act, that is as a consequence of the injury to the vessel. Thus such a right would arise where members of the ship’s crew are illegally arrested and detained after the illegal arrest of the ship itself.

Article 19

Recommended practice

A State entitled to exercise diplomatic protection according to the present draft articles, should:

(a) Give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred;

(b) Take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the repairation to be sought; and

(c) Transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.

Commentary

(1) There are certain practices on the part of States in the field of diplomatic protection which have not yet acquired the status of customary rules and which are not susceptible to transformation into rules of law in the exercise of progressive development of the law. Nevertheless they are desirable practices, constituting necessary features of diplomatic protection, that add strength to diplomatic protection as a means for the protection of human rights and foreign investment. These practices are recommended to States for their consideration in the exercise of diplomatic protection in draft article 19, which recommends that States “should” follow certain practices. The use of recommendatory, and not prescriptive, language of this kind is not unknown to treaties, although it cannot be described as a common feature of treaties.268

(2) Subparagraph (a), recommends to States that they should give consideration to the possibility of exercising diplomatic protection on behalf of a national who suffers significant injury. The protection of human beings by means of international law is today one of the principal goals of the international legal order, as was reaffirmed by the 2005 World Summit Outcome resolution adopted by the General Assembly on 24 October 2005.269 This protection may be achieved by many means, including consular protection, resort to international human rights treaties mechanisms, criminal prosecution or action by the Security Council or other international bodies - and diplomatic protection. Which procedure or remedy is most likely to achieve the goal of effective protection will, inevitably, depend on the circumstances of each case. When the protection of foreign nationals is in issue, diplomatic protection is an obvious remedy to which States should give serious consideration. After all it is the remedy with the longest history and has a proven record of effectiveness. Draft article 19, subparagraph (a), serves as a reminder to States that they should consider the possibility of resorting to this remedial procedure.

(3) A State is not under international law obliged to exercise diplomatic protection on behalf of a national who has been injured as a result of an internationally wrongful act attributable to

268 Article 36 (3) of the Charter of the United Nations, for instance, provides that in recommending appropriate procedures for the settlement of disputes, “the Security Council should also take into consideration that legal disputes should be 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” (emphasis added). Conventions on the law of the sea also employ the term “should” rather than “shall”. Article 3 of the 1958 Geneva Convention on the High Seas, United Nations, Treaty Series, vol. 450, p. 11, provides that “in order to enjoy freedom of the seas on equal terms with coastal States, States having no sea coast should have free access to the sea” (emphasis added). See, too, articles 27, 28, 43 and 123 of the 1982 United Nations Convention on the Law of the Sea.

269 A/RES/60/1, paras. 119-120, 138-140.
another State. The discretionary nature of the State’s right to exercise diplomatic protection is
affirmed by draft article 2 of the present draft articles and has been asserted by the International
Court of Justice and national courts, as shown in the commentary to draft article 2. Despite
this there is growing support for the view that there is some obligation, however imperfect, on
States, either under international law or national law, to protect their nationals abroad when they
are subjected to significant human rights violations. The Constitutions of many States recognize
the right of the individual to receive diplomatic protection for injuries suffered abroad, which
must carry with it the corresponding duty of the State to exercise protection. Moreover, a
number of national court decisions indicate that although a State has a discretion whether to
exercise diplomatic protection or not, there is an obligation on that State, subject to judicial
review, to do something to assist its nationals, which may include an obligation to give due
consideration to the possibility of exercising diplomatic protection. In Kaunda and Others v.
President of the Republic of South Africa the South Africa Constitutional Court stated that:
“there may be a duty on government, consistent with its obligations under international
law, to take action to protect one of its citizens against a gross abuse of international
human rights norms. A request to government for assistance in such circumstances
where the evidence is clear would be difficult, and in extreme cases possibly impossible
to refuse. It is unlikely that such a request would ever be refused by government, but if it
were, the decision would be justiciable and a court would order the government to take
appropriate action.”

In these circumstances it is possible to seriously suggest that international law already recognizes
the existence of some obligation on the part of a State to consider the possibility of exercising
diplomatic protection on behalf of a national who has suffered a significant injury abroad. If
customary international law has not yet reached this stage of development then draft article 19,
subparagraph (a), must be seen as an exercise in progressive development.

(4) Subparagraph (b), provides that a State “should”, in the exercise of diplomatic protection,
take into account, wherever feasible, the views of injured persons with regard to resort to
diplomatic protection and the reparation to be sought”. In practice States exercising diplomatic
protection do have regard to the moral and material consequences of an injury to an alien in
assessing the damages to be claimed. In order to do this it is obviously necessary to consult
with the injured person. So, too, with the decision whether to demand satisfaction, restitution
or compensation by way of reparation. This has led some scholars to contend that the admonition
contained in draft article 19, subparagraph (b), is already a rule of customary international law.
If it is not, draft article 19, subparagraph (b), must also be seen as an exercise in progressive
development.

(5) Subparagraph (c) provides that States should transfer any compensation received from
the responsible State in respect of an injury to a national to the injured national. This
recommendation is designed to encourage the widespread perception that States have an absolute
discretion in such matters and are under no obligation to transfer moneys received for a claim
based on diplomatic protection to the injured national. This perception has its roots in the
Mavrommatis rule and a number of judicial pronouncements. In terms of the Mavrommatis
Palestine Concessions dictum a State asserts its own right in exercising diplomatic protection
and becomes “the sole claimant”. Consequently, logic dictates that no restraints are placed on
the State, in the interests of the individual, in the settlement of the claim or the payment of any
compensation received. That the State has “complete freedom of action” in its exercise of
diplomatic protection is confirmed by the Barcelona Traction case. Despite the fact that the
logic of Mavrommatis is undermined by the practice of calculating the amount of damages

270 Barcelona Traction case, at p. 44.
278 I.C.J. Reports 1970, p. 3 at p. 44.
claimed on the basis of the injury suffered by the individual, which is claimed to be a rule of customary international law, the view persists that the State has an absolute discretion in the disposal of compensation received. This is illustrated by the dictum of Umpire Parker in the US-German Mixed Claims Commission in Administrative Decision V:

“In exercising such control [the nation] is governed not only by the interest of the particular claimant but by the larger interests of the whole people of the nation and must exercise an untrammeled discretion in determining when and how the claim will be presented and pressed, or withdrawn or compromised and the private owner will be bound by the action taken. Even if payment is made to the expounding nation in pursuance of the award, it has complete control over the fund so paid to and held by it and may, to prevent fraud, correct a mistake or protect the national honour, at its election return the fund to the nation paying it or otherwise dispose of it.”

Similar statements are to be found in a number of English judicial decisions, which are seen by some to be an accurate statement of international law.

(6) It is by no means clear that State practice accords with the above view. On the one hand, States agree to lump sum settlements in respect of multiple individual claims which in practice result in individual claims receiving considerably less than was claimed. On the other hand, some States have enacted legislation to ensure that compensation awards are fairly distributed to individual claimants. Moreover, there is clear evidence that in practice States do pay money received in diplomatic claims to their injured nationals. In Administrative Decision V, Umpire Parker stated:

“... But where a demand is made on behalf of a designated national, and an award and payment is made on that specific demand, the fund so paid is not a national fund in the sense that the title vests in the nation receiving it entirely free from any obligation to account to the private claimant, on whose behalf the claim was asserted and paid and who is the real owner thereof. Broad and misleading statements susceptible of this construction are found in cases where lump-sum awards and payments have been made to the demanding nation covering numerous claims put forward by it and where the tribunal making the award did not undertake to adjudicate each claim or to allocate any specified amount to any designated claim. It is not believed that any case can be cited in which an award has been made by an international tribunal in favour of the demanding nation on behalf of its designated national in which the nation receiving payment of such award has, in the absence of fraud or mistake, hesitated to account to the national designated, or those claiming under him, for the full amount of the award received. So far as the United States is concerned it would seem that the Congress has treated funds paid the nation in satisfaction of specific claims as held ‘in trust for citizens of the United States or others’."

That this is the practice of States is confirmed by scholars. Further evidence of the erosion of the State’s discretion is to be found in the decisions of arbitral tribunals which prescribe how the award is to be divided. Moreover in 1994 the European Court of Human Rights decided in Beaumartin v. France that an international agreement making provision for compensation could give rise to an enforceable right on the part of the injured persons to compensation.

279 Chorow Factory case (Merits) P.C.I.J. Reports 1928, Series A, No. 17, at p. 28.
280 See the authors cited in footnote 276 above.
(7) Subparagraph (c) acknowledges that it would not be inappropriate for a State to make reasonable deductions from the compensation transferred to injured persons. The most obvious justification for such deductions would be to recoup the costs of State efforts to obtain compensation for its nationals, or to recover the cost of goods or services provided by the State to them.

(8) Although there is some support for curtailing the absolute right of the State to withhold payment of compensation received to the injured national in national legislation, judicial decisions and doctrine, this probably does not constitute a settled practice. Nor is there any sense of obligation on the part of States to limit their freedom of disposal of compensation awards. On the other hand, public policy, equity and respect for human rights support the curtailment of the States’ discretion in the disbursement of compensation. It is against this background that draft article 19, subparagraph (c), has been adopted. While it is an exercise in progressive development it is supported by State practice and equity.
Convention relating to the Status of Refugees, 1951
Treaty Series

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VOLUME 189

Recueil des Traités

Traité et accords internationaux
enregistrés
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au Secrétariat de l'Organisation des Nations Unies

No. 2545

AUSTRALIA, BELGIUM, DENMARK,
FEDERAL REPUBLIC OF GERMANY,
LUXEMBOURG, etc.


Convention relating to the Status of Refugees (with schedule). Signed at Geneva, on 28 July 1951

Official texts: English and French.
Registered ex officio on 22 April 1954.

AUSTRALIE, BELGIQUE, DANEMARK,
RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE,
LUXEMBOURG, etc.


Convenitio relative au statut des réfugiés (avec annexe). Signée à Genève, le 28 juillet 1951

Textes officiels anglais et français.
Enregistrés d'office le 22 avril 1954.
No. 2545. FINAL ACT OF THE UNITED NATIONS CONFERENCE OF PLENIPOTENTIARIES ON THE STATUS OF REFUGEES AND STATELESS PERSONS. HELD AT GENEVA, FROM 2 JULY 1951 TO 25 JULY 1951

I

The General Assembly of the United Nations, by Resolution 429 (V) of 14 December 1950,1 decided to convene in Geneva a Conference of Plenipotentiaries to complete the drafting of, and to sign, a Convention2 relating to the Status of Refugees and a Protocol relating to the Status of Stateless Persons.


The Governments of the following twenty-six States were represented by delegates who all submitted satisfactory credentials or other communications of appointment authorizing them to participate in the Conference:

- Australia
- Austria
- Belgium
- Brazil
- Canada
- Colombia
- Denmark
- Egypt
- France
- Federal Republic of Germany
- Greece
- Holy See
- Iraq
- Israel
- Italy
- Luxembourg
- Monaco
- Netherlands
- Norway
- Sweden
- Switzerland (the Swiss delegation also represented Liechtenstein)
- Turkey
- United Kingdom of Great Britain and Northern Ireland
- United States of America
- Venezuela
- Yugoslavia

The Governments of the following two States were represented by observers:

- Cuba
- Iran

Pursuant to the request of the General Assembly, the United Nations High Commissioner for Refugees participated, without the right to vote, in the deliberations of the Conference.

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2 See p. 150 of this volume.
Representatives of Non-Governmental Organizations which have been granted consultative status by the Economic and Social Council as well as of those entered by the Secretary-General on the Register referred to in Resolution 288 B (X)\(^1\) of the Economic and Social Council, paragraph 17, had under the rules of procedure adopted by the Conference the right to submit written or oral statements to the Conference.

The Conference elected Mr. Knud Larsen, of Denmark, as President, and Mr. A. Herment, of Belgium, and Mr. Talat Miras, of Turkey, as Vice-Presidents.

At its second meeting, the Conference, acting on a proposal of the representative of Egypt, unanimously decided to address an invitation to the Holy See to designate a plenipotentiary representative to participate in its work. A representative of the Holy See took his place at the Conference on 10 July 1951.

The Conference adopted as its agenda the Provisional Agenda drawn up by the Secretary-General (A/CONF.2/2/Rev.1). It also adopted the Provisional Rules of Procedure drawn up by the Secretary-General, with the addition of a provision which authorized a representative of the Council of Europe to be present at the Conference without the right to vote and to submit proposals (A/CONF.2/3/Rev.1).

In accordance with the Rules of Procedure of the Conference, the President and Vice-Presidents examined the credentials of representatives and on 17 July 1951 reported to the Conference the results of such examination, the Conference adopting the report.

The Conference used as the basis of its discussions the draft Convention relating to the Status of Refugees and the draft Protocol relating to the Status of Stateless Persons prepared by the ad hoc Committee on Refugees and Stateless Persons at its second session held in Geneva from 14 to 25 August 1950, with the exception of the preamble and Article 1 (Definition of the term "refugee") of the draft Convention. The text of the preamble before the Conference was that which was adopted by the Economic and Social Council on 11 August 1950 in Resolution 319 B II (XI). The text of Article 1 before the Conference was that recommended by the General Assembly on 14 December 1950 and contained in the Annex to Resolution 429 (V). The latter was a modification of the text as it had been adopted by the Economic and Social Council in Resolution 319 B II (XI).*

The Conference adopted the Convention relating to the Status of Refugees in two readings. Prior to its second reading it established a Style Committee composed of the President and the representatives of Belgium, France, Israel, Italy, the United Kingdom of Great Britain and Northern Ireland and the United States of America, together with the High Commissioner for Refugees, which elected as its Chairman Mr. G. Warren, of the United States of America. The Style Committee redrafted the text which had been adopted by the Conference on first reading, particularly from the point of view of language and of concordance between the English and French texts.

The Convention was adopted on 25 July by 24 votes to none with no abstentions and opened for signature at the European Office of the United Nations on 28 July to 31 August 1951. It will be re-opened for signature at the permanent headquarters of the United Nations in New York from 17 September 1951 to 31 December 1952.

The English and French texts of the Convention, which are equally authentic, are appended to this Final Act.

II

The Conference decided, by 17 votes to 3 with 3 abstentions, that the titles of the chapters and of the articles of the Convention are included for practical purposes and do not constitute an element of interpretation.

III

With respect to the draft Protocol relating to the Status of Stateless Persons, the Conference adopted the following resolution:

"THE CONFERENCE,

"HAVING CONSIDERED the draft Protocol relating to the Status of Stateless Persons,

"CONSIDERING that the subject still requires more detailed study,

"DECIDES not to take a decision on the subject at the present Conference and refers the draft Protocol back to the appropriate organs of the United Nations for further study."

IV

The Conference adopted unanimously the following recommendations:

A

"THE CONFERENCE,

"CONSIDERING that the issue and recognition of travel documents is necessary to facilitate the movements of refugees, and in particular their resettlement,

"URGES Governments which are parties to the Inter-Governmental Agreement on Refugee Travel Documents signed in London on 15 October

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* The texts referred to in the paragraph above are contained in document A/CONF.2/1.
1946, or which recognize travel documents issued in accordance with the Agreement, to continue to issue or to recognize such travel documents, and to extend the issue of such documents to refugees as defined in article 1 of the Convention relating to the Status of Refugees or to recognize the travel documents so issued to such persons, until they shall have undertaken obligations under article 28 of the said Convention.”

B

"THE CONFERENCE,

"CONSIDERING that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee, and that such unity is constantly threatened, and

"NOTING with satisfaction that, according to the official commentary of the ad hoc Committee on Statelessness and Related Problems (E/1618, p. 40) the rights granted to a refugee are extended to members of his family,

"RECOMMENDS Governments to take the necessary measures for the protection of the refugee’s family, especially with a view to:

"(1) Ensuring that the unity of the refugee’s family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country;

"(2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption."

C

"THE CONFERENCE,

"CONSIDERING that, in the moral, legal and material spheres, refugees need the help of suitable welfare services, especially that of appropriate non-governmental organizations;

"RECOMMENDS Governments and intergovernmental bodies to facilitate, encourage and sustain the efforts of properly qualified organizations."

D

"THE CONFERENCE,

"CONSIDERING that many persons still leave their country of origin for reasons of persecution and are entitled to special protection on account of their position,


"RECOMMENDS that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement.”

E

"THE CONFERENCE

"EXPRESSES the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.”

IN WITNESS WHEREOF the President, Vice-Presidents and the Executive Secretary of the Conference have signed this Final Act.

DONE at Geneva this twenty-eighth day of July one thousand nine hundred and fifty-one in a single copy in the English and French languages, each text being equally authentic. Translations of this Final Act into Chinese, Russian and Spanish will be prepared by the Secretary-General of the United Nations, who will, on request, send copies thereof to each of the Governments invited to attend the Conference.

The President of the Conference:
Knud Larsen

The Vice-Presidents of the Conference:
Herment
Talat Miras

The Executive Secretary of the Conference:
John P. Humphrey
CONVENTION RELATING TO THE STATUS OF REFUGEES. SIGNED AT GENEVA, ON 28 JULY 1951

Preamble

The High Contracting Parties,

CONSIDERING that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

CONSIDERING that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms,

CONSIDERING that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope and the protection accorded by such instruments by means of a new agreement,

CONSIDERING that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,

Article 1

DEFINITION OF THE TERM "REFUGEE"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

1. Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

2. As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

In the case of a person who has more than one nationality, the term “the country of his nationality” shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, “without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

B. (1) For the purposes of this Convention, the words “events occurring before 1 January 1951” in article 1, section A, shall be understood to mean either

(a) “events occurring in Europe before 1 January 1951”; or
(b) “events occurring in Europe or elsewhere before 1 January 1951”;
and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

(2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations.

C. This Convention shall cease to apply to any person falling under the terms of section A if:

(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
(2) Having lost his nationality, he has voluntarily reacquired it; or
(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
(5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Article 2

GENERAL OBLIGATIONS

Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

Article 3

NON-DISCRIMINATION

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

Article 4

RELIGION

The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to
freedom to practice their religion and freedom as regards the religious education of their children.

Article 5

RIGHTS GRANTED APART FROM THIS CONVENTION

Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.

Article 6

THE TERM “IN THE SAME CIRCUMSTANCES”

For the purpose of this Convention, the term “in the same circumstances” implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling.

Article 7

EXEMPTION FROM RECIPROCITY

1. Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.
2. After a period of three years’ residence, all refugees shall enjoy exemption from legislative reciprocity in the territory of the Contracting States.
3. Each Contracting State shall continue to accord to refugees the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State.
4. The Contracting States shall consider favourably the possibility of according to refugees, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to paragraphs 2 and 3, and to extending exemption from reciprocity to refugees who do not fulfil the conditions provided for in paragraphs 2 and 3.
5. The provisions of paragraphs 2 and 3 apply both to the rights and benefits referred to in articles 13, 18, 19, 21 and 22 of this Convention and to rights and benefits for which this Convention does not provide.

Article 8

EXEMPTION FROM EXCEPTIONAL MEASURES

With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article, shall, in appropriate cases, grant exemptions in favour of such refugees.

Article 9

PROVISIONAL MEASURES

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

Article 10

CONTINUITY OF RESIDENCE

1. Where a refugee has been forcibly displaced during the Second World War and removed to the territory of a Contracting State, and is resident there, the period of such enforced sojourn shall be considered to have been lawful residence within that territory.
2. Where a refugee has been forcibly displaced during the Second World War from the territory of a Contracting State and has, prior to the date of entry into force of this Convention, returned there for the purpose of taking up residence, the period of residence before and after such enforced displacement shall be regarded as one uninterrupted period for any purposes for which uninterrupted residence is required.

Article 11

REFUGEE SEAMEN

In the case of refugees regularly serving as crew members on board a ship flying the flag of a Contracting State, that State shall give sympathetic consideration to their establishment on its territory and the issue of travel documents to them or their temporary admission to its territory particularly with a view to facilitating their establishment in another country.
Chapter II

JURIDICAL STATUS

Article 12

PERSONAL STATUS

1. The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.

2. Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee.

Article 13

MOVABLE AND IMMOVABLE PROPERTY

The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.

Article 14

ARTISTIC RIGHTS AND INDUSTRIAL PROPERTY

In respect of the protection of industrial property, such as inventions, designs or models, trade marks, trade names, and of rights in literary, artistic and scientific works, a refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other Contracting State, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence.

Article 15

RIGHT OF ASSOCIATION

As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.

Article 16

ACCESS TO COURTS

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from cautio judicatum solvi.

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

Chapter III

GAINFUL EMPLOYMENT

Article 17

WAGE-EARNING EMPLOYMENT

1. The Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.

2. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfils one of the following conditions:

(a) He has completed three years' residence in the country.

(b) He has a spouse possessing the nationality of the country of residence.

(c) He has one or more children possessing the nationality of the country of residence.

3. The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.
**Article 18**

**SELF-EMPLOYMENT**

The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.

**Article 19**

**LIBERAL PROFESSIONS**

1. Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

2. The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible.

**CHAPTER IV**

**WELFARE**

**Article 20**

**RATIONING**

Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals.

**Article 21**

**HOUSING**

As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

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**Article 22**

**PUBLIC EDUCATION**

1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

2. The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

**Article 23**

**PUBLIC RELIEF**

The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

**Article 24**

**LABOUR LEGISLATION AND SOCIAL SECURITY**

1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters:

   (a) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;

   (b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:

      (i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;
(ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.

2. The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.

3. The Contracting States shall extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

4. The Contracting States will give sympathetic consideration to extending to refugees so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non-contracting States.

Chapter V
ADMINISTRATIVE MEASURES

Article 25
ADMINISTRATIVE ASSISTANCE

1. When the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority.

2. The authority or authorities mentioned in paragraph 1 shall deliver or cause to be delivered under their supervision to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities.

3. Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities, and shall be given credence in the absence of proof to the contrary.

4. Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.

5. The provisions of this article shall be without prejudice to articles 27 and 28.

Article 26
FREEDOM OF MOVEMENT

Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.

Article 27
IDENTITY PAPERS

The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.

Article 28
TRAVEL DOCUMENTS

1. The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

2. Travel documents issued to refugees under previous international agreements by parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article.

Article 29
FISCAL CHARGES

1. The Contracting States shall not impose upon refugees duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.

2. Nothing in the above paragraphs shall prevent the application to refugees of the laws and regulations concerning charges in respect of the issue to aliens of administrative documents including identity papers.
Article 30
TRANSFER OF ASSETS
1. A Contracting State shall, in conformity with its laws and regulations, permit refugees to transfer assets which they have brought into its territory, to another country where they have been admitted for the purposes of resettlement.

2. A Contracting State shall give sympathetic consideration to the application of refugees for permission to transfer assets wherever they may be and which are necessary for their resettlement in another country to which they have been admitted.

Article 31
REFUGEES UNLAWFULLY IN THE COUNTRY OF REFUGE
1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Article 32
EXPULSION
1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33
PROHIBITION OF EXPULSION OR RETURN ("REFOULEMENT")
1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Article 34
NATURALIZATION
The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

Chapter VI
EXECUTORY AND TRANSITORY PROVISIONS

Article 35
CO-OPERATION OF THE NATIONAL AUTHORITIES WITH THE UNITED NATIONS
1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:

(a) the condition of refugees,
(b) the implementation of this Convention, and
(c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.
Article 36

INFORMATION ON NATIONAL LEGISLATION

The Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention.

Article 37

RELATION TO PREVIOUS CONVENTIONS

Without prejudice to article 28, paragraph 2, of this Convention, this Convention replaces, as between parties to it, the Arrangements of 5 July 1922, 1 31 May 1924, 12 May 1926, 2 30 June 1928, 3 and 30 July 1935, the Conventions of 28 October 1933 4 and 10 February 1938, 5 the Protocol of 14 September 1939 6 and the Agreement of 15 October 1946. 7

CHAPTER VII

FINAL CLAUSES

Article 38

SETTLEMENT OF DISPUTES

Any dispute between parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

Article 39

SIGNATURE, RATIFICATION AND ACCESSION

1. This Convention shall be opened for signature at Geneva on 28 July 1951 and shall thereafter be deposited with the Secretary-General of the United Nations. It shall be open for signature at the European Office of the United Nations from

28 July to 31 August 1951 and shall be re-opened for signature at the Headquarters of the United Nations from 17 September 1951 to 31 December 1952.

2. This Convention shall be open for signature on behalf of all States Members of the United Nations, and also on behalf of any other State invited to attend the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons or to which an invitation to sign will have been addressed by the General Assembly. It shall be ratified and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. This Convention shall be open from 28 July 1951 for accession by the States referred to in paragraph 2 of this article. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 40

TERRITORIAL APPLICATION CLAUSE

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article 41

FEDERAL CLAUSE

In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of Parties which are not Federal States;
(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of states, provinces or cantons at the earliest possible moment.

(c) A Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention showing the extent to which effect has been given to that provision by legislative or other action.

**Article 42**

**RESERVATIONS**

1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1), 23, 36-46 inclusive.

2. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

**Article 43**

**ENTRY INTO FORCE**

1. This Convention shall come into force on the ninetieth day following the day of deposit of the sixth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the sixth instrument of ratification or accession, the Convention shall enter into force on the ninetieth day following the date of deposit by such State of its instrument of ratification or accession.

**Article 44**

**DENUNCIATION**

1. Any Contracting State may denounced this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. Such denunciation shall take effect for the Contracting State concerned one year from the date upon which it is received by the Secretary-General of the United Nations.

3. Any State which has made a declaration or notification under article 40 may, at any time thereafter, by a notification to the Secretary-General of the United Nations, declare that the Convention shall cease to extend to such territory one year after the date of receipt of the notification by the Secretary-General.

**Article 45**

**REVISION**

1. Any Contracting State may request revision of this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall recommend the steps, if any, to be taken in respect of such request.

**Article 46**

**NOTIFICATIONS BY THE SECRETARY-GENERAL OF THE UNITED NATIONS**

The Secretary-General of the United Nations shall inform all Members of the United Nations and non-member States referred to in article 39:

(a) Of declarations and notifications in accordance with section B of article 1;

(b) Of signatures, ratifications and accessions in accordance with article 39;

(c) Of declarations and notifications in accordance with article 40;

(d) Of reservations and withdrawals in accordance with article 42;

(e) Of the date on which this Convention will come into force in accordance with article 43;

(f) Of denunciations and notifications in accordance with article 44;

(g) Of requests for revision in accordance with article 45.

IN FAITH WHEREOF the undersigned, duly authorized, have signed this Convention on behalf of their respective Governments.

DONE at Geneva, this twenty-eighth day of July, one thousand nine hundred and fifty-one, in a single copy, of which the English and French texts are equally authentic and which shall remain deposited in the archives of the United Nations, and certified true copies of which shall be delivered to all Members of the United Nations and to the non-member States referred to in article 39.
Convention relating to the Status of Stateless Persons, 1954
Treaty Series

Treaties and international agreements
registered
or filed and recorded
with the Secretariat of the United Nations

VOLUME 360

Recueil des Traités

Traités et accords internationaux
enregistrés
ou classés et inscrits au répertoire
au Secrétariat de l'Organisation des Nations Unies

No. 5158

BELGIUM, DENMARK, FRANCE,
ISRAEL, NORWAY, etc.


Convention relating to the Status of Stateless Persons.
Done at New York, on 28 September 1954

Official texts: English, French and Spanish.
Registered ex officio on 6 June 1960.

BELGIQUE, DANEMARK, FRANCE,
ISRAËL, NORVÈGE, etc.


Convention relative au statut des apatrides. Faite à New-York, le 28 septembre 1954

Textes officiels anglais, français et espagnol.
Enregistrés d'office le 6 juin 1960.
No. 5158. FINAL ACT OF THE UNITED NATIONS CONFERENCE ON THE STATUS OF STATELESS PERSONS. DONE AT NEW YORK, ON 28 SEPTEMBER 1954

The Economic and Social Council, on 26 April 1954 at its seventeenth session, by resolution 526 A (XVII) decided that a second conference of plenipotentiaries should be convened to revise in the light of the provisions of the Convention Relating to the Status of Refugees of 28 July 1951 and of the observations made by Governments the draft Protocol relating to the Status of Stateless Persons prepared by an Ad Hoc Committee of the Economic and Social Council in 1950 and to open the instrument for signature.


The Governments of the following twenty-seven States were represented by delegates all of whom submitted satisfactory credentials or other communications of appointment authorizing them to participate in the Conference:

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<tr>
<th>Australia</th>
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<td>Belgium</td>
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<td>Costa Rica</td>
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<td>El Salvador</td>
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The Governments of the following five States were represented by observers:

Argentina, Egypt, Greece, Indonesia, Japan.

A representative of the United Nations High Commissioner for Refugees participated, without the right to vote, in the deliberations of the Conference.

The Conference decided to invite interested specialized agencies to participate in the proceedings without the right to vote. The International Labour Organisation was accordingly represented.


The Conference also decided to permit representatives of non-governmental organizations which have been granted consultative status by the Economic and Social Council as well as those entered by the Secretary-General on the Register to submit written or oral statements to the Conference.

Representatives of the following non-governmental organizations were present as observers:

**Category A**
- International Confederation of Free Trade Unions
- International Federation of Christian Trade Unions

**Category B**
- Agudas Israel
- Commission of the Churches on International Affairs
- Consultative Council of Jewish Organizations
- Friends’ World Committee for Consultation
- International Conference of Catholic Charities
- International League for the Rights of Man
- World Jewish Congress
- World’s Alliance of Young Men’s Christian Associations

**Organizations on the Register**
- Lutheran World Federation

The Conference elected Mr. Knud Larsen of Denmark as President and Mr. A. Hermen of Belgium, and Mr. Jayme de Barros Gomes of Brazil as Vice-Presidents.

The Conference adopted as its agenda the Provisional Agenda drawn up by the Secretary-General (E/CONF.17/2). It also adopted the draft Rules of Procedure drawn up by the Secretary-General (E/CONF.17/2) excepting rule 5, which it decided to delete (E/CONF.17/2/Add.1). At its 12th meeting the Conference decided to amend rule 7 (E/CONF.17/2/Add.2).

The Conference appointed (i) a Drafting Committee on the Definition of the Term “Stateless Person”, which was composed of the President of the Conference and the representatives of Australia, Belgium, Brazil, the Federal Republic of Germany, France, Israel and the United Kingdom of Great Britain and Northern Ireland; (ii) an Ad Hoc Committee on the Question of the Travel Document for Stateless Persons composed of the President of the Conference and the representatives of Belgium, Brazil, France, the Federal Republic of Germany, the United Kingdom and Yugoslavia; and (iii) a Style Committee composed of the President of the Conference and the representatives of Belgium, France, Guatemala and the United Kingdom.

The Conference decided, by 12 votes to none with 3 abstentions, to prepare an independent convention dealing with the status of stateless persons rather than a protocol to the 1951 Convention Relating to the Status of Refugees.

The Convention was adopted on 23 September 1954 by 19 votes to none with 2 abstentions, and opened for signature at the Headquarters of the United Nations.

The English, French and Spanish texts of the Convention, which are equally authentic, are appended to this Final Act.

II

The Conference unanimously decided that the titles of the chapters and of the articles of the Convention are included for practical purposes and do not constitute an element of interpretation.

III

The Conference adopted the following recommendation by 16 votes to 1 with 4 abstentions:

"The Conference,

"Recommends that each Contracting State, when it recognizes as valid the reasons for which a person has renounced the protection of the State of which he is a national, consider sympathetically the possibility of according to that person the treatment which the Convention accords to stateless persons; and

"Recommends further that, in cases where the State in whose territory the person resides has decided to accord the treatment referred to above, other Contracting States also accord him the treatment provided for by the Convention."

IV

The Conference unanimously adopted the following resolution:

"The Conference,

"Being of the opinion that Article 33 of the Convention Relating to the Status of Refugees of 1951 is an expression of the generally accepted principle that no State should expel or return a person in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion,

"Has not found it necessary to include in the Convention Relating to the Status of Stateless Persons an article equivalent to Article 33 of the Convention Relating to the Status of Refugees of 1951."

IN WITNESS WHEREOF the President, the Vice-Presidents and the Executive Secretary of the Conference have signed this Final Act.

DONE at New York this twenty-eighth day of September one thousand nine hundred and fifty-four in a single copy in the English, French and Spanish languages, each text being equally authentic. Translations of this Final Act into Chinese and Russian will be prepared by the Secretary-General of the United Nations, who will, on request, send copies thereof to each of the Governments invited to attend the Conference.
CONVENTION RELATING TO THE STATUS OF STATELESS PERSONS. DONE AT NEW YORK, ON 28 SEPTEMBER 1954

PREAMBLE

The High Contracting Parties,

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly of the United Nations have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

Considering that the United Nations has, on various occasions, manifested its profound concern for stateless persons and endeavoured to assure stateless persons the widest possible exercise of these fundamental rights and freedoms,

Considering that only those stateless persons who are also refugees are covered by the Convention relating to the Status of Refugees of 28 July 1951, and that there are many stateless persons who are not covered by that Convention,

Considering that it is desirable to regulate and improve the status of stateless persons by an international agreement,

Have agreed as follows:

1. In accordance with article 39, the Convention came into force on 6 June 1960, the ninetieth day following the day of deposit of the sixth instrument of ratification or accession in respect of the following States on behalf of which the instruments of ratification or accession (a) were deposited or the dates indicated:

- Denmark (with reservations) 17 January 1956
- France 8 March 1960
  (Applicable to the metropolitan Departments and to the Departments of Algeria, of the Oases and of Saoura, Guadaloupe, Martinique and Guiana and the five Overseas Territories (New Caledonia and dependencies, Polynesian, French Somaliland, the Congo, Archipelago and the Islands of St. Pierre and Miquelon)).
- Israel 23 December 1958
- Norway 19 November 1956

In addition, the instrument of ratification of Belgium was deposited on 27 May 1960, to take effect on 25 August 1960.

2. This Convention shall not apply:

(i) To persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance;

(ii) To persons who are recognized by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country;

(iii) To persons with respect to whom there are serious reasons for considering that:

   (a) They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;

   (b) They have committed a serious non-political crime outside the country of their residence prior to their admission to that country;

   (c) They have been guilty of acts contrary to the purposes and principles of the United Nations.

3. General obligations

Every stateless person has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

4. Non-discrimination

The Contracting States shall apply the provisions of this Convention to stateless persons without discrimination as to race, religion or country of origin.
Article 4

Religion

The Contracting States shall accord to stateless persons within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children.

Article 5

Rights granted apart from this Convention

Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to stateless persons apart from this Convention.

Article 6

The term "in the same circumstances"

For the purpose of this Convention, the term "in the same circumstances" implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a stateless person, must be fulfilled by him, with the exception of requirements which by their nature a stateless person is incapable of fulfilling.

Article 7

Exemption from reciprocity

1. Except where this Convention contains more favourable provisions, a Contracting State shall accord to stateless persons the same treatment as is accorded to aliens generally.

2. After a period of three years’ residence, all stateless persons shall enjoy exemption from legislative reciprocity in the territory of the Contracting States.

3. Each Contracting State shall continue to accord to stateless persons the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State.

4. The Contracting States shall consider favourably the possibility of according to stateless persons, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to paragraphs 2 and 3, and to extending exemption from reciprocity to stateless persons who do not fulfil the conditions provided for in paragraphs 2 and 3.

5. The provisions of paragraphs 2 and 3 apply both to the rights and benefits referred to in articles 13, 18, 19, 21 and 22 of this Convention and to rights and benefits for which this Convention does not provide.

Article 8

Exemption from exceptional measures

With regard to exceptional measures which may be taken against the person, property or interests of nationals or former nationals of a foreign State, the Contracting States shall not apply such measures to a stateless person solely on account of his having previously possessed the nationality of the foreign State in question. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article shall, in appropriate cases, grant exemptions in favour of such stateless persons.

Article 9

Provisional measures

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a stateless person and that the continuance of such measures is necessary in his case in the interests of national security.

Article 10

Continuity of residence

1. Where a stateless person has been forcibly displaced during the Second World War and removed to the territory of a Contracting State, and is resident there, the period of such enforced sojourn shall be considered to have been lawful residence within that territory.

2. Where a stateless person has been forcibly displaced during the Second World War from the territory of a Contracting State and has, prior to the date of entry into force of this Convention, returned there for the purpose of taking up residence, the period of residence before and after such enforced displacement shall be regarded as one uninterrupted period for any purposes for which uninterrupted residence is required.

Article 11

Stateless seamen

In the case of stateless persons regularly serving as crew members on board a ship flying the flag of a Contracting State, that State shall give sympathetic consideration to their establishment on its territory and the issue of travel documents to them or their temporary admission to its territory particularly with a view to facilitating their establishment in another country.
CHAPTER II

JURIDICAL STATUS

Article 12

Personal status

1. The personal status of a stateless person shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.

2. Rights previously acquired by a stateless person and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become stateless.

Article 13

Movable and immovable property

The Contracting States shall accord to a stateless person treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.

Article 14

Artistic rights and industrial property

In respect of the protection of industrial property, such as inventions, designs or models, trade marks, trade names, and of rights in literary, artistic and scientific works, a stateless person shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other Contracting State, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence.

Article 15

Right of association

As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to stateless persons lawfully staying in their territory treatment as favourable as possible, and in any event, not less favourable than that accorded to aliens generally in the same circumstances.

Chapter III

GAINFUL EMPLOYMENT

Article 17

Wage-earning employment

1. The Contracting States shall accord to stateless persons lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage in wage-earning employment.

2. The Contracting States shall give sympathetic consideration to assimilating the rights of all stateless persons with regard to wage-earning employment to those of nationals, and in particular of those stateless persons who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.

Article 18

Self-employment

The Contracting States shall accord to a stateless person lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.
Article 19
Liberal professions

Each Contracting State shall accord to stateless persons lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

CHAPTER IV
Welfare

Article 20
Rationing

Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, stateless persons shall be accorded the same treatment as nationals.

Article 21
Housing

As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to stateless persons lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

Article 22
Public education

1. The Contracting States shall accord to stateless persons the same treatment as is accorded to nationals with respect to elementary education.

2. The Contracting States shall accord to stateless persons treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

Article 23
Public relief

The Contracting States shall accord to stateless persons lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

Article 24
Labour legislation and social security

1. The Contracting States shall accord to stateless persons lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters:

(a) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;

(b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:

(i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

(ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.

2. The right to compensation for the death of a stateless person resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.

3. The Contracting States shall extend to stateless persons the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

4. The Contracting States will give sympathetic consideration to extending to stateless persons so far as possible the benefits of similar agreements which
may at any time be in force between such Contracting States and non-contracting States.

CHAPTER V
ADMINISTRATIVE MEASURES

Article 25
ADMINISTRATIVE ASSISTANCE

1. When the exercise of a right by a stateless person would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting State in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities.

2. The authority or authorities mentioned in paragraph 1 shall deliver or cause to be delivered under their supervision to stateless persons such documents or certifications as would normally be delivered to aliens by or through their national authorities.

3. Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities, and shall be given credence in the absence of proof to the contrary.

4. Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.

5. The provisions of this article shall be without prejudice to articles 27 and 28.

Article 26
FREEDOM OF MOVEMENT

Each Contracting State shall accord to stateless persons lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.

Article 27
IDENTITY PAPERS

The Contracting States shall issue identity papers to any stateless person in their territory who does not possess a valid travel document.

Article 28
TRAVEL DOCUMENTS

The Contracting States shall issue to stateless persons lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other stateless person in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to stateless persons in their territory who are unable to obtain a travel document from the country of their lawful residence.

Article 29
FISCAL CHARGES

1. The Contracting States shall not impose upon stateless persons duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.

2. Nothing in the above paragraph shall prevent the application to stateless persons of the laws and regulations concerning charges in respect of the issue to aliens of administrative documents including identity papers.

Article 30
TRANSFER OF ASSETS

1. A Contracting State shall, in conformity with its laws and regulations, permit stateless persons to transfer assets which they have brought into its territory, to another country where they have been admitted for the purposes of resettlement.

2. A Contracting State shall give sympathetic consideration to the application of stateless persons for permission to transfer assets wherever they may be and which are necessary for their resettlement in another country to which they have been admitted.

Article 31
EXPULSION

1. The Contracting States shall not expel a stateless person lawfully in their territory save on grounds of national security or public order.

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1 See p. 162 of this volume.

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2. The expulsion of such a stateless person shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the stateless person shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a stateless person a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 32

NATURALIZATION

The Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

CHAPTER VI

FINAL CLAUSES

Article 33

INFORMATION ON NATIONAL LEGISLATION

The Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention.

Article 34

SETTLEMENT OF DISPUTES

Any dispute between parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

Article 35

SIGNATURE, RATIFICATION AND ACCESION

1. This Convention shall be open for signature at the Headquarters of the United Nations until 31 December 1955.

2. It shall be open for signature on behalf of:
   (a) Any State Member of the United Nations;
   (b) Any other State invited to attend the United Nations Conference on the Status of Stateless Persons; and
   (c) Any State to which an invitation to sign or to accede may be addressed by the General Assembly of the United Nations.

3. It shall be ratified and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

4. It shall be open for accession by the States referred to in paragraph 2 of this article. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 36

TERRITORIAL APPLICATION CLAUSE

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the nineteenth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article 37

FEDERAL CLAUSE

In the case of a Federal or non-unitary State, the following provisions shall apply:
   (a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of Parties which are not Federal States;
(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the Federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of states, provinces or cantons at the earliest possible moment.

(c) A Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention showing the extent to which effect has been given to that provision by legislative or other action.

**Article 38**

**Reservations**

1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1) and 33 to 42 inclusive.

2. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

**Article 39**

**Entry into force**

1. This Convention shall come into force on the ninetieth day following the day of deposit of the sixth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the sixth instrument of ratification or accession, the Convention shall enter into force on the ninetieth day following the date of deposit by such State of its instrument of ratification or accession.

**Article 40**

**Denunciation**

1. Any Contracting State may denounce this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. Such denunciation shall take effect for the Contracting State concerned one year from the date upon which it is received by the Secretary-General of the United Nations.

3. Any State which has made a declaration or notification under article 36 may, at any time thereafter, by a notification to the Secretary-General of the United Nations, declare that the Convention shall cease to extend to such territory one year after the date of receipt of the notification by the Secretary-General.

**Article 41**

**Revision**

1. Any Contracting State may request revision of this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall recommend the steps, if any, to be taken in respect of such request.

**Article 42**

**Notifications by the Secretary-General of the United Nations**

The Secretary-General of the United Nations shall inform all Members of the United Nations and non-Member States referred to in article 35:

(a) Of signatures, ratifications and accessions in accordance with article 35;

(b) Of declarations and notifications in accordance with article 36;

(c) Of reservations and withdrawals in accordance with article 38;

(d) Of the date on which this Convention will come into force in accordance with article 39;

(e) Of denunciations and notifications in accordance with article 40;

(f) Of requests for revision in accordance with article 41.

In faith whereof the undersigned, duly authorized, have signed this Convention on behalf of their respective Governments.

Done at New York, this twenty-eighth day of September, one thousand nine hundred and fifty-four, in a single copy, of which the English, French and Spanish texts are equally authentic and which shall remain deposited in the archives of the United Nations, and certified true copies of which shall be delivered to all Members of the United Nations and to the non-Member States referred to in article 35.
SCHEDULE

Paragraph 1

1. The travel document referred to in article 28 of this Convention shall indicate that the holder is a stateless person under the terms of the Convention of 28 September 1954.¹

2. The document shall be made out in at least two languages, one of which shall be English or French.

3. The Contracting States will consider the desirability of adopting the model travel document attached hereto.³

Paragraph 2

Subject to the regulations obtaining in the country of issue, children may be included in the travel document of a parent or, in exceptional circumstances, of another adult.

Paragraph 3

The fees charged for issue of the document shall not exceed the lowest scale of charges for national passports.

Paragraph 4

Save in special or exceptional cases, the document shall be made valid for the largest possible number of countries.

Paragraph 5

The document shall have a validity of not less than three months and not more than two years.

Paragraph 6

1. The renewal or extension of the validity of the document is a matter for the authority which issued it, so long as the holder has not established lawful residence in another territory and resides lawfully in the territory of the said authority. The issue of a new document is, under the same conditions, a matter for the authority which issued the former document.

2. Diplomatic or consular authorities may be authorized to extend, for a period not exceeding six months, the validity of travel documents issued by their Governments.

3. The Contracting States shall give sympathetic consideration to renewing or extending the validity of travel documents or issuing new documents to stateless persons no longer lawfully resident in their territory who are unable to obtain a travel document from the country of their lawful residence.

¹ See p. 130 of this volume.
³ See p. 166 of this volume.
Paragraph 14

Subject only to the terms of paragraph 13, the provisions of this Schedule in no way affect the laws and regulations governing the conditions of admission to, transit through, residence and establishment in, and departure from, the territories of the Contracting States.

Paragraph 15

Neither the issue of the document nor the entries made thereon determine or affect the status of the holder, particularly as regards nationality.

Paragraph 16

The issue of the document does not in any way entitle the holder to the protection of the diplomatic or consular authorities of the country of issue, and does not ipso facto confer on these authorities a right of protection.

MODEL TRAVEL DOCUMENT

It is recommended that the document be in booklet form (approximately 15 × 10 centimetres), that it be so printed that any erasure or alteration by chemical or other means can be readily detected, and that the words "Convention of 28 September 1954" be printed in continuous repetition on each page, in the language of the issuing country.

(COVER OF BOOKLET)
TRAVEL DOCUMENT
(Convention of 28 September 1954)

No. ..............

(1)
TRAVEL DOCUMENT
(Convention of 28 September 1954)

This document expires on .............. unless its validity is extended or renewed.

Name .................................................................

Forename(s) ............................................................

Accompanied by ......................... child (children).

1. This document is issued solely with a view to providing the holder with a travel document which can serve in lieu of a national passport. It is without prejudice to and in no way affects the holder's nationality.

2. The holder is authorized to return to ......................... [state here the country whose authorities are issuing the document] on or before ......................... unless some later date is hereafter specified. [The period during which the holder is allowed to return must not be less than three months except when the country to which the holder proposes to travel does not insist on the travel document according the right of re-entry.]

3. Should the holder take up residence in a country other than that which issued the present document, he must, if he wishes to travel again, apply to the competent authorities of his country of residence for a new document. [The old travel document shall be withdrawn by the authority issuing the new document and returned to the authority which issued it.]1

(This document contains 32 pages, exclusive of cover.)

1 The sentence in brackets to be inserted by Governments which so desire.

(2)

Place and date of birth .................................................................

Occupation .................................................................

Present residence .................................................................

*Maiden name and forename(s) of wife .................................................................

*Name and forename(s) of husband .................................................................

Description

Height .................................................................

Hair .................................................................

Colour of eyes .................................................................

Nose .................................................................

Shape of face .................................................................

Complexion .................................................................

Special peculiarities .................................................................

Children accompanying holder

Name .................................................................

Forename(s) .................................................................

Place and date of birth .................................................................

Sex .................................................................

* Strike out whichever does not apply.

(This document contains 32 pages, exclusive of cover.)

No. 5158
(3) Photograph of holder and stamp of issuing authority
Finger-prints of holder (if required)

Signature of holder .................................................................

(This document contains 32 pages, exclusive of cover.)

(4)

1. This document is valid for the following countries:

........................................................................................................
........................................................................................................
........................................................................................................

2. Document or documents on the basis of which the present document is issued:

........................................................................................................
........................................................................................................
........................................................................................................

Issued at ............................................
Date ............................................

Signature and stamp of authority
issuing the document:

Fee paid:

(This document contains 32 pages, exclusive of cover.)

(5)

Extension or renewal of validity

Fee paid:
From ............................................
To ............................................

Done at ............................................ Date ............................................

Signature and stamp of authority
extending or renewing the validity
of the document:

Extension or renewal of validity

Fee paid:
From ............................................
To ............................................

Done at ............................................ Date ............................................

Signature and stamp of authority
extending or renewing the validity
of the document:

Extension or renewal of validity

Fee paid:
From ............................................
To ............................................

Done at ............................................ Date ............................................

Signature and stamp of authority
extending or renewing the validity
of the document:

(7-32)

Visas

The name of the holder of the document must be repeated in each visa.

(This document contains 32 pages, exclusive of cover.)
Permanent Court of International Justice

Panevezys-Saldutiskis Railway
Judgment of 28 February 1939

_P.C.I.J., Series A/B, No. 76_
PERMANENT COURT OF INTERNATIONAL JUSTICE

JUDICIAL YEAR 1939.

February 28th, 1939.

THE PANEVEZYS-SALDUTISKIS RAILWAY CASE

1. Preliminary objection based on the rule that a claim must be a national claim not only at the time of its presentation, but also at the time when the injury was suffered. This objection not held to constitute a preliminary objection within the meaning of Article 62 of the Rules; impossibility in this case of adjudicating on this objection without adjudicating on the merits.

2. Preliminary objection based on the local remedies rule. This objection held to be well founded.

JUDGMENT.

Present: M. Guerrero, President; Sir Cecil Hurst, Vice-President; Count Rostworowski, MM. Fromageot, Altamira, Negulesco, Jhr. van Eysinga, MM. Nagaoka, Cheng, Hudson, De Visscher, Erich, Judges; MM. Strandman and Römeris, Judges ad hoc.
In the case concerning the Panevezys-Saldutiskis railway, between
the Government of the Republic of Estonia, represented by Baron Boris Nolde, as Agent,

and

the Government of the Republic of Lithuania, represented by M. André Mandelstam, as Agent,

The Court,
composed as above,
delivers the following judgment:

By an Application filed with the Registry of the Court on November 2nd, 1937, under Article 40 of the Statute, the Estonian Government instituted proceedings before the Court against the Lithuanian Government owing to the refusal of the latter Government to recognize the proprietary and concessionary rights claimed by a Company known as the Esimene Juurdeveo Raaditeede Selts Venemaal in respect of the Panevezys-Saldutiskis railway, which had been seized and operated by the Lithuanian Government. The Applicant, in submitting the case, relies upon the declarations of Estonia and Lithuania accepting the compulsory jurisdiction of the Court as provided in Article 36, paragraph 2, of the Statute of the Court.

After a succinct statement of the facts and arguments adduced in support of the claim, the Application prays the Court to adjudge and declare:

"I. That the Lithuanian Government has wrongfully refused to recognize the rights of the Esimene Juurdeveo Raaditeede Selts Venemaal Company, as owners and concessionaires of the Panevezys-Saldutiskis railway line, and to compensate the Company for the illegal seizure and operation of this line.

2. That the Lithuanian Government is under an obligation to make good the prejudice which has been sustained by the Esimene Juurdeveo Raaditeede Selts Venemaal Company, and which is estimated, the proposals for a compromise made by that Company having been withdrawn, at the sum of 14,000,000 Gold Lits, with interest at 6% per annum as from January 1st, 1937."

On November 2nd, 1937, notice of the Application of the Estonian Government was given to the Lithuanian Government, and on November 5th the communications provided for in Article 40 of the Statute and Article 34 of the Rules of Court were duly despatched.
expiration of the time allowed to the Estonian Government for the presentation of a written statement of its observations and submissions in regard to the objections raised by the Lithuanian Government.

The written proceedings in regard to the objections were brought to a close by the filing within the prescribed time-limit of this statement in which it was submitted that the Court should "overrule the objections".

After hearings held on June 13th, 14th, 15th, 17th and 18th, 1938, the Court, on June 30th, 1938, made an Order whereby, under Article 62, paragraph 5, of the Rules, it joined "the objections raised by the Lithuanian Government to the merits of the proceedings instituted by the Application of the Estonian Government filed with the Registry on November 2nd, 1937, in order that it may adjudicate in one and the same judgment upon these objections and, if need be, on the merits". At the same time the Court fixed new time-limits for the filing of the Counter-Memorial, Reply and Rejoinder.

These documents were duly filed within the prescribed time-limits, the last of which, that for the Rejoinder, expired on November 25th, 1938. Accordingly on that date the case became ready for hearing.

In its Counter-Memorial, the Lithuanian Government presented the following submissions:

"The Lithuanian Government, reserving the right subsequently to present any further arguments or submissions,

Prays the Permanent Court of International Justice to dismiss the claims of the Estonian Government.

Alternatively,

And subject to the subsequent presentation of any further arguments and evidence,

In case the Court should hold that the legal personality of the former First Russian Company persists in the "Estimene Juurdevee Raudtee Selts Venemaa" Company, and should recognize that the latter is entitled to reparation, the Lithuanian Government, in accordance with Article 63 of the Rules of Court, now presents a counter-claim against the Estonian Government, estimating the amount of the prejudice sustained at the sum of 7,337,271 Lits 98 cents, with interest at 6½% per annum as from September 1st, 1938, until the date of payment,

And prays the Permanent Court of International Justice to award it the amount of this counter-claim."

In its Reply, the Estonian Government maintained the submissions contained in its Memorial and written statement and prayed the Court "to overrule the counter-claim of the Lithuanian Government".

In its Rejoinder, the Lithuanian Government maintained the submissions which it had already made.

In the course of public sittings held on January 19th, 20th, 24th, 25th, 27th and 30th, 1939, the Court heard the Agents of the two Parties, who at the conclusion of their oral arguments presented the following final submissions.

The Agent for the Estonian Government prayed the Court

"To dismiss the counter-claim of the Lithuanian Government presented in its Counter-Memorial of August 30th, 1938,

To adjudge and declare

That the Lithuanian Government has wrongfully refused to recognize the rights of the "Estimene Juurdevee Raudtee Selts Venemaa" Company, as owners and concessionaires of the Panevezys-Saldutiskis railway line, and to compensate the Company for the illegal seizure and operation of this line;

That the Lithuanian Government is under an obligation to make good the prejudice which has thus been sustained by the "Estimene Juurdevee Raudtee Selts Venemaa" Company, and which is estimated at (1) the sum of 6,850,000 Gold Lits representing the price of the railway, plus (2) interest on this sum calculated at the rate of six per cent per annum from the date of seizure to the date of payment;

That the above payment shall be made in the course of the month following delivery of the judgment by means of a payment in pounds sterling to the account of the Estonian State Bank (Eesti Pank) with the Royal Scotland Bank in London, for the compensation of the "Estimene Juurdevee Raudtee Selts Venemaa" Company;

That the said payment will involve total and final release of the Panevezys-Salitiskis railway and all the movable and immovable property appertaining thereto, from all mortgages or liens which may belong to the bondholders of the First Company of Secondary Railways in Russia (or the "Estimene Juurdevee Raudtee Selts Venemaa" Company)."

The Agent for the Lithuanian Government, maintaining all submissions and arguments previously presented by his Government, prayed the Permanent Court of International Justice

"to declare that the claims of the Estonian Government cannot be entertained.

With regard to the merits, to dismiss the claims of the Estonian Government.

Alternatively,

In case the Court should hold that the legal personality of the former First Russian Company persists in the "Estimene" Company and should recognize that the latter is entitled to compensation,
To award to the Lithuanian Government the amount of its counter-claim, assessing the prejudice sustained at the sum of 7,337,271 Lits 98 cents, with interest at 6% per annum from September 25th, 1938, until the date of payment.

Documents in support of their contentions were filed on behalf of each Party.¹

The above being the state of the proceedings, the Court must now adjudicate.

* * *

The facts are as follows:

In 1892 a company was founded at St. Petersburg under the name of the "First Company of Secondary Railways in Russia", and its statutes were approved by Imperial decree on March 26th, 1892.

Under § 1 of its statutes, the Company had for its object "the construction and operation of broad and narrow gauge approach and secondary railways in general for public and private use, and the construction, operation and sale of transportable railways". Under § 2, the Company was authorized, subject to obtaining where necessary the sanction of the competent administrative body, inter alia, to construct and operate railways of every kind and type on its own account and at its own risk. The Company might engage in these activities throughout the whole of the Russian Empire. Under § 26, the registered offices of the Company were established at St. Petersburg.

By an Imperial decree of November 21st, 1897, the Company was authorized to construct and operate (under the conditions fixed by a decree of June 27th, 1894, for another line, the Sventziany to Gloubokoile line) a railway between the station at Sventziany, on the St. Petersburg-Warsaw railway, and the station at Panevezys, on the Libau-Romny railway. The Company also possessed other lines in various parts of the Russian Empire, in particular in the Baltic provinces and in the Ukraine.

The statutes of the Company were revised and received Imperial sanction on July 3rd, 1898, and subsequently various partial amendments were approved by Imperial decrees of April 11th, 1900, November 6th, 1901, and April 24th, 1912.

A general meeting of shareholders appears to have taken place in July 1917. Three months later, the Bolshevist revolution—the so-called October revolution—took place. Almost immediately afterwards, December 14th, 1917, a decree of the Central Executive Committee concerning the nationalization of banks placed in the hands of the Soviet Government the shares, assets and liabilities of companies existing in Russia. Among these companies was the "First Company of Secondary Railways".

Political events then followed in rapid succession: on February 16th, 1918, Lithuania proclaimed itself an independent State; on February 24th the same thing happened in Estonia, and some days later, March 3rd, the Treaty of Brest-Litovsk between Germany and her allies and Russia confirmed the abandonment of Russian sovereignty over the former Baltic provinces and Lithuania which, however, remained in the occupation of German troops.

Furthermore, the Bolshevist leaders hurried on measures intended to establish the communist Soviet régime confiscating private property throughout Russian territory. On June 28th, 1918, a decree was promulgated declaring "to be the property of the Russian Socialist Federated Soviet Republic" all industrial and commercial undertakings in Soviet Russia including "all the undertakings of private and secondary railway companies, whether in operation or under construction" (Art. I). The competent sections of the Supreme Council of National Economy were instructed to work out and carry through as speedily as possible the organization of the administration of the nationalized undertakings; in so far as railways were concerned, the task was entrusted to the Commissariat of the People for Communications, subject to the approval of the Council of Commissaries of the People (Art. II). Until special orders were issued, undertakings which had been declared the property of the Soviet Republic were "regarded as leased rent free to the former owners; the Boards of Directors and former owners financing them under the old conditions and receiving the revenues as before" (Art. III). The directors and other managers responsible for nationalized undertakings were responsible for the maintenance, upkeep and operation of the undertaking. If they abandoned their posts or showed negligence, they incurred criminal liability (Art. IV). The responsible administrators were declared to be in the service of the Russian Socialist Federated Soviet Republic. If they abandoned their posts, members of the technical and administrative staff were to be held responsible before the Revolutionary Tribunal "with the utmost rigour of the law" (Art. V). Finally, all monies belonging personally to members of Boards, to the shareholders and owners of nationalized undertakings were provisionally attached.

¹ See list in annex.
Shortly afterwards, on September 4th, 1918, a second Soviet decree was promulgated which was designed "to supplement" the preceding decree, particularly with regard to railways. The Boards of former private railways which now became the property of the Republic were abolished and replaced by a so-called liquidation commission for each line.

Some months later, March 4th, 1919, a third Soviet decree provided as follows: "Article I.—The shares and foundation shares of joint-stock companies the undertakings of which have been nationalized or sequestred are annulled even in cases where such undertakings have not yet passed under the control of governmental boards and where they have been leased to the former owners rent free."

In September 1919, the Lithuanian Government took possession of the Panevezys-Sventziany railway which was situated in territory which had become part of the State of Lithuania.

Some months later, on February 2nd, 1920, the Russian Socialist Federated Soviet Republic signed its first treaty with the new Baltic States: the Treaty of Tartu with Estonia, which was followed on July 12th, 1920, by the Treaty concluded at Moscow with Lithuania and, on August 11th, 1920, by the Treaty with Latvia, also signed at Moscow.

In the present case, the Treaty of Tartu of February 2nd, 1920, concluded between the Soviet Republic and Estonia merits special attention for the reason that, unlike the two other treaties which followed it, it contains detailed provisions as to the fate of private property situated in Estonian territory, particularly as to the property of joint-stock companies.

Under Article XI of this Treaty, of which the meaning and perhaps even the translation are disputed between the Parties, Russia renounces "all the rights of the Russian Treasury to the movable and immovable property of individuals which previously did not belong to her, in so far as such property may be situated in Estonian territory". All such property became "the sole property of Estonia" and was freed from all obligatons as from December 14th, 1917, which, as has been seen, was the date of the decree nationalizing the banks.

Further, an article supplementary to this Article XI provides that: "The Russian Government will hand over to the Estonian Government inter alia the shares of those joint-stock companies which had undertakings in Estonian territory, in so far as such shares may be at the disposal of the Russian

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officers in accordance with the statutes approved by the former
Russian Government and had had its statutes registered in
accordance with Estonian law.

On May 21st, 1922, the ‘First Company of Secondary Rail-
ways in Russia’, which had been sequestrated on April 7th,
was placed under curatorship by order of the District Court
of Tallinn-Hapsal.

It does not appear that any general meeting of this Com-
pany was held at this period in Estonia. On the other hand,
the documents produced to the Court show that, on No-
overmber 23rd, 1922, a general meeting of the Company—the first
since the meeting of July 1917—was held, not in Estonia, but
at Riga in Latvia, with the sanction of the Latvian Govern-
ment and under Latvian law, and that at this meeting the
Board of Directors was instructed to take the necessary steps
to reacquire possession of and to operate the property of the
Company in Lithuania and Poland; while the portion of the
system situated in Latvia was to be ceded to a Latvian com-
pany which was to be formed.

On August 4th, 1923, a law was promulgated in Estonia
declaring that, ‘in accordance with § 19 of the concession of
the ‘First Company of Secondary Railways in Russia’, all railways
of this Company in the territory of the Estonian Republic
shall be bought out and become the property of the Treasury
as from October 1st, 1923’. The concession referred to is that
granted by the Czar in 1897, and § 19 concerns the Imperial
Government’s right of redemption.

The next thing that happened was that the Estonian Gov-
ernment, on September 7th, 1923, authorized the holding of a
general meeting of the Company (which, as has been seen, had
been under curatorship since May 21st, 1922) and the curators,
‘in accordance with the statutes (§ 60)’, proceeded to convene
a general meeting for October 19th of the same year.

This general meeting was actually held in Tallinn on No-
overmber 2nd, 1923. It proceeded to revise and amend the statutes
in accordance with Estonian law and with a view to the exer-
cise of the powers thenceforward to be enjoyed by the Com-
pany in Estonia: namely in respect of operation, works, tariffs,
exemption from taxes, the right of expropriation, subjection to
the laws and regulations in regard to railways, etc. The regist-
ered offices of the Company were fixed in Tallinn.

These new statutes were approved on November 8th, 1923,
and registered on November 23rd.

As stated in the Estonian Memorial, the “First Company of
Secondary Railways in Russia” was thus transformed “into an
Estonian company having its registered office in Estonia under
the name of the Esimene Juurdevo Raudteede Settis Venemaal

—an translation into Estonian of the name of the Russian com-
pany.

On March 10th, 1924, a general meeting of the Esimene held
in Tallinn authorized the Board of Directors to sell the line
situated in Lithuania and the lines in Latvia and Poland. On
October 3rd, 1924, another general meeting appears to have
been held at which particular consideration was given to the
question of the Panevezys-Saldutiskis railway.

On March 5th, 1925, a request was sent on behalf of the
Board of the Esimene to the Lithuanian Government, asking
it “to give instructions for the necessary steps to be taken
for the handing over of the Panevezys-Saldutiskis line to its
legal owners”.

It does not appear that any answer was made to this peti-
tion, and several years elapsed in the course of which further
petitions were made.

On November 14th, 1931, a memorandum accompanied by
a petition from the Board of the Esimene was transmitted to
the Lithuanian Government. In this memorandum the Esimene
pointed out that it was the former Russian company trans-
formed into an Estonian company with the same titles and
rights, and accordingly it claimed “in that capacity” fair com-
ensation for the Panevezys line which belonged to it and of
which it had been unjustifiably deprived.

On April 29th, 1932, after the chairman of the Company had
approached the Lithuanian Government, the Board of Directors,
in a further petition of May 20th, 1932, stated that they
consented to the non-restitution of the line in question but
hoped on the other hand that some equitable method would
be found of compensating the Company for the property of
which it had been deprived.

Further petitions were sent by the Board of Directors of the
Esimene, in particular one on May 20th, 1932.

On January 25th, 1933, the Lithuanian Government referred
to its Council of State, which, under the organic law of
August 21st, 1928, is an advisory body, the question whether
the Esimene Company was justified in putting forward a claim
in law against the Lithuanian Government in respect of the
Panevezys railway. The opinion given was in the negative.

On September 15th, 1933, and October 25th, 1933, the Es-
imene Company presented further petitions to which the Lithu-
anian Government replied, refusing to admit the claim of the
Company to be entitled to the rights of the former company
which, in its contention, no longer existed.

The negotiations were thenceforward continued between the
Estonian Minister in Kaunas and the Lithuanian Government,
the Company proposing the purchase of its line by the Lithuanian
Government (proposals of September 7th, 1934, September 14th,
1936, and letter of December 3rd, 1936, addressed by the Estonian Minister to the Lithuanian Government.

In a letter of December 30th, 1936, the Lithuanian Government replied that the dispute was a matter of civil law and within the jurisdiction of the Lithuanian courts.

On February 1st, 1937, the Estonian Government renewed its representations, the dispute bearing as before both on the question of the recognition of the Esimene Company as entitled to the rights of the Russian company and on the question of the jurisdiction of the Lithuanian courts. It was also argued that there had been a violation of the Commercial Convention concluded on January 13th, 1934, between Estonia and Lithuania and a denial of justice.

On May 5th, 1937, the Lithuanian Government replied that it could not entertain the Estonian claim.

On August 20th, 1937, the Estonian Government informed the Lithuanian Government that it intended to bring the case before the Permanent Court of International Justice. The Lithuanian Government then replied that, while maintaining its own view on the question of law, the friendly relations between the two States might make it possible to reach a friendly settlement of the dispute, should the Esimene Company not win its case before the Lithuanian courts.

Such are the facts, which moreover do not appear to be disputed by the Parties, and on the basis of which the Estonian Government on November 2nd, 1937, filed with the Court the Application instituting the proceedings referred to at the beginning of this judgment.

* * *

Within the time-limit fixed for the filing of the Counter-Memorial by the Lithuanian Government, the Agent for that Government submitted two preliminary objections. After the usual proceedings and hearings in connection with these objections, the Court, as has been explained, joined these objections to the merits by its Order of June 30th, 1938, saying in the course of that Order that at the then stage of the proceedings the Court could not take a decision either as to the preliminary character of the objections or as to whether they were well founded, for any such decision would raise questions of fact and law in regard to which the Parties were in several respects in disagreement and which were too closely linked to the merits for the Court to adjudicate upon them at that stage. Now that it has heard the arguments of the Parties on the merits of the case as well as on the objections, the Court is in a position to give its decision on the objections.

Both the objections were submitted as preliminary objections under Article 62 of the Rules of Court. It is clear that Article 62 covers more than objections to the jurisdiction of the Court. Both the wording and the substance of the Article show that it covers any objection of which the effect will be, if the objection is upheld, to interrupt further proceedings in the case, and which it will therefore be appropriate for the Court to deal with before enquiring into the merits.

The Lithuanian objections are based on the non-observance by the Estonian Government: (1) of the rule of international law that a claim must be national not only at the time of its presentation but also at the time of the injury; and (2) of the rule requiring the exhaustion of the remedies afforded by municipal law.

In the opinion of the Court, the rule of international law on which the first Lithuanian objection is based is that in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. This right is necessarily limited to intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged. Where the injury was done to the national of some other State, no claim to which such injury may give rise falls within the scope of the diplomatic protection which a State is entitled to afford nor can it give rise to a claim which that State is entitled to espouse.

The Estonian Agent both in the written pleadings and in the oral arguments has endeavoured to discredit this rule of international law, if not to deny its existence. He cited a certain number of precedents, but when these precedents are examined it will be seen that they are cases where the governments concerned had agreed to waive the strict application of the rule, cases where the two governments had agreed to establish an international tribunal with jurisdiction to adjudicate on claims even if this condition as to nationality were not fulfilled. In the present case no grounds exist for holding that the Parties intended to exclude the application of the rule. The Lithuanian Agent is therefore right in maintaining that Estonia must prove that at the time when the injury occurred which is alleged to involve the international responsibility of
Lithuania the company suffering the injury possessed Estonian nationality.

Though it is true that an objection disputing the national character of a claim is in principle of a preliminary character, this is not so in the actual case before the Court. This is because the grounds on which Lithuania disputes Estonia's right to take up the case on behalf of the Company, viz. that the claim lacks national character, cannot be separated from those on which Lithuania disputes the Company's alleged right to the ownership of the Panevezys-Saldutiskis railway.

The question whether the Esimene Company is to be regarded as the owner or concessionaire of the Panevezys-Saldutiskis railway undoubtedly forms part of the merits of the dispute. The ground on which the Company claims the railway is that it is the same as, or the successor to, the Russian company. The issue as to whether or not it is so involves a decision with regard to the effect of the events and the legislation in Russia at the time of the Bolshevik revolution, for it has been argued that the events and the legislation in Russia put an end to the company's existence and left the devolution of its property outside Russia to be governed by the law of the country in which the property was situated. This question, however, closely affects also the question whether or not there was in existence at the time of the Lithuanian acts giving rise to the present claim an Estonian national whose cause the Estonian Government was entitled to espouse.

Similarly it would be necessary for the Court in dealing with the merits of the Estonian claim to adjudicate on the interpretation of the Treaty of Tartu, for it has been argued that the effect of that Treaty was to preserve the existence of the Russian company and convert it automatically into an Estonian company. Here again this same question has an intimate bearing on the nationality issue raised by the first Lithuanian objection. If for the purpose of deciding the Lithuanian objection the Court were to give a decision on the effect on Russian companies of the measures of the Soviet Government at the time of the Russian revolution, and as to the meaning and effects of the Treaty of Tartu, it would also have decided questions which form an important part of the merits of the dispute.

For these reasons the Court cannot regard the first Lithuanian objection as one which in the particular circumstances of the case can be decided without passing on the merits. The Court cannot therefore admit the objection as a preliminary objection within the meaning of Article 62 of the Rules of Court.

The second Lithuanian objection is based on the non-observance by the Estonian Government of "the rule of international law requiring the exhaustion of the remedies afforded by municipal law". The existence of this rule which in principle subordinates the presentation of an international claim to such an exhaustion is not contested by the Estonian Agent; his contention is that the case falls within one or more of the admitted exceptions to the rule.

First it is maintained that the courts in Lithuania cannot entertain a suit in this case. Secondly it is said that on one point—and that a point which constitutes an essential element in the Estonian case—the highest court in Lithuania has already given a decision adverse to the Estonian company's claim.

If either of these points could be substantiated, the Court would be bound to overrule the second Lithuanian objection. There can be no need to resort to the municipal courts if those courts have no jurisdiction to afford relief; nor is it necessary again to resort to those courts if the result must be a repetition of a decision already given.

Before examining in detail the second Lithuanian objection, it should be observed that the Estonian submission in this case is based on Lithuania's refusal to recognize the Esimene Company's proprietary and concessionary rights in the Panevezys-Saldutiskis railway, i.e., it is based on a dispute as to the non-recognition of a claim by an individual to a property right and to a contractual right. In principle, the property rights and the contractual rights of individuals depend in every State on municipal law and fall therefore more particularly within the jurisdiction of municipal tribunals.

The Estonian Agent has argued that the Lithuanian courts have no jurisdiction to entertain a suit by the Esimene Company to establish the Company's title to the Panevezys-Saldutiskis railway. His allegation is met with an emphatic assertion by the Lithuanian Agent that the courts in Lithuania possess such jurisdiction. The Lithuanian Agent also points to Article 2 of the Lithuanian Code of Civil Procedure where it is laid down that "private persons ..., whose legal rights are infringed by decisions of administrative institutes or persons may bring an action in the courts".
The question whether or not the Lithuanian courts have jurisdiction to entertain a particular suit depends on Lithuanian law and is one on which the Lithuanian courts alone can pronounce a final decision. It is not for this Court to consider the arguments which have been addressed to it for the purpose either of establishing the jurisdiction of the Lithuanian tribunals by adducing particular provisions of the laws in force in Lithuania, or of denying the jurisdiction of those tribunals by attributing a particular character (seizure *jure imperii*) to the act of the Lithuanian Government. Until it has been clearly shown that the Lithuanian courts have no jurisdiction to entertain a suit by the *Esimene* Company as to its title to the Panevezys-Saldutiskis railway, the Court cannot accept the contention of the Estonian Agent that the rule as to the exhaustion of local remedies does not apply in this case because Lithuanian law affords no means of redress.

The second ground on which the Estonian Agent has maintained that the rule as to the exhaustion of local remedies does not apply in this case is that the highest court, the Supreme Court in Lithuania, has already held that there is no continuity between the Russian company and the Estonian company, and has therefore already given an adverse decision on a point which constitutes an essential element in the *Esimene* Company's claim to the Panevezys-Saldutiskis railway. The rule of international law as to the exhaustion of local remedies has never, it is contended, been held to require that a claimant should be bound to institute proceedings on a point on which the highest court has already given a decision.

The Court does not regard the argument as applicable in this instance.

The case in which it is alleged that the Supreme Tribunal in Lithuania gave such a decision on March 26th, 1934, is a suit brought against the *Esimene* Company in the Lithuanian courts by one Jeglinas to recover the capital value and the arrears of interest due on one of the bonds issued by the Russian company for the construction of the railway in question, and to obtain a decision that holders of the bonds were entitled to be paid in priority to other creditors, and also to obtain a ruling as to the rate of exchange as between roubles and lits.

The Lithuanian Agent stated that the Jeglinas case was not a genuine case. Whatever may be the case on this point, it is sufficient for the Court to make the following observations.

After the case had been dealt with in the Court of the *juge de paix* and the Tribunal *d'arrondissement*, Jeglinas entered an appeal to the Supreme Court in Lithuania. The judges in that court ignored the contentions and admissions of the parties, annulled the judgment of the Tribunal *d'arrondissement* and quashed all the proceedings upon the ground that there was no properly qualified defendant before the court. The following are the important paragraphs of the judgment according to the French translation supplied to the Court:

"The defendant cited in this case as liable for the bond is not the First Company of Secondary Railways in Russia, with its Board of Directors in Petrograd, but the First Company of Secondary Railways in Russia, with its Board of Directors at Tallinn in Estonia and whose managing director, Paul Klompus, at present resides in Kaunas, at the Lithuania Hotel, No. 9, Daukant Street. Consequently, in order to bring this case within the jurisdiction of the Lithuanian courts, a domicile has been artificially created in breach of Article 220 of the Code of Civil Procedure which indicates where a company is to be sued.

More especially since, as may be seen from the evidence produced by the defendant, no company exists in Estonia in whose name the bond was issued and whose statutes were in force in 1892, but there is a company newly founded under the name of *Esimene Juurudevoe Raudeede Selts Venemaa* (which, translated, may mean: 'First Company of Secondary Railways in Russia').

Evidence has not been produced in this case that the said Estonian company can be recognized by our laws or by international treaties as successor to the old Russian company, and the Court knows of no such laws or treaties. Only companies whose statutes are registered in accordance with our laws and duly published (law concerning joint-stock companies, 'Government Gazette', No. 179) may operate in Lithuania. And only such joint-stock companies are entitled to have their enterprises there, especially enterprises of such great importance as railways. Moreover the Tribunal *d'arrondissement*, with the participation of the representative of the Estonian company and on the basis of § 14 of the bond, gave the claimant a preferential right of execution upon the movable and immovable property of the Sventziany-Ponèvègè railway, although, as has been stated, part of this line is in the possession of the Lithuanian Ministry of Communications.

In view of the foregoing, there is no ground for regarding Paul Klompus, the director of the *Esimene Juurudevoe Raudeede Selts Venemaa* Company, as a defendant entitled to answer for bond No. 0742, issued by the 'First Company of Secondary Railways in Russia', i.e., as qualified to be the defendant in accordance with Article 4 of the Code of Civil Procedure, and consequently the whole of the proceedings in this case which have taken place without the real defendant
having been summoned or heard must be annulled and the appeal in cassation cannot be considered."

The passage quoted above in which it is said that the proofs had not been submitted in the case to show that the Estonian company could be recognized as the successor of the former Russian company has been thought to mean that the Supreme Tribunal examined the evidence and gave a decision as to its effect. An examination of the judgment shows however that the passage in the judgment means no more than that no evidence had been submitted to the Lithuanian courts to show the identity of the two companies.

It must also be pointed out that if the Esimene Company instituted proceedings in the Lithuanian court as to their right to be regarded as the owners and concessionaires of the Panevezys-Saldutiskis railway, the parties to the suit would not be the same as those in the Jeglinas case—so that no question of res judicata could arise; nor is there anything to show that the Esimene Company would find itself confronted by a course of decisions (jurisprudence constante) of the Lithuanian courts which would render the Company’s suit hopeless, despite the difference of the parties.

The Estonian Agent has also drawn the attention of the Court to an opinion rendered by the Lithuanian Council of State on January 25th, 1933, as to the juridical basis of the Esimene Company’s claim to the Panevezys-Saldutiskis railway. The conclusion reached by the Council of State was that the Esimene Company was neither the same as nor the successor to the Russian company and therefore had no claim to the railway.

The function of the Council of State in Lithuania is among others to notify to the Council of Ministers or to the particular Minister concerned any case in which the orders, regulations or instructions of the executive authorities are inconsistent with the laws in force. It is not a judicial authority the opinions of which would be binding on the Lithuanian courts. For this reason the fact that in 1933 it rendered an opinion to the Lithuanian Government adverse to the validity of the Esimene Company’s claim cannot be regarded as excusing that Company from seeking redress in the Lithuanian courts.

Neither of the reasons put forward by the Estonian Agent for the non-application of the rule as to the exhaustion of the local means of redress can therefore be regarded as holding good in the present case.

1 Translation by the Registry.
Count Rostworowski and M. De Visscher, Judges, declare that they are unable to concur in that part of the judgment given by the Court concerning the first objection raised by the Lithuanian Government and, availing themselves of the right conferred upon them by Article 57 of the Statute, have appended to the judgment the separate opinion which follows.

M. Altamira, Judge, declares that he is unable to concur in this judgment in regard either to the operative clause or to the grounds on which it is based.

Jonkheer van Eysinga, Mr. Hudson and M. Erich, Judges, declare that they are unable to concur in the judgment given by the Court and, availing themselves of the right conferred upon them by Article 57 of the Statute, have appended to the judgment the respective separate opinions which follow.

M. Römer's, Judge ad hoc, while in agreement with the operative clause of the judgment, declares, with regard to the fact that the Court has refrained from adjudicating upon the first Lithuanian preliminary objection on the ground that it would be impossible to do so without entering into the merits, that he is unable to concur in the opinion of the Court on this point and is in agreement with the separate opinion delivered by M. De Visscher and Count Rostworowski, Judges.

(Initialled) J. G. G.

(Initialled) J. L. O.
AFFAIRE NOTTEBOHM
(LIECHTENSTEIN c. GUATEMALA)

DEUXIÈME PHASE

ARRÊT DU 6 AVRIL 1955

1955

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

NOTTEBOHM CASE
(LIECHTENSTEIN v. GUATEMALA)
SECOND PHASE

JUDGMENT OF APRIL 6th, 1955

Le présent arrêt doit être cité comme suit :
« Affaire Notebohm (deuxième phase), Arrêt du 6 avril 1955: C. I. J. Recueil 1955, p. 4. »

This Judgment should be cited as follows:
In the Nottebohm Case,

between

the Principality of Liechtenstein,

represented by:

Dr. Erwin H. Loewenfeld, LL.B., Solicitor of the Supreme Court, as Agent,

assisted by:

Professor Georges Sauser-Hall, Honorary Professor at the Universities of Geneva and of Neuchâtel,

Mr. James E. S. Fawcett, D.S.C., of the English Bar,

Mr. Kurt Lipstein, Ph.D., of the English Bar, as Counsel,

and

the Republic of Guatemala,

represented by:

M. V. S. Pinto J., Minister Plenipotentiary, as Agent,

assisted by:

Mr. Henri Rolin, Professor of Law at the Free University of Brussels,

M. Adolfo Molina Orantes, Dean of the Faculty of Jurisprudence of the University of Guatemala, as Counsel,

and by

Mr. A. Dupont-Willemin, of the Geneva Bar, as Secretary,

The Court, composed as above,
delivers the following Judgment:

By its Judgment of November 18th, 1953, the Court rejected the Preliminary Objection raised by the Government of the Republic of Guatemala to the Application of the Government of the Principality of Liechtenstein. At the same time it fixed time-limits for the further pleadings on the merits. These time-limits were subsequently extended by Orders of January 15th, May 8th and September 13th, 1954. The second phase of the case was ready
for hearing on November 2nd, 1954, when the Rejoinder of
the Government of Guatemala was filed.

Public hearings were held on February 10th, 11th, 14th to 19th,
21st to 24th and on March 2nd, 3rd, 4th, 7th and 8th, 1955. The
Court included on the Bench M. Paul Guggenheim, Professor at the
Graduate Institute of International Studies of Geneva and a Member
of the Permanent Court of Arbitration, chosen as Judge ad hoc
by the Government of Liechtenstein, and M. Carlos Garcia Bauer,
Professor of the University of San Carlos, former Chairman of the
Guatemalan Delegation to the General Assembly of the United
Nations, chosen as Judge ad hoc by the Government of Guatemala.

The Agent for the Government of Guatemala having filed a
number of new documents, after the closure of the written proceed-
ings, without the consent of the other Party, the Court, in accord-
ance with the provisions of Article 48, paragraph 2, of its Rules,
had, after hearing the Parties, to give its decision. Dr. Loewenfeld
and Mr. Fawcett, on behalf of the Government of Liechtenstein,
and M. Rolin, on behalf of the Government of Guatemala, addressed
the Court on this question at the hearings on February 10th and
11th, 1955. The decision of the Court was given at the opening of
the hearing on February 14th, 1955. Having taken note of the fact
that during the course of the hearings the Agent of the Government
of Liechtenstein had given his consent to the production of certain
of the new documents; taking into account the special circum-
stances in connection with the search for, and classification and
presentation of, the documents in respect of which consent had
been refused, the Court permitted the production of all the docu-
ments and reserved to the Agent of the Government of Liechten-
stein the right, if he so desired, to avail himself of the opportunity
provided for in the second paragraph of Article 48 of the Rules
of Court, after having heard the contentions of the Agent of the
Government of Guatemala based on these documents, and after
such lapse of time as the Court might, on his request, deem just.
The Agent of the Government of Liechtenstein, availing himself
of this right, filed a number of documents on February 26th, 1955.

At the hearings on February 14th, 1955, and at the subsequent
hearings, the Court heard the oral arguments and replies of Dr.
Loewenfeld, Professor Sausser-Hall, Mr. Fawcett and Mr. Lipstein,
on behalf of the Government of Liechtenstein, and of M. Pinto,
M. Rolin and M. Molina, on behalf of the Government of Guatemala.

The following Submissions were presented by the Parties:

On behalf of the Government of Liechtenstein:

in the Memorial:

"The Government of Liechtenstein submit that the Court should
adjudge and declare that:

1. The Government of Guatemala in arresting, detaining, expelling
and refusing to readmit Mr. Nottebohm and in seizing and

retaining his property without compensation acted in breach of
their obligations under international law and consequently in
a manner requiring the payment of reparation.

2. In respect of the wrongful arrest, detention, expulsion and
refusal to readmit Mr. Nottebohm the Government of Guatemala
should pay to the Government of Liechtenstein:

(i) special damages amounting, according to the data received
so far, to not less than 20,000 Swiss francs;

(ii) general damages to the amount of 645,000 Swiss francs.

3. In respect of the seizure and retention of the property
of Mr. Nottebohm, the Government of Guatemala should submit
an account of the profits accruing in respect of the various parts
of the property since the dates on which they were seized and
should pay the equivalent in Swiss francs (with interest at
6 % from the date of accrual) of such sum as may be found in
that account to be owing by them. Further, the Government of
Guatemala should pay damages (at present estimated at
300,000 Swiss francs per annum) representing the additional
income which in the opinion of the Court would have been
earned by the property if it had remained under the control of
its lawful owner.

4. Further, the Government of Guatemala should restore to Mr. Not-
ttebohm all his property which they have seized and retained
together with damages for the deterioration of that property.
Alternatively, they should pay to the Government of Liechten-
stein the sum of 6,510,556 Swiss francs representing the estimated
present market value of the seized property had it been main-
tained in its original condition."

in the Reply:

"May it please the Court to hold and declare,

As to the pleas of non-admissibility of the claim of Liechtenstein
in respect of Mr. Nottebohm:

(1) that there is a dispute between Liechtenstein and Guatemala
which is the subject-matter of the application to the Court by
the Government of Liechtenstein and that it is admissible for
adjudication by the Court without further diplomatic exchanges
or negotiations between the Parties;

(2) that the naturalization of Mr. Nottebohm in Liechtenstein
on October 20th, 1939, was granted in accordance with the
municipal law of Liechtenstein and was not contrary to inter-
national law; that in consequence Mr. Nottebohm was from
that date divested of his German nationality; and that Liech-
tenstein's claim on behalf of Mr. Nottebohm as a national of
Liechtenstein is admissible before the Court;

(3) that the plea by Guatemala of the non-exhaustion of local
remedies by Mr. Nottebohm is excluded by the prorogation in
this case of the jurisdiction of the Court; or alternatively that
the plea goes properly not to the admissibility of Liechtenstein’s claim on his behalf but to the merits of that claim;

(4) that in any event Mr. Nottebohm exhausted all the local remedies in Guatemala which he was able or required to exhaust under the municipal law of Guatemala and under international law.

As to the merits of its claim, the Government of Liechtenstein repeats the Final Conclusions set out in its Memorial at p. 51 and with reference to paragraphs 2, 3 and 4 of those Final Conclusions, will further ask the Court to order, under Article 50 of the Statute, such inquiry as may be necessary into the account of profits and quantification of damages.”

as final Submissions presented at the hearing of March 4th, 1955:

“May it please the Court,

I, as to the pleas of non-admissibility of the claim of Liechtenstein in respect of Mr. Frederic Nottebohm:

(1) to hold and declare that there is a dispute between Liechtenstein and Guatemala, that it forms the subject-matter of the present application to the Court by the Government of Liechtenstein and that it is admissible for adjudication by the Court without further diplomatic communication or negotiations between the parties;

(2) to find and declare that the naturalization of Mr. Frederic Nottebohm in Liechtenstein on October 13th, 1939, was not contrary to international law; and that Liechtenstein’s claim on behalf of Mr. Nottebohm as a national of Liechtenstein is admissible before the Court;

(3) to hold and declare:

(a) that in regard to the person of Mr. Frederic Nottebohm he was prevented from exhausting the local remedies and that in any case such remedies would have been ineffective;

(b) that in regard to the properties in respect to which no decision was given by the Minister upon the application for exoneration, lodged by Mr. Frederic Nottebohm, Mr. Frederic Nottebohm has exhausted the remedies which were available to him in Guatemala and which he was required to exhaust under the municipal law of Guatemala and under international law;

(4) if the Court should not hold and declare in favour of conclusion (3) above

to declare nevertheless

that the claim is admissible since the facts disclose a breach of international law by Guatemala in the treatment of the person and property of Mr. Frederic Nottebohm.

II. As to the Merits of its claim:

(5) to adjourn the oral pleadings for not less than three months in order that the Government of Liechtenstein may obtain and assemble documents in support of comments on the new documents produced by the Government of Guatemala;

(6) to request the Government of Guatemala to produce the original or certified copy of the original of the 1922 agreements referred to in the agreements of 8th January, 1924 (Document numbered VIII) and of 15th March, 1938 (Document numbered XI);

(7) to fix in due course a date for the completion of the oral hearings on the Merits;

(8) if the Court should not make any Order as requested in (5)-(7), the Government of Liechtenstein repeats the final conclusions set out in its Memorial at page 51, and with reference to the paragraphs 2, 3 and 4 of those final conclusions further asks the Court to order under Article 50 of the Statute such enquiry as may be necessary into the account of profits and quantification of damages.”

On behalf of the Government of Guatemala:

in the Counter-Memorial:

“May it please the Court,

subject to all reservations and without prejudice,

As to admissibility:

to declare that the claim of the Principality of Liechtenstein is inadmissible

(i) by reason of the absence of any prior diplomatic negotiations;

(ii) because the Principality of Liechtenstein has failed to prove that M. Nottebohm, for whose protection it is acting, properly acquired Liechtenstein nationality in accordance with the law of the Principality;

because, even if such proof were provided, the legal provisions which would have been applied cannot be regarded as in conformity with international law;

and because M. Nottebohm appears in any event not to have lost, or not validly to have lost, his German nationality;

(iii) on the ground of M. Nottebohm’s failure to exhaust local remedies;

In the alternative, on the Merits:

to hold that neither in the legislative measures of Guatemala applied in the case of M. Nottebohm, nor in the administrative or
their conduct in relation to him such as to involve the responsibility of the Respondent State; consequently, to dismiss the claim of Liechtenstein.

In the further alternative, in the event of the ordering of an expert opinion to determine the quantum of damages:

to hold that the amount of damages to be awarded should be calculated in accordance with the Guatemalan law, namely, Decree 540 and, in respect of certain immovable property, the Agrarian Reform Law;”

as final submissions presented at the hearing of March 7th, 1955:

“May it please the Court,

subject to all reservations and without prejudice,

as to admissibility:

to declare that the claim of the Principality of Liechtenstein is inadmissible

(1) on the ground of the absence of any prior diplomatic negotiations between the Principality of Liechtenstein and Guatemala such as would disclose the existence of a dispute between the two States before the filing of the Application instituting proceedings;

in the alternative on this point:

to declare that the claim of the Principality on this ground is inadmissible, at least in so far as it relates to reparation for injury allegedly caused to the person of Friedrich Nottebohm.

(2) (a) on the ground that Mr. Nottebohm, for whose protection the Principality of Liechtenstein is acting before the Court, has not properly acquired Liechtenstein nationality in accordance with the law of the Principality;

(b) on the ground that naturalization was not granted to Mr. Nottebohm in accordance with the generally recognized principles in regard to nationality;

(c) in any case, on the ground that Mr. Nottebohm appears to have solicited Liechtenstein nationality fraudulently, that is to say, with the sole object of acquiring the status of a neutral national before returning to Guatemala, and without any genuine intention to establish a durable link, excluding German nationality, between the Principality and himself;

in the alternative on this point:

to invite Liechtenstein to produce to the Court, within a time-limit to be fixed by the latter, all original documents in the archives relating to the naturalization of Nottebohm and, in particular, the convocations of members of the Diet to the sitting on October 14th, 1939, and those of the Assembly of Mauens citizens on October 15th, 1939, the agenda and minutes of the aforesaid sittings, together with the instrument conferring naturalization allegedly signed by His Highness the Prince Regnant;

(3) on the ground of the non-exhaustion by Friedrich Nottebohm of the local remedies available to him under the Guatemalan legislation, whether in regard to his person or his property, even if
it should appear that the complaints against Guatemala were concerned with an alleged original breach of international law:

in the alternative on this point:

to declare that this contention is well founded, at least in respect of reparation for injury allegedly caused to the person of Nottebohm, and to the property, other than immovable property, or shares that he may have owned in immovable property registered as belonging to the Nottebohm Hermanos Company;

in the further alternative on the Merits:

to declare that there is no occasion to order the supplementary enquiry proposed, since it was incumbent on the Principality, on its own initiative, to discover the nature of Friedrich Nottebohm’s interests in the Nottebohm Hermanos Company and the successive changes effected in the status of that Company and in its direct or indirect relations with the Nottebohm Company of Hamburg;

to hold that no violation of international law has been shown to have been committed by Guatemala in regard to Mr. Nottebohm, either in respect of his property or his person;

more especially in regard to the liquidation of his property, to declare that Guatemala was not obliged to regard the naturalization of Friedrich Nottebohm in the Principality of Liechtenstein as binding upon her, or as a bar to his treatment as an enemy national in the circumstances of the case;

consequently, to dismiss the claim of Liechtenstein together with her conclusions;

as a final alternative in regard to the amount of the damages claimed:


to record a finding on behalf of Guatemala that she expressly disputes the proposed valuations, which have no valid justification.”

* * *

By the Application filed on December 17th, 1931, the Government of Liechtenstein instituted proceedings before the Court in which it claimed restitution and compensation on the ground that the Government of Guatemala had “acted towards the person and property of Mr. Friedrich Nottebohm, a citizen of Liechtenstein, in a manner contrary to international law”. In its Counter-Memorial, the Government of Guatemala contended that this claim was inadmissible on a number of grounds, and one of its objections to the admissibility of the claim related to the nationality of the person for whose protection Liechtenstein had seised the Court.

It appears to the Court that this plea in bar is of fundamental importance and that it is therefore desirable to consider it at the outset.

Guatemala has referred to a well-established principle of international law, which it expressed in Counter-Memorial, where it is stated that “it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection”. This sentence is taken from a Judgment of the Permanent Court of International Justice (Series A/B, No. 76, p. 16), which relates to the form of diplomatic protection constituted by international judicial proceedings.

Liechtenstein considers itself to be acting in conformity with this principle and contends that Nottebohm is its national by virtue of the naturalization conferred upon him.

* * *

Nottebohm was born at Hamburg on September 16th, 1881. He was German by birth, and still possessed German nationality when, in October 1939, he applied for naturalization in Liechtenstein.

In 1905 he went to Guatemala. He took up residence there and made that country the headquarters of his business activities, which increased and prospered; these activities developed in the field of commerce, banking and plantations. Having been an employee in the firm of Nottebohm Hermanos, which had been founded by his brothers Juan and Arturo, he became their partner in 1912 and later, in 1937, he was made head of the firm. After 1905 he sometimes went to Germany on business and to other countries for holidays. He continued to have business connections in Germany. He paid a few visits to a brother who had lived in Liechtenstein since 1931. Some of his other brothers, relatives and friends were in Germany, others in Guatemala. He himself continued to have his fixed abode in Guatemala until 1943, that is to say, until the occurrence of the events which constitute the basis of the present dispute.

In 1939, after having provided for the safeguarding of his interests in Guatemala by a power of attorney given to the firm of Nottebohm Hermanos on March 22nd, he left that country at a date fixed by Counsel for Liechtenstein as at approximately the end of March or the beginning of April, when he seems to have gone to Hamburg, and later to have paid a few brief visits to Vaduz where he was at the beginning of October 1939. It was then, on October 9th, a little more than a month after the opening of the second World War marked by Germany’s attack on Poland, that his attorney, Dr. Marxer, submitted an application for naturalization on behalf of Nottebohm.

The Liechtenstein Law of January 4th, 1934, lays down the conditions for the naturalization of foreigners, specifies the supporting documents to be submitted and the undertakings to be given and defines the competent organs for giving a decision and the procedure to be followed. The Law specifies certain mandatory requirements, namely, that the applicant for naturalization should prove: (1)
“(that the acceptance into the Home Corporation (Heimatverband) of a Liechtenstein commune has been promised to him in case of acquisition of the nationality of the State); (2) that he will lose his former nationality as a result of naturalization, although this requirement may be waived under stated conditions. It further makes naturalization conditional upon compliance with the requirement of residence for at least three years in the territory of the Principality, although it is provided that “this requirement can be dispensed with in circumstances deserving special consideration and by way of exception”. In addition, the applicant for naturalization is required to submit a number of documents, such as evidence of his residence in the territory of the Principality, a certificate of good conduct issued by the competent authority of the place of residence, documents relating to his property and income and, if he is not a resident in the Principality, proof that he has concluded an agreement with the Revenue authorities, “subsequent to the revenue commission of the presumptive home commune having been heard”. The Law further provides for the payment by the applicant of a naturalization fee, which is fixed by the Princely Government and amounts to at least one half of the sum payable by the applicant for reception into the Home Corporation of a Liechtenstein commune, the promise of such reception constituting a condition under the Law for the grant of naturalization.

The Law reveals concern that naturalization should only be granted with knowledge of all the pertinent facts, in that it expressly provides for an inquiry into the relations of the applicant with the country of his former nationality, as well as into all other personal and family circumstances, and adds that “the grant of nationality is barred where these relations and circumstances are such as to cause apprehension that prejudice of any kind may ensue to the State by reason of the admission to nationality”.

As to the consideration of the application by the competent organs and the procedure to be followed by them, the Law provides that the Government, after having examined the application and the documents pertaining thereto, and after having obtained satisfactory information concerning the applicant, shall submit the application to the Diet. If the latter approves the application, the Government shall submit the requisite request to the Prince, who alone is entitled to confer nationality of the Principality.

Finally, the Law empowers the Princely Government, within a period of five years from the date of naturalization, to withdraw Liechtenstein nationality from any person who may have acquired it if it appears that the requirement laid down in the Law were not satisfied; it likewise provides that the Government may at any time deprive a person of his nationality if the naturalization was fraudulently obtained.

This was the legal position with regard to applications for naturalization at the time when Nottebohm’s application was submitted.

* * *

On October 9th, 1939, Nottebohm, “resident in Guatemala since 1905 (at present residing as a visitor with his brother, Hermann Nottebohm, in Vaduz)”, applied for admission as a national of Liechtenstein and, at the same time, for the previous conferment of citizenship in the Commune of Mauren. He sought dispensation from the condition of three years’ residence as prescribed by law, without indicating the special circumstances warranting such waiver. He submitted a statement of the Crédit Suisse in Zürich concerning his assets, and undertook to pay 25,000 Swiss francs to the Commune of Mauren, 12,500 Swiss francs to the State, to which was to be added the payment of due in connection with the proceedings. He further stated that he had had “arrangements with the Revenue Authorities of the Government of Liechtenstein for the conclusion of a formal agreement to the effect that he will pay an annual tax of naturalization amounting to Swiss francs 1,000, of which Swiss francs 600 are payable to the Commune of Mauren and Swiss francs 400 are payable to the Princely Authority of Liechtenstein, subject to the proviso that the payments of these taxes will be set off against ordinary taxes which will fall due if the applicant takes up residence in one of the Communes of the Principality”. He further undertook to deposit as security a sum of 30,000 Swiss francs. He also gave certain general information as to his financial position and indicated that he would never become a burden to the Commune whose citizenship he was seeking.

Lastly, he requested “that naturalization proceedings be initiated and concluded before the Government of the Principality and before the Commune of Mauren without delay, that the application be then placed before the Diet with a favourable recommendation and, finally, that it be submitted with all necessary expedition to His Highness the Reigning Prince”.

On the original typewritten application which has been produced in a photostatic copy, it can be seen that the name of the Commune of Mauren and the amounts to be paid were added by hand, a fact which gave rise to some argument on the part of Counsel for the Parties. There is also a reference to the “Vorausverständnis” of the Reigning Prince obtained on October 13th, 1939, which Liechtenstein interprets as showing the decision to grant naturalization, which interpretation has, however, been questioned. Finally, there is annexed to the application an otherwise blank sheet bearing the signature of the Reigning Prince, “Franz Josef”, but without any date or other explanation.

A document dated October 15th, 1939, certifies that on that date the Commune of Mauren conferred the privilege of its citizenship upon Mr. Nottebohm and requested the Government to transmit it to the Diet for approval. A certificate of October 17th, 1939,
evidences the payment of the taxes required to be paid by Mr. Nottebohm. On October 20th, 1939, Mr. Nottebohm took the oath of allegiance and a final arrangement concerning liability to taxation was concluded on October 23rd.

This was the procedure followed in the case of the naturalization of Nottebohm.

A certificate of nationality has also been produced, signed on behalf of the Government of the Principality and dated October 25th, 1939, to the effect that Nottebohm was naturalized by Supreme Resolution of the Reining Prince dated October 13th, 1939.

Having obtained a Liechtenstein passport, Nottebohm had it visa-ed by the Consul General of Guatemala in Zurich on December 1st, 1939, and returned to Guatemala at the beginning of 1940, where he resumed his former business activities and in particular the management of the firm of Nottebohm Hermanos.

* * *

Relying on the nationality thus conferred on Nottebohm, Liechtenstein considers itself entitled to seise the Court of its claim on his behalf, and its Final Conclusions contain two submissions in this connection. Liechtenstein requests the Court to find and declare, first, “that the naturalization of Mr. Frederic Nottebohm in Liechtenstein on October 13th, 1939, was not contrary to international law”, and, secondly, “that Liechtenstein’s claim on behalf of Mr. Nottebohm as a national of Liechtenstein is admissible before the Court”.

The Final Conclusions of Guatemala, on the other hand, request the Court “to declare that the claim of the Principality of Liechtenstein is inadmissible”, and set forth a number of grounds relating to the nationality of Liechtenstein granted to Nottebohm by naturalization.

Thus, the real issue before the Court is the admissibility of the claim of Liechtenstein in respect of Nottebohm. Liechtenstein’s first submission referred to above is a reason advanced for a decision by the Court in favour of Liechtenstein, while the several grounds given by Guatemala on the question of nationality are intended as reasons for the inadmissibility of Liechtenstein’s claim. The present task of the Court is limited to adjudicating upon the admissibility of the claim of Liechtenstein in respect of Nottebohm on the basis of such reasons as it may itself consider relevant and proper.

In order to decide upon the admissibility of the Application, the Court must ascertain whether the nationality conferred on Nottebohm by Liechtenstein by means of a naturalization which took place in the circumstances which have been described, can be validly invoked as against Guatemala, whether it bestows upon Liechtenstein a sufficient title to the exercise of protection in respect of Nottebohm as against Guatemala and therefore entitles it to seise the Court of a claim relating to him. In this connection, Counsel for Liechtenstein said: “the essential question is whether Mr. Nottebohm, having acquired the nationality of Liechtenstein, that acquisition of nationality is one which must be recognized by other States”. This formulation is accurate, subject to the twofold reservation that, in the first place, what is involved is not recognition for all purposes but merely for the purposes of the admissibility of the Application, and, secondly, that what is involved is not recognition by all States but only by Guatemala.

The Court does not propose to go beyond the limited scope of the question which it has to decide, namely whether the nationality conferred on Nottebohm can be relied upon as against Guatemala in justification of the proceedings instituted before the Court. It must decide this question on the basis of international law; to do so is consistent with the nature of the question and with the nature of the Court’s own function.

* * *

In order to establish that the Application must be held to be admissible, Liechtenstein has argued that Guatemala formerly recognized the naturalization which it now challenges and cannot therefore be heard to put forward a contention which is inconsistent with its former attitude.

Various documents, facts and actions have been relied upon in this connection.

Reliance has been placed on the fact that, on December 15th, 1939, the Consul General of Guatemala in Zurich entered a visa in the Liechtenstein passport of Mr. Nottebohm for his return to Guatemala; that on January 29th, 1940, Nottebohm informed the Ministry of External Affairs in Guatemala that he had adopted the nationality of Liechtenstein and therefore requested that the entry relating to him in the Register of Aliens should be altered accordingly, a request which was granted on January 31st; that on February 9th, 1940, a similar amendment was made to his identity document, and lastly, that a certificate to the same effect was issued to him by the Civil Registry of Guatemala on July 1st, 1940.

The acts of the Guatemalan authorities just referred to proceeded on the basis of the statements made to them by the person concerned. The one led to the other. The only purpose of the first, as appears from Article 9 of the Guatemalan law relating to pass-
ports, was to make possible or facilitate entry into Guatemala, and nothing more. According to the Aliens Act of January 25th, 1936, Article 49, entry in the Register “constitutes a legal presumption that the alien possesses the nationality there attributed to him, but evidence to the contrary is admissible”. All of these acts have reference to the control of aliens in Guatemala and not to the exercise of diplomatic protection. When Nottebohm thus presented himself before the Guatemalan authorities, the latter had before them a private individual: there did not thus come into being any relationship between governments. There was nothing in all this to show that Guatemala then recognized that the naturalization conferred upon Nottebohm gave Liechtenstein any title to the exercise of protection.

Although the request sent by Nottebohm Hermanos to the Minister of Finance and Public Credit on September 13th, 1940, with reference to the inclusion of the firm on the British Statutory List, referred to the fact that only one of the partners was “a national of Liechtenstein/Switzerland”, this point was only made incidentally, and the whole request was based on the consideration that the firm “is a wholly Guatemalan business” and on the interests of the “national economy”. It was on this basis that the matter was discussed, and no reference whatsoever was made to any intervention by the Government of Liechtenstein at that time.

Similarly unconnected with the exercise of protection was the Note addressed on October 18th, 1943, by the Minister of External Affairs to the Swiss Consul who, having understood that the registration documents indicated that Nottebohm was a Swiss citizen of Liechtenstein, requested, in a Note of September 25th, 1943, that this matter might be clarified. He received the reply that there was no such indication of Swiss nationality in the documents and, although the Consul had referred to the representation of the interests of the Principality abroad by the representatives of the Swiss Government, the reply sent to him made no allusion to the exercise, by or on behalf of Liechtenstein, of protection in favour of Nottebohm.

When, on October 20th, 1943, the Swiss Consul asked that “Mr. Walter Schellenberg of Swiss nationality and Mr. Federico Nottebohm of Liechtenstein”, who had been transferred to the United States Military Base for the purpose of being deported, should, “as citizens of neutral countries”, be returned home, the Minister of External Affairs of Guatemala replied, on October 22nd, that the action taken was attributable to the authorities of the United States, and made no reference to the nationality of Nottebohm.

In a letter of the Swiss Consul of December 15th, 1944, to the Minister of External Affairs, reference is made to the entry on the Black Lists of “Frederick Nottebohm, a national of Liechtenstein”. Neither the text of these lists nor any extract therefrom has been produced, but this is not germane to the present discussion. The important fact is that Guatemala, in its reply dated December 20th, 1944, expressly stated that it could not “recognize that Mr. Nottebohm, a German subject habitually resident in Guatemala, has acquired the nationality of Liechtenstein without changing his habitual residence”. The Court has not at present to consider the validity of the ground put forward for disputing Nottebohm’s nationality, which was subsequently put forward to justify the cancellation of his registration as a citizen of the “Condado” of Liechtenstein. It is sufficient for it to note that there is here an express denial by Guatemala of Nottebohm’s Liechtenstein nationality.

Nottebohm’s name having been removed from the Register of Resident Aliens, his relative Karl Heinz Nottebohm Stoltz, on July 24th, 1946, requested the cancellation of the decision and the restoration of Nottebohm’s name to the Register as a citizen of Liechtenstein, putting forward a number of considerations, essentially based on the exclusive right of Liechtenstein to decide as to the nationality in question and the duty of Guatemala to conform to such decision. Far from accepting the considerations thus put forward, the Minister of External Affairs rejected the request, on August 1st, 1946, merely saying that it was pointless, since Nottebohm was no longer a resident of Guatemala.

There is nothing here to show that before the institution of proceedings Guatemala had recognized Liechtenstein’s title to exercise protection in favour of Nottebohm and that it is thus precluded from denying such a title.

Nor can the Court find any recognition of such title in the communication signed by the Minister of External Affairs of Guatemala, addressed to the President of the Court, on September 9th, 1952. In this communication reference is made to measures taken against Nottebohm “who claims to be a national of the claimant State” (“quien se alega ser ciudadano del Estado reclamante”). Then, reference having been made to the claim presented by the Government of the Principality of Liechtenstein with regard to these measures, it is stated that the Government of Guatemala “is quite willing to begin negotiations with the Government of the said Principality with a view to arriving at an amicable solution, either in the sense of a direct settlement, an arbitration or judicial settlement”. It would constitute an obstacle to the opening of negotiations for the purpose of reaching a settlement of an international dispute or of concluding a special agreement for arbitration and would hamper the use of the means of settlement recommended by Article 33 of the Charter of the United Nations, to interpret an offer to have recourse
to such negotiations or such means, consent to participate in them or actual participation, as imposing the abandonment of any defence which a party may consider it is entitled to raise or as implying acceptance of any claim by the other party, when no such abandonment or acceptance has been expressed and where it does not indisputably follow from the attitude adopted. The Court cannot see in the communication of September 9th, 1952, any admission by Guatemala of the possession by Nottebohm of a nationality which it clearly disputed in its last official communication on this subject, namely, the letter of December 20th, 1944, to the Swiss Consul, still less can it find any recognition of Liechtenstein's title, based on such nationality, to exercise its protection and to seize the Court in the present case.

* * *

Since no proof has been adduced that Guatemala has recognized the title to the exercise of protection relied upon by Liechtenstein as being derived from the naturalization which it granted to Nottebohm, the Court must consider whether such an act of granting nationality by Liechtenstein directly entails an obligation on the part of Guatemala to recognize its effect, namely, Liechtenstein's right to exercise its protection. In other words, it must be determined whether that unilateral act by Liechtenstein is one which can be relied upon against Guatemala in regard to the exercise of protection. The Court will deal with this question without considering that of the validity of Nottebohm's naturalization according to the law of Liechtenstein.

It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation. It is not necessary to determine whether international law imposes any limitations on its freedom of decision in this domain. Furthermore, nationality has its most immediate, its most far-reaching and, for most people, its only effects within the legal system of the State conferring it. Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals. This is implied in the wider concept that nationality is within the domestic jurisdiction of the State.

But the issue which the Court must decide is not one which pertains to the legal system of Liechtenstein. It does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection, in the case under consideration. To exercise protection, to apply to the Court, is to place oneself on the plane of international law. It is international law which determines whether a State is entitled to exercise protection and to seize the Court.

The naturalization of Nottebohm was an act performed by Liechtenstein in the exercise of its domestic jurisdiction. The question to be decided is whether that act has the international effect here under consideration.

International practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction which do not necessarily or automatically have international effect, which are not necessarily and automatically binding on other States or which are binding on them only subject to certain conditions: this is the case, for instance, of a judgment given by the competent court of a State which it is sought to invoke in another State.

In the present case it is necessary to determine whether the naturalization conferred on Nottebohm can be successfully invoked against Guatemala, whether, as has already been stated, it can be relied upon as against that State, so that Liechtenstein is thereby entitled to exercise its protection in favour of Nottebohm against Guatemala.

When one State has conferred its nationality upon an individual and another State has conferred its own nationality on the same person, it may occur that each of these States, considering itself to have acted in the exercise of its domestic jurisdiction, adheres to its own view and bases itself thereon in so far as its own actions are concerned. In so doing, each State remains within the limits of its domestic jurisdiction.

This situation may arise on the international plane and fall to be considered by international arbitrators or by the courts of a third State. If the arbitrators or the courts of such a State should confine themselves to the view that nationality is exclusively within the domestic jurisdiction of the State, it would be necessary for them to find that they were confronted by two contradictory assertions made by two sovereign States, assertions which they would consequently have to regard as of equal weight, which would oblige them to allow the contradiction to subsist and thus fail to resolve the conflict submitted to them.

In most cases arbitrators have not strictly speaking had to decide a conflict of nationality as between States, but rather to determine whether the nationality invoked by the applicant State was one which could be relied upon as against the respondent State, that is to say, whether it entitled the applicant State to exercise protection. International arbitrators, having before them allegations of nationality by the applicant State which were contested by the respondent State, have sought to ascertain whether nationality had been conferred by the applicant State in circumstances such as to give rise to an obligation on the part
of the respondent State to recognize the effect of that nationality. In order to decide this question arbitrators have evolved certain principles for determining whether full international effect was to be attributed to the nationality invoked. The same issue is now before the Court: it must be resolved by applying the same principles.

The courts of third States, when confronted by a similar situation, have dealt with it in the same way. They have done so not in connection with the exercise of protection, which did not arise before them, but where two different nationalities have been invoked before them they have had, not indeed to decide such a dispute as between the two States concerned, but to determine whether a given foreign nationality which had been invoked before them was one which they ought to recognize.

International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors may arise into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.

Similarly, the courts of third States, when they have before them an individual whom two other States hold to be their national, seek to resolve the conflict by having recourse to international criteria and their prevailing tendency is to prefer the real and effective nationality.

The same tendency prevails in the writings of publicists and in practice. This notion is inherent in the provisions of Article 3, paragraph 2, of the Statute of the Court. National laws reflect this tendency when, inter alia, they make naturalization dependent on conditions indicating the existence of a link, which may vary in their purpose or in their nature but which are essentially concerned with this idea. The Liechtenstein Law of January 4th, 1934, is a good example.

The practice of certain States which refrain from exercising protection in favour of a naturalized person when the latter has in fact, by his prolonged absence, severed his links with what is no longer for him anything but his nominal country, manifests the view of these States that, in order to be capable of being invoked against another State, nationality must correspond with the factual situation. A similar view is manifested in the relevant provisions of the bilateral nationality treaties concluded between the United States of America and other States since 1868, such as those sometimes referred to as the Bancroft Treaties, and in the Pan-American Convention, signed at Rio de Janeiro on August 13th, 1906, on the status of naturalized citizens who resume residence in their country of origin.

The character thus recognized on the international level as pertaining to nationality is in no way inconsistent with the fact that international law leaves it to each State to lay down the rules governing the grant of its own nationality. The reason for this is that the diversity of demographic conditions has thus far made it impossible for any general agreement to be reached on the rules relating to nationality, although the latter by its very nature affects international relations. It has been considered that the best way of making such rules accord with the varying demographic conditions in different countries is to leave the fixing of such rules to the competence of each State. On the other hand, a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual’s genuine connection with the State which assumes the defence of its citizens by means of protection as against other States.

The requirement that such a concordance must exist is to be found in the studies carried on in the course of the last thirty years upon the initiative and under the auspices of the League of Nations and the United Nations. It explains the provision which the Conference for the Codification of International Law, held at The Hague in 1930, inserted in Article 1 of the Convention relating to the Conflict of Nationality Laws, laying down that the law enacted by a State for the purpose of determining who are its nationals “shall be recognized by other States in so far as it is consistent with ... international custom, and the principles of law generally recognized with regard to nationality”. In the same spirit, Article 5 of the Convention refers to criteria of the individual’s genuine connections for the purpose of resolving questions of dual nationality which arise in third States.

According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual’s connection with the State which has made him its national.
Diplomatic protection and protection by means of international judicial proceedings constitute measures for the defence of the rights of the State. As the Permanent Court of International Justice has said and has repeated, "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" (P.C.I.J., Series A, No. 2, p. 12, and Series A/B, Nos. 20-21, p. 17).

* * *

Since this is the character which nationality must possess when it is invoked to furnish the State which has granted it with a title to the exercise of protection and to the institution of international judicial proceedings, the Court must ascertain whether the nationality granted to Nottebohm by means of naturalization is of this character or, in other words, whether the factual connection between Nottebohm and Liechtenstein in the period preceding, contemporaneous with and following his naturalization appears to be sufficiently close, so preponderant in relation to any connection which may have existed between him and any other State, that it is possible to regard the nationality conferred upon him as real and effective, as the exact juridical expression of a social fact of a connection which existed previously or came into existence thereafter.

Naturalization is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being. It involves his breaking of a bond of allegiance and his establishment of a new bond of allegiance. It may have far-reaching consequences and involve profound changes in the destiny of the individual who obtains it. It concerns him personally, and to consider it only from the point of view of its repercussions with regard to his property would be to misunderstand its profound significance. In order to appraise its international effect, it is impossible to disregard the circumstances in which it was conferred, the serious character which attaches to it, the real and effective, and not merely the verbal preference of the individual seeking it for the country which grants it to him.

At the time of his naturalization does Nottebohm appear to have been more closely attached by his tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future to Liechtenstein than to any other State?

The essential facts appear with sufficient clarity from the record. The Court considers it unnecessary to have regard to the documents purporting to show that Nottebohm had or had not retained his interests in Germany, or to have regard to the alternative submission of Guatemala relating to a request to Liechtenstein to produce further documents. It would further point out that the Government of Liechtenstein, in asking in its Final Conclusions for an adjournment of the oral proceedings and an opportunity to present further documents, did so only for the eventuality of the Application being held to be admissible and not for the purpose of throwing further light upon the question of the admissibility of the Application.

The essential facts are as follows:

At the date when he applied for naturalization Nottebohm had been a German national from the time of his birth. He had always retained his connections with members of his family who had remained in Germany and he had always had business connections with that country. His country had been at war for more than a month, and there is nothing to indicate that the application for naturalization then made by Nottebohm was motivated by any desire to dissociate himself from the Government of his country.

He had been settled in Guatemala for 34 years. He had carried on his activities there. It was the main seat of his interests. He returned there shortly after his naturalization, and it remained the centre of his interests and of his business activities. He stayed there until his removal as a result of war measures in 1943. He subsequently attempted to return there, and he now complains of Guatemala's refusal to admit him. There, too, were several members of his family who sought to safeguard his interests.

In contrast, his actual connections with Liechtenstein were extremely tenuous. No settled abode, no prolonged residence in that country at the time of his application for naturalization: the application indicates that he was paying a visit there and confirms the transient character of this visit by its request that the naturalization proceedings should be initiated and concluded without delay. No intention of settling there was shown at that time or realized in the ensuing weeks, months or years—on the contrary, he returned to Guatemala very shortly after his naturalization and showed every intention of remaining there. If Nottebohm went to Liechtenstein in 1946, this was because of the refusal of Guatemala to admit him. No indication is given of the grounds warranting the waiver of the condition of residence, required by the 1934 Nationality Law, which waiver was implicitly granted to him. There is no allegation of any economic interests or of any activities exercised or to be exercised in Liechtenstein, and no manifestation of any intention whatsoever to transfer all or some of his interests and his business activities to Liechtenstein. It is unnecessary in this connection to attribute much importance to the promise to pay the taxes levied at the time of his naturalization. The only links to be discovered between the Principality and Nottebohm are the short sojourns already referred to and the presence in Vaduz of one of his brothers: but his brother's presence is referred
to in his application for naturalization only as a reference to his good conduct. Furthermore, other members of his family have asserted Nottebohm's desire to spend his old age in Guatemala.

These facts clearly establish, on the one hand, the absence of any bond of attachment between Nottebohm and Liechtenstein and, on the other hand, the existence of a long-standing and close connection between him and Guatemala, a link which his naturalization in no way weakened. That naturalization was not based on any real prior connection with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred in exceptional circumstances of speed and accommodation. In both respects, it was lacking in the genuineness requisite to an act of such importance, if it is to be entitled to be respected by a State in the position of Guatemala. It was granted without regard to the concept of nationality adopted in international relations.

Naturalization was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm's membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of a belligerent State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations—other than fiscal obligations—and exercising the rights pertaining to the status thus acquired.

Guatemala is under no obligation to recognize a nationality granted in such circumstances. Liechtenstein consequently is not entitled to extend its protection to Nottebohm vis-à-vis Guatemala and its claim must, for this reason, be held to be inadmissible.

The Court is not therefore called upon to deal with the other pleas in bar put forward by Guatemala or the Conclusions of the Parties other than those on which it is adjudicating in accordance with the reasons indicated above.

For these reasons,

The Court,

by eleven votes to three,

Holds that the claim submitted by the Government of the Principality of Liechtenstein is inadmissible.
International Court of Justice

Barcelona Traction, Light and Power Company, Limited
(Belgium v. Spain)
Second Phase, Judgment

*I.C.J. Reports 1970*
CASE CONCERNING
THE BARCELONA TRACTION, LIGHT 
AND POWER COMPANY, LIMITED
(NEW APPLICATION: 1962)
(BELGIUM v. SPAIN)
SECOND PHASE
JUDGMENT OF 5 FEBRUARY 1970

Mode officiel de citation:
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Official citation:
Barcelona Traction, Light and Power Company, Limited,
INTernational Court of Justice

Year 1970

5 February 1970

CASE CONCERNING
THE BARCELONA TRACTION, LIGHT
AND POWER COMPANY, LIMITED

(NEW APPLICATION: 1962)
(BELGIUM v. SPAIN)
SECOND PHASE

Question of admissibility—Capacity of Applicant Government to act.
Claim brought on behalf of natural and juristic persons alleged to be shareholders in foreign limited liability company and based on allegedly unlawful measures taken against the company—Nature of corporate entities under municipal law generally—Distinction between injury to rights of company and injury to direct rights of shareholders—Distinction between rights and interests—No injury to shareholders’ direct rights alleged—Injury to shareholders’ interests resulting from injury to rights of company insufficient to found claim.

Diplomatic protection—General principle of protection of company by company’s national State—Company incorporated in third State, admitted by both Parties to be company’s national State—Possible circumstances involving exceptions to general principle: case of disappearance of company; case of company’s national State lacking capacity to act—Cessation of protection by company’s national State not equivalent to legal impediment—Irrelevance of non-existence of link of compulsory jurisdiction between company’s national State and Respondent Government.

Foreign investments as part of State’s national economic resources—Injury thereto—No responsibility in absence of injury to recognized rights of State.
Possible relevance of considerations of equity—Right of protection in respect of shareholders’ interests if not possible to apply general principle—Practical difficulties of any system of concurrent or secondary rights—Equitable considerations not applicable if company’s national State able to act.

JUDGMENT

President: President Bustamante y Rivero; Vice-President Koretsky; Judges Sir Gerald Fitzmaurice, Tanaka, Jessup, Morelli, Padilla Nervo, Forster, Gros, Ammoun, Bengzon, Petren, Lachs, Onyeama; Judges ad hoc Armand-Ugon, Riphagen; Registrar Aquaroni.

In the case concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962),

between

the Kingdom of Belgium,
represented by
Chevalier Y. Devadder, Legal Adviser to the Ministry of Foreign Affairs and External Trade,
as Agent,
Mr. H. Rolin, Professor emeritus of the Faculty of Law of the Free University of Brussels and Advocate at the Brussels Court of Appeal,
as Co-Agent and Counsel,
assisted by
Mrs. S. Bastid, Professor in the Faculty of Law of the University of Paris
Mr. J. Van Ryn, Professor in the Faculty of Law of the Free University of Brussels and Advocate at the Brussels Court of Cassation,
Mr. M. Grégoire, Advocate at the Brussels Court of Appeal,
Mr. F. A. Mann, Honorary Professor in the Faculty of Law of the University of Bonn, Solicitor of the Supreme Court, England,
Mr. M. Virally, Professor in the Faculties of Law of the Universities of Geneva and Strasbourg and at the Graduate Institute of International Studies in Geneva,
Mr. E. Lauterpacht, Lecturer in the University of Cambridge, Member of the English Bar,
Mr. A. S. Pattillo, Q.C., Member of the Ontario Bar (Canada),
Mr. M. Slusny, Lecturer in the Faculty of Law of the Free University of Brussels and Advocate at the Brussels Court of Appeal,
Mr. P. Van Omme slaghe, Professeur extraordinaire in the Faculty of Law of the Free University of Brussels and Advocate at the Brussels Court of Appeal,
Mr. M. Waelbroeck, Professeur extraordinaire in the Faculty of Law of the Free University of Brussels,
Mr. J. Kirkpatrick, Lecturer in the Faculty of Law of the Free University of Brussels and Advocate at the Brussels Court of Appeal,
as Counsel,
Mr. H. Bachrach, Member of the New York State and Federal Bars,
as Assistant Counsel and Secretary,
and by
Mr. L. Prieto-Castro, Professor in the Faculty of Law of the University of Madrid,
Mr. M. Olivencia Ruiz, Professor in the Faculty of Law of the University of Seville,
Mr. J. Girón Tena, Professor in the Faculty of Law of the University of Valladolid,
as Expert-Counsel in Spanish Law,

and

the Spanish State,
represented by
Mr. J. M. Castro-Rial, Professor, Legal Adviser to the Ministry of Foreign Affairs,
as Agent,
assisted by
Mr. R. Ago, Professor of International Law in the Faculty of Law of the University of Rome,
Mr. M. Bos, Professor of International Law in the Faculty of Law of the University of Utrecht,
Mr. P. Cahier, Professor of International Law at the Graduate Institute of International Studies in Geneva,
Mr. J. Carreras Lllansana, Professor in the Faculty of Law of the University of Navarre,
Mr. F. de Castro y Bravo, Professor, Legal Adviser to the Ministry of Foreign Affairs,
Mr. J. M. Gil-Robles Quiñones, Professor in the Faculty of Law of the University of Oviedo,
Mr. M. Gimeno Fernández, Judge of the Supreme Court, Madrid,
Mr. P. Guggenheim, Professor of International Law at the Graduate Institute of International Studies in Geneva,
Mr. E. Jiménez de Aréchaga, Professor of International Law in the Faculty of Law of the University of Montevideo,
Mr. A. Malintoppi, Professor of International Law in the Faculty of Political Science of the University of Florence,
Mr. F. Ramírez, Secretary-General of the Spanish Institute of Foreign Exchange, Madrid,
Mr. P. Reuter, Professor in the Faculty of Law of the University of Paris,
Mr. J. M. Rivas Fresnedo, Inspector and Expert, Ministry of Finance, Madrid,
Mr. J. L. Sureda Carrión, Professor in the Faculty of Law of the University of Barcelona,
Mr. D. Triay Moll, Inspector and Expert, Ministry of Finance, Madrid,
Mr. R. Uría González, Professor in the Faculty of Law of the University of Madrid,
Sir Humphrey Waldock, C.M.G., O.B.E., Q.C., Chichele Professor of Public International Law in the University of Oxford,
Mr. P. Weil, Professor in the Faculty of Law of the University of Paris,
as Counsel or Advocates,

and by
Mr. J. M. Lleolet y Muñoz, Secretary of Embassy,
Mr. L. Martínez-Aguiló, Secretary of Embassy,
as Secretaries,

THE COURT,
composed as above,

delivers the following Judgment:

1. In 1958 the Belgian Government filed with the International Court of Justice an Application against the Spanish Government seeking reparation for damage allegedly caused to the Barcelona Traction, Light and Power Company, Limited, on account of acts said to be contrary to international law committed by organs of the Spanish State. After the filing of the Belgian Memorial and the submission of preliminary objections by the Spanish Government, the Belgian Government gave notice of discontinuance of the proceedings, with a view to negotiations between the representatives of the private interests concerned. The case was removed from the Court’s General List on 10 April 1961.

2. On 19 June 1962, the negotiations having failed, the Belgian Government submitted to the Court a new Application, claiming reparation for the damage allegedly sustained by Belgian nationals, shareholders in the Barcelona Traction company, on account of acts said to be contrary to international law committed in respect of the company by organs of the Spanish State. On 15 March 1963 the Spanish Government raised four preliminary objections to the Belgian Application.

3. By its Judgment of 24 July 1964, the Court rejected the first two preliminary objections. The first was to the effect that the discontinuance, under Article 69, paragraph 2, of the Court’s Rules, of previous proceedings relative to the same events in Spain, disentitled the Belgian Government from bringing the present proceedings. The second was to the effect that even if this was not the case, the Court was not competent, because the necessary jurisdictional basis requiring Spain to submit to the jurisdiction of the Court did not exist. The Court joined the third and fourth objections to the merits. The third was to the effect that the claim is inadmissible because the Belgian Government lacks any jus standi to intervene or make a judicial claim on behalf of Belgian interests in a Canadian company, assuming that the Belgian character of such interests were established, which is denied by the Spanish Government. The fourth was to the effect that even if the Belgian Government has the necessary jus standi, the claim still remains inadmissible because local remedies in respect of the acts complained of were not exhausted.

4. Time-limits for the filing of the further pleadings were fixed or, at the request of the Parties, extended by Orders of 28 July 1964, 11 June 1965, 12 January 1966, 23 November 1966, 12 April 1967, 15 September 1967 and 24 May 1968, in the last-mentioned of which the Court noted with regret that the time-limits originally fixed by the Court for the filing of the pleadings had not been observed, whereby the written proceedings had been considerably prolonged. The written proceedings finally came to an end on 1 July 1968 with the filing of the Rejoinder of the Spanish Government.
5. Pursuant to Article 31, paragraph 3, of the Statute, Mr. Willem Riphagen, Professor of International Law at the Rotterdam School of Economics, and Mr. Enrique C. Armand-Ugon, former President of the Supreme Court of Justice of Uruguay and a former Member of the International Court of Justice, were chosen by the Belgian and Spanish Governments respectively to sit as judges ad hoc.

6. Pursuant to Article 44, paragraph 2, of the Rules of Court, the pleadings and annexed documents were, after consultation of the Parties, made available to the Governments of Chile, Peru and the United States of America. Pursuant to paragraph 3 of the same Article, the pleadings and annexed documents were, with the consent of the Parties, made accessible to the public as from 10 April 1969.

7. At 64 public sittings held between 15 April and 22 July 1969 the Court heard oral arguments and replies by Chevalier Devadder, Agent, Mr. Rolin, co-Agent and Counsel, Mrs. Bastid, Mr. Van Ryn, Mr. Grégoire, Mr. Mann, Mr. Virally, Mr. Lauterpacht, and Mr. Pattillo, Counsel, on behalf of the Belgian Government and by Mr. Castro-Rial, Agent, Mr. Ago, Mr. Carreras Mr. Gil-Robles, Mr. Guggenheim, Mr. Jiménez de Aréchaga, Mr. Malintoppi, Mr. Reuter, Mr. Sureda, Mr. Uria, Sir Humphrey Waldock and Mr. Weil, Counsel or Advocates, on behalf of the Spanish Government.

* * *

8. The Barcelona Traction, Light and Power Company, Limited, is a holding company incorporated in 1911 in Toronto (Canada), where it has its head office. For the purpose of creating and developing an electric power production and distribution system in Catalonia (Spain), it formed a number of operating, financing and concession-holding subsidiary companies. Three of these companies, whose shares it owned wholly or almost wholly, were incorporated under Canadian law and had their registered offices in Canada (Ebro Irrigation and Power Company, Limited, Catalanian Land Company, Limited and International Utilities Finance Corporation, Limited); the others were incorporated under Spanish law and had their registered offices in Spain. At the time of the outbreak of the Spanish Civil War the group, through its operating subsidiaries, supplied the major part of Catalonia's electricity requirements.

9. According to the Belgian Government, some years after the First World War Barcelona Traction's share capital came to be very largely held by Belgian nationals—natural or juristic persons—and a very high percentage of the shares has since then continuously belonged to Belgian nationals, particularly the Société Internationale d'Energie Hydro-Electrique (Sidro), whose principal shareholder, the Société Financière de Transports et d'Entreprises Industrielles (Sofina), is itself a company in which Belgian interests are preponderant. The fact that large blocks of shares were for certain periods transferred to American nominees, to protect these securities in the event of invasion of Belgian territory during the Second World War, is not, according to the Belgian contention, of any relevance in this connection, as it was Belgian nationals, particularly Sidro, who continued to be the real owners. For a time the shares were vested in a trustee, but the Belgian Government maintains that the trust terminated in 1946. The Spanish Government contends, on the contrary, that the Belgian nationality of the shareholders is not proven and that the trustee or the nominees must be regarded as the true shareholders in the case of the shares concerned.

10. Barcelona Traction issued several series of bonds, some in pesetas but principally in sterling. The issues were secured by trust deeds, with the National Trust Company, Limited, of Toronto as trustee of the sterling bonds, the security consisting essentially of a charge on bonds and shares of Ebro and other subsidiaries and of a mortgage executed by Ebro in favour of National Trust. The sterling bonds were serviced out of transfers to Barcelona Traction effected by the subsidiary companies operating in Spain.

11. In 1936 the servicing of the Barcelona Traction bonds was suspended on account of the Spanish civil war. In 1940 payment of interest on the peseta bonds was resumed with the authorization of the Spanish exchange control authorities (required because the debt was owed by a foreign company), but authorization for the transfer of the foreign currency necessary for the servicing of the sterling bonds was refused and those interest payments were never resumed.

12. In 1945 Barcelona Traction proposed a plan of compromise which provided for the reimbursement of the sterling debt. When the Spanish authorities refused to authorize the transfer of the necessary foreign currency, this plan was twice modified. In its final form, the plan provided, inter alia, for an advance redemption by Ebro of Barcelona Traction peseta bonds, for which authorization was likewise required. Such authorization was refused by the Spanish authorities. Later, when the Belgian Government complained of the refusals to authorize foreign currency transfers, without which the debts on the bonds could not be honoured, the Spanish Government stated that the transfers could not be authorized unless it was shown that the foreign currency was to be used to repay debts arising from the genuine importation of foreign capital into Spain, and that this had not been established.

13. On 9 February 1948 three Spanish holders of recently acquired Barcelona Traction sterling bonds petitioned the court of Reus (Province of Tarragona) for a declaration adjudging the company bankrupt, on account of failure to pay the interest on the bonds. The petition was admitted by an order of 10 February 1948 and a judgment declaring the company bankrupt was given on 12 February. This judgment included provisions appointing a commissioner in bankruptcy and an interim
receiver and ordering the seizure of the assets of Barcelona Traction, Ebro and Compañía Barcelona de Electricidad, another subsidiary company.

14. The shares of Ebro and Barcelona had been deposited by Barcelona Traction and Ebro with the National Trust company of Toronto as security for their bond issues. All the Ebro and the Barcelona ordinary shares were held outside Spain, and the possession taken of them was characterized as "mediated and constructive civil possession", that is to say was not accompanied by physical possession. Pursuant to the bankruptcy judgment the commissioner in bankruptcy at once dismissed the principal management personnel of the two companies and during the ensuing weeks the interim receiver appointed Spanish directors and declared that the companies were thus "normalized". Shortly after the bankruptcy judgment the petitioners brought about the extension of the taking of possession and related measures to the other subsidiary companies.

15. Proceedings in Spain to contest the bankruptcy judgment and the related decisions were instituted by Barcelona Traction, National Trust, the subsidiary companies and their directors or management personnel. However, Barcelona Traction, which had not received a judicial notice of the bankruptcy proceedings, and was not represented before the Reus court in February, took no proceedings in the courts until 18 June 1948. In particular it did not enter a plea of opposition against the bankruptcy judgment within the time-limit of eight days from the date of publication of the judgment laid down in Spanish legislation. On the grounds that the notification and publication did not comply with the relevant legal requirements, the Belgian Government contends that the eight-day time-limit had never begun to run.

16. Motions contesting the jurisdiction of the Reus court and of the Spanish courts as a whole, in particular by certain bondholders, had a suspensive effect on the actions for redress; a decision on the question of jurisdiction was in turn delayed by lengthy proceedings brought by the Genora company, a creditor of Barcelona Traction, disputing Barcelona Traction's right to be a party to the proceedings on the jurisdictional issue. One of the motions contesting jurisdiction was not finally dismissed by the Barcelona court of appeal until 1963, after the Belgian Application had been filed with the International Court of Justice.

17. In June 1949, on an application by the Namel company, with the intervention of the Genora company, the Barcelona court of appeal gave a judgment making it possible for the meeting of creditors to be convened for the election of the trustees in bankruptcy, by excluding the necessary procedure from the suspensive effect of the motion contesting jurisdiction. Trustees were then elected, and procured decisions that new shares of the subsidiary companies should be created, cancelling the shares located outside Spain (December 1949), and that the head offices of Ebro and Catalonian Land should henceforth be at Barcelona and not Toronto. Finally in August 1951 the trustees obtained court authorization to sell "the totality of the shares, with all the rights attaching to them, representing the corporate capital" of the subsidiary companies, in the form of the newly created share certificates. The sale took place by public auction on 4 January 1952 on the basis of a set of General Conditions and became effective on 17 June 1952. The purchaser was a newly formed company, Fuerzas Eléctricas de Cataluña, S.A. (Fecsa), which thereupon acquired complete control of the undertaking in Spain.

18. Proceedings before the court of Reus, various courts of Barcelona and the Spanish Supreme Court, to contest the sale and the operations which preceded or followed it, were taken by, among others, Barcelona Traction, National Trust and the Belgian company Sidro as a shareholder in Barcelona Traction, but without success. According to the Spanish Government, up to the filing of the Belgian Application, 2,736 orders had been made in the case and 494 judgments given by lower and 37 by higher courts. For the purposes of this Judgment it is not necessary to go into these orders and judgments.

19. After the bankruptcy declaration, representations were made to the Spanish Government by the British, Canadian, United States and Belgian Governments.

20. The British Government made representations to the Spanish Government on 23 February 1948 concerning the bankruptcy of Barcelona Traction and the seizure of its assets as well as those of Ebro and Barcelona, stating its interest in the situation of the bondholders resident in the United Kingdom. It subsequently supported the representations made by the Canadian Government.

21. The Canadian Government made representations to the Spanish Government in a series of diplomatic notes, the first being dated 27 March 1948 and the last 21 April 1952; in addition, approaches were made on a less official level in July 1954 and March 1955. The Canadian Government first complained of the denials of justice said to have been committed in Spain towards Barcelona Traction, Ebro and National Trust, but it subsequently based its complaints more particularly on conduct towards the Ebro company said to be in breach of certain treaty provisions applicable between Spain and Canada. The Spanish Government did not respond to a Canadian proposal for the submission of the dispute to arbitration and the Canadian Government subsequently confined itself, until the time when its interposition entirely ceased, to endeavouring to promote a settlement by agreement between the private groups concerned.

22. The United States Government made representations to the Spanish Government on behalf of Barcelona Traction in a note of 22 July 1949, in support of a note submitted by the Canadian Government the previous day. It subsequently continued its interposition through the diplomatic channel and by other means. Since references were made by the United States Government in these representations to the presence of
American interests in Barcelona Traction, the Spanish Government draws the conclusion that, in the light of the customary practice of the United States Government to protect only substantial American investments abroad, the existence must be presumed of such large American interests as to rule out a preponderance of Belgian interests. The Belgian Government considers that the United States Government was motivated by a more general concern to secure equitable treatment of foreign investments in Spain, and in this context cites, inter alia, a note of 5 June 1967 from the United States Government.

23. The Spanish Government having stated in a note of 26 September 1949 that Ebro had not furnished proof as to the origin and genuineness of the bond debts, which justified the refusal of foreign currency transfers, the Belgian and Canadian Governments considered proposing to the Spanish Government the establishment of a tripartite committee to study the question. Before this proposal was made, the Spanish Government suggested in March 1950 the creation of a committee on which, in addition to Spain, only Canada and the United Kingdom would be represented. This proposal was accepted by the United Kingdom and Canadian Governments. The work of the committee led to a joint statement of 11 June 1951 by the three Governments to the effect, inter alia, that the attitude of the Spanish administration in not authorizing the transfers of foreign currency was fully justified. The Belgian Government protested against the fact that it had not been invited to nominate an expert to take part in the enquiry, and reserved its rights; in the proceedings before the Court it contended that the joint statement of 1951, which was based on the work of the committee, could not be set up against it, being res inter alios acta.

24. The Belgian Government made representations to the Spanish Government on the same day as the Canadian Government, in a note of 27 March 1948. It continued its diplomatic intervention until the rejection by the Spanish Government of a Belgian proposal for submission to arbitration (end of 1951). After the admission of Spain to membership in the United Nations (1955), which, as found by the Court in 1964, rendered operative again the clause of compulsory jurisdiction contained in the 1927 Hispano-Belgian Treaty of Conciliation, Judicial Settlement and Arbitration, the Belgian Government attempted further representations. After the rejection of a proposal for a special agreement, it decided to refer the dispute unilaterally to this Court.

* * *

25. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of the Belgian Government,
in the Application:

"May it please the Court

1. to adjudge and declare that the measures, acts, decisions and omissions of the organs of the Spanish State described in the present Application are contrary to international law and that the Spanish State is under an obligation towards Belgium to make reparation for the consequential damage suffered by Belgian nationals, natural and juristic persons, shareholders in Barcelona Traction;

2. to adjudge and declare that this reparation should, as far as possible, annul all the consequences which these acts contrary to international law have had for the said nationals, and that the Spanish State is therefore under an obligation to secure, if possible, the annulment of the adjudication in bankruptcy and of the judicial and other acts resulting therefrom, obtaining for the injured Belgian nationals all the legal effects which should result for them from this annulment; further, to determine the amount of the compensation to be paid by the Spanish State to the Belgian State by reason of all the incidental damage sustained by Belgian nationals as a result of the acts complained of, including the deprivation of enjoyment of rights and the expenses incurred in the defence of their rights;

3. to adjudge and declare, in the event of the annulment of the consequences of the acts complained of proving impossible, that the Spanish State shall be under an obligation to pay to the Belgian State, by way of compensation, a sum equivalent to 88 per cent. of the net value of the business on 12 February 1948; this compensation to be increased by an amount corresponding to all the incidental damage suffered by the Belgian nationals as the result of the acts complained of, including the deprivation of enjoyment of rights and the expenses incurred in the defence of their rights";

in the Memorial:

"May it please the Court

I. to adjudge and declare that the measures, acts, decisions and omissions of the organs of the Spanish State described in the present Memorial are contrary to international law and that the Spanish State is under an obligation towards Belgium to make reparation for the consequential damage suffered by Belgian nationals, natural and juristic persons, shareholders in Barcelona Traction;

II. to adjudge and declare that this reparation should, as far as possible, annul all the consequences which these acts contrary to international law have had for the said nationals, and that the Spanish State is therefore under an obligation to secure, if possible, the annulment by administrative means of the adjudication in bankruptcy and of the judicial and other acts resulting therefrom, obtaining for the said injured Belgian nationals all the legal effects which should result for them from this annulment; further, to determine the amount of the compensation to be paid by the Spanish State to the Belgian State by reason of all the incidental damage sustained by Belgian nationals as a result of the acts complained of, including the deprivation of enjoyment of rights and the expenses incurred in the defence of their rights;
III. to adjudicate and declare, in the event of the annulment of the consequences of the acts complained of proving impossible, that the Spanish State shall be under an obligation to pay to the Belgian State, by way of compensation, a sum equivalent to 88 per cent. of the sum of $88,600,000 arrived at in paragraph 379 of the present Memorial, this compensation to be increased by an amount corresponding to all the incidental damage suffered by the said Belgian nationals as the result of the acts complained of, including the deprivation of enjoyment of rights, the expenses incurred in the defence of their rights and the equivalent in capital and interest of the amount of Barcelona Traction bonds held by Belgian nationals and of their other claims on the companies in the group which it was not possible to recover owing to the acts complained of; 

in the Reply:

"May it please the Court, rejecting any other submissions of the Spanish State which are broader or to a contrary effect, to adjudge and declare 

(1) that the Application of the Belgian Government is admissible; 
(2) that the Spanish State is responsible for the damage sustained by the Belgian State in the person of its nationals, shareholders in Barcelona Traction, as the result of the acts contrary to international law committed by its organs, which led to the total spoliation of the Barcelona Traction group; 
(3) that the Spanish State is under an obligation to ensure reparation of the said damage; 
(4) that this damage can be assessed at U.S. $78,000,000, representing 88 per cent. of the net value, on 12 February 1948, of the property of which the Barcelona Traction group was despoiled; 
(5) that the Spanish State is, in addition, under an obligation to pay, as an all-embracing payment to cover loss of enjoyment, compensatory interest at the rate of 6 per cent. on the said sum of U.S. $78,000,000, from 12 February 1948 to the date of judgment; 
(6) that the Spanish State must, in addition, pay a sum provisionally assessed at U.S. $3,800,000 to cover the expenses incurred by the Belgian nationals in defending their rights since 12 February 1948; 

(7) that the Spanish State is also liable in the sum of £433,821 representing the amount, in principal and interest, on 4 January 1952, of the Barcelona Traction sterling bonds held by the said nationals, as well as in the sum of U.S. $1,623,127, representing a debt owed to one of the said nationals by a subsidiary company of Barcelona Traction, this sum including lump-sum compensation for loss of profits resulting from the premature termination of a contract; 

that there will be due on those sums interest at the rate of 6 per cent. per annum, as from 4 January 1952 so far as concerns the sum of £433,821, and as from 12 February 1948 so far as concerns the sum of U.S. $1,623,127; both up to the date of judgment; 
(8) that the Spanish State is also liable to pay interest, by way of interest on a sum due and outstanding, at a rate to be determined by reference to the rates generally prevailing, on the amount of compensation awarded, from the date of the Court's decision fixing such compensation up to the date of payment; 
(9) in the alternative to submissions (4) to (6) above, that the amount of the compensation due to the Belgian State shall be established by means of an expert enquiry to be ordered by the Court; and to place on record that the Belgian Government reserves its right to submit in the course of the proceedings such observations as it may deem advisable concerning the object and methods of such measure of investigation; 
(10) and, should the Court consider that it cannot, without an expert enquiry, decide the final amount of the compensation due to the Belgian State, have regard to the considerable magnitude of the damage caused and make an immediate award of provisional compensation, on account of the compensation to be determined after receiving the expert opinion, the amount of such provisional compensation being left to the discretion of the Court." 

On behalf of the Spanish Government, 
in the Counter-Memorial:

"May it please the Court to adjudge and declare 

I. that the Belgian claim which, throughout the diplomatic correspondence and in the first Application submitted to the Court, has always been a claim with a view to the protection of the Barcelona Traction company, has not changed its character in the second Application, whatever the apparent modifications introduced into it; 
that even if the true subject of the Belgian claim were, not the Barcelona Traction company, but those whom the Belgian Government characterizes on some occasions as 'Belgian shareholders' and on other occasions as 'Belgian interests' in that company, and the damage allegedly sustained by those 'shareholders' or 'interests', it would still remain true that the Belgian Government has not validly proved either that the shares of the company in question belonged on the material dates to 'Belgian shareholders', or, moreover, that there is in the end, in the case submitted to the Court, a preponderance of genuine 'Belgian interests'; 
that even if the Belgian claim effectively had as its beneficiaries alleged 'shareholders' of Barcelona Traction who were 'Belgian', or yet again alleged genuine 'Belgian interests' of the magnitude which is attributed to them, the general principles of international law governing this matter, confirmed by practice which knows of no exception, do not recognize that the national State of shareholders or 'interests', whatever their number or magnitude, may make a claim on their behalf in reliance on allegedly unlawful damage sustained by the company, which possesses the nationality of a third State; 
that the Belgian Government therefore lacks jus standi in the present case; 
II. that a rule of general international law, confirmed both by judicial precedents and the teachings of publicists, and reiterated in Article 3 of the Treaty of Conciliation, Judicial Settlement and Arbitration of 19 July 1927 between Spain and Belgium, requires that private persons
allegedly injured by a measure contrary to international law should have used and exhausted the remedies and means of redress provided by the internal legal order before diplomatic, and above all judicial, protection may be exercised on their behalf;

that the applicability of this rule to the present case has not been disputed and that the prior requirement which it lays down has not been satisfied;

III. that the organic machinery for financing the Barcelona Traction undertaking, as conceived from its creation and constantly applied thereafter, placed it in a permanent state of latent bankruptcy, and that the constitutional structure of the group and the relationship between its members were used as the instrument for manifold and ceaseless operations to the detriment both of the interests of the creditors and of the economy and law of Spain, the country in which the undertaking was to carry on all its business;

that these same facts led, on the part of the undertaking, to an attitude towards the Spanish authorities which could not but provoke a fully justified refusal to give effect to the currency applications made to the Spanish Government;

that the bankruptcy declaration of 12 February 1948, the natural outcome of the conduct of the undertaking, and the bankruptcy proceedings which ensued, were in both respects in conformity with the provisions of Spanish legislation on the matter; and that moreover these provisions are comparable with those of other statutory systems, in particular Belgian legislation itself;

that the complaint of usurpation of jurisdiction is not well founded when the bankruptcy of a foreign company is connected in any way with the territorial jurisdiction of the State, that being certainly so in the present case;

that the Spanish judicial authorities cannot be accused of either one or more denials of justice in the proper sense of the term, Barcelona Traction never having been denied access to the Spanish courts and the judicial decisions on its applications and appeals never having suffered unjustified or unreasonable delays; nor is it possible to detect in the conduct of the Spanish authorities the elements of some breach of international law other than a denial of justice;

that the claim for reparation, the very principle of which is disputed by the Spanish Government, is moreover, having regard to the circumstances of the case, an abuse of the right of diplomatic protection in connection with which the Spanish Government waives none of its possible rights;

IV. that, therefore, the Belgian claim is dismissed as inadmissible or, if not, as unfounded”;

in the Rejoinder:

"May it please the Court
to adjudge and declare
that the claim of the Belgian Government is declared inadmissible or, if not, unfounded."

In the course of the oral proceedings, the following text was presented as final submissions

on behalf of the Belgian Government,

after the hearing of 9 July 1969:

"1. Whereas the Court stated on page 9 of its Judgment of 24 July 1964 that 'The Application of the Belgian Government of 19 June 1962 seeks reparation for damage claimed to have been caused to a number of Belgian nationals, said to be shareholders in the Barcelona Traction, Light and Power Company, Limited, a company under Canadian law, by the conduct, alleged to have been contrary to international law, of various organs of the Spanish State in relation to that company and to other companies of its group';

Whereas it was therefore manifestly wrong of the Spanish Government, in the submissions in the Counter-Memorial and in the oral arguments of its counsel, to persist in the contention that the object of the Belgian claim is to protect the Barcelona Traction company;

2. Whereas Barcelona Traction was adjudicated bankrupt in a judgment rendered by the court of Reus, in Spain, on 12 February 1948;

3. Whereas that holding company was on that date in a perfectly sound financial situation, as were its subsidiaries, Canadian or Spanish companies having their business in Spain;

4. Whereas, however, the Spanish Civil War and the Second World War had, from 1936 to 1944, prevented Barcelona Traction from being able to receive, from its subsidiaries operating in Spain, the foreign currency necessary for the service of the sterling loans issued by it for the financing of the group's investments in Spain;

5. Whereas, in order to remedy this situation, those in control of Barcelona Traction agreed with the bondholders in 1945, despite the opposition of the March group, to a plan of compromise, which was approved by the trustee and by the competent Canadian court; and whereas its implementation was rendered impossible as a result of the opposition of the Spanish exchange authorities, even though the method of financing finally proposed no longer involved any sacrifice of foreign currency whatever for the Spanish economy;

6. Whereas, using this situation as a pretext, the March group, which in the meantime had made further considerable purchases of bonds, sought and obtained the judgment adjudicating Barcelona Traction bankrupt;

7. Whereas the bankruptcy proceedings were conducted in such a manner as to lead to the sale to the March group, which took place on 4 January 1952, of all the assets of the bankrupt company, far exceeding in value its liabilities, in consideration of the assumption by the purchaser itself of solely the bonded debt, which, by new purchases, it had concentrated into its own hands to the extent of approximately 85 per cent., while the cash price paid to the trustees in bankruptcy, 10,000,000 pesetas—approximately $250,000—, being insufficient to cover the bankruptcy costs, did not allow them to pass anything to the bankruptcy company or its shareholders, or even to pay its unsecured creditors;

8. Whereas the accusations of fraud made by the Spanish Government against the Barcelona Traction company and the allegation that that company was in a permanent state of latent bankruptcy are devoid of all
relevance to the case and, furthermore, are entirely unfounded;

9. Whereas the acts and omissions giving rise to the responsibility of the Spanish Government are attributed by the Belgian Government to certain administrative authorities, on the one hand, and to certain judicial authorities, on the other hand;

Whereas it is apparent when those acts and omissions are examined as a whole that, apart from the defects proper to each, they converged towards one common result, namely the diversion of the bankruptcy procedure from its statutory purposes to the forced transfer, without compensation, of the undertakings of the Barcelona Traction group to the benefit of a private Spanish group, the March group;

I

ABUSE OF RIGHTS, ARBITRARY AND DISCRIMINATORY ATTITUDE OF CERTAIN ADMINISTRATIVE AUTHORITIES

Considering that the Spanish administrative authorities behaved in an improper, arbitrary and discriminatory manner towards Barcelona Traction and its shareholders, in that, with the purpose of facilitating the transfer of control over the property of the Barcelona Traction group from Belgian hands into the hands of a private Spanish group, they in particular—

(a) frustrated, in October and December 1946, the implementation of the third method for financing the plan of compromise, by refusing to authorize Ebro, a Canadian company with residence in Spain, to pay 64,000,000 pesetas in the national currency to Spanish residents on behalf of Barcelona Traction, a non-resident company, so that the latter might redeem its peseta bonds circulating in Spain, despite the fact that Ebro continued uninterruptedly to be granted periodical authorization to pay the interest on those same bonds up to the time of the bankruptcy;

(b) on the other hand, accepted that Juan March, a Spanish citizen manifestly resident in Spain, should purchase considerable quantities of Barcelona Traction sterling bonds abroad;

(c) made improper use of an international enquiry, from which the Belgian Government was excluded, by gravely distorting the purport of the conclusions of the Committee of Experts, to whom they attributed the finding of irregularities of all kinds such as to entail severe penalties for the Barcelona Traction group, which enabled the trustees in bankruptcy, at March’s instigation, to bring about the premature sale at a ridiculously low price of the assets of the Barcelona Traction group and their purchase by the March group thanks to the granting of all the necessary exchange authorizations;

II

USURPATION OF JURISDICTION

Considering that the Spanish courts, in agreeing to entertain the bankruptcy of Barcelona Traction, a company under Canadian law with its registered office in Toronto, having neither registered office nor commercial establishment in Spain, nor possessing any property or carrying on any business there, usurped a power of jurisdiction which was not theirs in international law;

Considering that the territorial limits of acts of sovereignty were patently disregarded in the measures of enforcement taken in respect of property situated outside Spanish territory without the concurrence of the competent foreign authorities;

Considering that there was, namely, conferred upon the bankruptcy authorities, through the artificial device of mediate and constructive civil possession, the power to exercise in Spain the rights attaching to the shares located in Canada of several subsidiary and sub-subsidiary companies on which, with the approval of the Spanish judicial authorities, they relied for the purpose of replacing the directors of those companies, modifying their terms of association, and cancelling their regularly issued shares and replacing them with others which they had printed in Spain and delivered to Fecsa at the time of the sale of the bankrupt company’s property, without there having been any effort to obtain possession of the real shares in a regular way;

Considering that that disregard is the more flagrant in that three of the subsidiaries were companies under Canadian law with their registered offices in Canada and that the bankruptcy authorities purported, with the approval of the Spanish judicial authorities, to transform two of them into Spanish companies, whereas such alteration is not permitted by the law governing the status of those companies;

III

DENIALS OF JUSTICE LATO SENSU

Considering that a large number of decisions of the Spanish courts are vitiated by gross and manifest error in the application of Spanish law, by arbitrariness or discrimination, constituting in international law denials of justice lato sensu;

Considering that in particular—

(1) The Spanish courts agreed to entertain the bankruptcy of Barcelona Traction in flagrant breach of the applicable provisions of Spanish law, which do not permit that a foreign debtor should be adjudged bankrupt if that debtor does not have his domicile, or at least an establishment, in Spanish territory;

(2) Those same courts adjudged Barcelona Traction bankrupt whereas that company was neither in a state of insolvency nor in a state of final, general and complete cessation of payments and had not ceased its payments in Spain, this being a manifest breach of the applicable statutory provisions of Spanish law, in particular Article 876 of the 1885 Commercial Code;

(3) The judgment of 12 February 1948 failed to order the publication of the bankruptcy by announcement in the place of domicile of the bankrupt, which constitutes a flagrant breach of Article 1044 (5) of the 1829 Commercial Code;

(4) The decisions failing to respect the separate estates of Barcelona Traction’s subsidiaries and sub-subsidiaries, in that they extended to their property the attachment arising out of the bankruptcy of the parent
company, and thus disregarded their distinct legal personalities, on the sole ground that all their shares belonged to Barcelona Traction or one of its subsidiaries, had no legal basis in Spanish law, were purely arbitrary and in any event constitute a flagrant breach of Article 35 of the Civil Code, Articles 116 and 174 of the 1885 Commercial Code (so far as the Spanish companies are concerned) and Article 15 of the same Code (so far as the Canadian companies are concerned), as well as of Article 1334 of the Civil Procedure Code;

If the estates of the subsidiaries and sub-subsidiaries could have been included in that of Barcelona Traction—*quod non*—, it would have been necessary to apply to that company the special régime established by the imperative provisions of Articles 930 et seq. of the 1885 Commercial Code and the Acts of 9 April 1904 and 2 January 1915 for the event that public-utility companies cease payment, and this was not done;

(5) The judicial decisions which conferred on the bankruptcy authorities the fictitious possession (termed "mediate and constructive civil possession") of the shares of certain subsidiary and sub-subsidiary companies have no statutory basis in Spanish bankruptcy law and were purely arbitrary; they comprise moreover a flagrant breach not only of the general principle recognized in the Spanish as in the majority of other legal systems to the effect that no person may exercise the rights embedded in negotiable securities without having at his disposal the securities themselves but also of Articles 1334 and 1335 of the Civil Procedure Code and Article 1046 of the 1829 Commercial Code, which require the bankruptcy authorities to proceed to the material apprehension of the bankrupt's property;

(6) The bestowal on the commissioner by the bankruptcy judgment of power to proceed to the dismissal, removal or appointment of members of the staff, employees and management, of the companies all of whose shares belonged to Barcelona Traction or one of its subsidiaries had no statutory basis in Spanish law and constituted a gross violation of the statutory provisions referred to under (4), first sub-paragraph, above and also of Article 1045 of the 1829 Commercial Code;

(7) The Spanish courts approved or tolerated the action of the trustees in setting themselves up as a purported general meeting of the two Canadian subsidiaries and in transforming them, in that capacity, into companies under Spanish law, thus gravely disregarding the rule embodied in Article 15 of the 1885 Commercial Code to the effect that the status and internal functioning of foreign companies shall be governed in Spain by the law under which they were incorporated;

(8) The Spanish courts approved or tolerated the action of the trustees in setting themselves up as purported general meetings and modifying, in that capacity, the terms of association of the Ebro, Catalonian Land, Union Eléctrica de Cataluña, Electricista Catalana, Barcelona and Saltos del Segre companies, cancelling their shares and issuing new shares; they thus committed a manifest breach of Article 15 of the 1885 Commercial Code (so far as the two Canadian companies were concerned) and Articles 547 et seq. of the same code, which authorize the issue of duplicates only in the circumstances they specify; they also gravely disregarded the clauses of the trust deeds concerning voting-rights, in flagrant contempt of the undisputed rule of Spanish law to the effect that acts performed and agreements concluded validly by the bankrupt before the date of the cessation of payments as determined in the judicial decisions shall retain their effects and their binding force in respect of the bankruptcy authorities (Articles 878 et seq. of the 1885 Commercial Code);

(9) The Spanish courts decided at one and the same time to ignore the separate legal personalities of the subsidiary and sub-subsidiary companies (so as to justify the attachment of their property in Spain and their inclusion in the bankrupt estate) and implicitly but indubitably to recognize these same personalities by the conferring of fictitious possession of their shares on the bankruptcy authorities, thus giving decisions which were vitiated by an obvious self-contradiction revealing their arbitrary and discriminatory nature;

(10) The general meeting of creditors of 19 September 1949 convened for the purpose of appointing the trustees was, with the approval of the Spanish judicial authorities, held in flagrant breach of Articles 300 and 1342 of the Civil Procedure Code, and 1044 (3), 1060, 1061 and 1063 of the 1829 Commercial Code, in that (a) it was not convened on cognizance of the list of creditors; (b) when that list was prepared, it was not drawn up on the basis of particulars from the balance-sheet or the books and documents of the bankrupt company, which books and documents were not, as the Spanish Government itself admits, in the possession of the commissioner on 8 October 1949, while the judicial authorities had not at any time sent letters rogatory to Toronto, Canada, with the request that they be put at his disposal;

(11) By authorizing the sale of the property of the bankrupt company when the adjudication in bankruptcy had not acquired irrevocability and while the proceedings were suspended, the Spanish courts flagrantly violated Articles 919, 1167, 1319 and 1331 of the Civil Procedure Code and the general principles of the right of defence;

In so far as that authorization was based on the allegedly perishable nature of the property to be sold, it constituted a serious disregard of Article 1055 of the 1829 Commercial Code and Article 1354 of the Civil Procedure Code, which articles allow the sale only of movable property which cannot be kept without deteriorating or spoiling; even supposing that those provisions could be applied in general to the property of Barcelona Traction, its subsidiaries and sub-subsidiaries—*quod non*—, there would still have been a gross and flagrant violation of them, inasmuch as that property as a whole was obviously not in any imminent danger of serious depreciation; indeed the only dangers advanced by the trustees, namely those arising out of the threats of prosecution contained in the Joint Statement, had not taken shape, either by the day on which authorization to sell was requested or by the day of the sale, in any proceedings or demand by the competent authorities and did not ever materialize, except to an insignificant extent;

The only penalty which the undertakings eventually had to bear, 15 months after the sale, was that relating to the currency offence, which had occasioned an *embargo* for a much higher sum as early as April 1948;

(12) The authorization to sell and the sale, in so far as they related to the shares of the subsidiary and sub-subsidiary companies without delivery of the certificates, constituted a flagrant violation of Articles
1461 and 1462 of the Spanish Civil Code, which require delivery of the thing sold, seeing that the certificates delivered to the successful bidder had not been properly issued and were consequently without legal value; if the authorization to sell and the sale had applied, as the respondent Government wrongly maintains, to the rights attaching to the shares and bonds or to the bankrupt company's power of domination over its subsidiaries, those rights ought to have been the subject of a joint valuation, on pain of flagrant violation of Articles 1084 to 1089 of the 1829 Commercial Code and Article 1358 of the Civil Procedure Code: in any event, it was in flagrant violation of these last-named provisions that the commissioner fixed an exaggeratedly low reserve price on the basis of a unilateral expert opinion which, through the effect of the General Conditions of Sale, allowed the March group to acquire the auctioned property at that reserve price;

(13) By approving the General Conditions of Sale on the very day on which they were submitted to them and then dismissing the proceedings instituted to contest those conditions, the judicial authorities committed a flagrant violation of numerous *orde public* provisions of Spanish law; thus, in particular, the General Conditions of Sale—

(a) provided for the payment of the bondholder creditors, an operation which, under Article 1322 of the Civil Procedure Code, falls under the fourth section of the bankruptcy, whereas that section was suspended as a result of the effects attributed to the Boter motion contesting jurisdiction, no exemption from that suspension having been applied for or obtained in pursuance of the second paragraph of Article 114 of the Civil Procedure Code;

(b) provided for the payment of the debts owing on the bonds before they had been approved and ranked by a general meeting of the creditors on the recommendation of the trustees, contrary to Articles 1101 to 1109 of the 1829 Commercial Code and to Articles 1266 to 1274, 1286 and 1378 of the Civil Procedure Code;

(c) in disregard of Articles 1236, 1240, 1512 and 1513 of the Civil Procedure Code, did not require the price to be lodged or deposited at the Court's disposal;

(d) conferred on the trustees power to recognize, determine and declare effective the rights attaching to the bonds, in disregard, on the one hand, of Articles 1101 to 1109 of the 1829 Commercial Code and of Articles 1266 to 1274 of the Civil Procedure Code, which reserve such rights for the general meeting of creditors under the supervision of the judge, and, on the other, of Articles 1445 and 1449 of the Civil Code, which lay down that the purchase price must be a definite sum and may not be left to the arbitrary decision of one of the contracting parties;

(e) in disregard of Articles 1291 to 1294 of the Civil Procedure Code, substituted the successful bidder for the trustees in respect of the payment of the debts owing on the bonds, whilst, in violation of the general principles applicable to novation, replacing the security for those debts, consisting, pursuant to the trust deeds, of shares and bonds issued by the subsidiary and sub-subsidiary companies, with the deposit of a certain sum with a bank or with a mere banker's guarantee limited to three years;

(f) delegated to a third party the function of paying certain debts, in disregard of Articles 1291 and 1292 of the Civil Procedure Code, which define the functions of the trustees in this field and do not allow of any delegation;

(g) ordered the payment of the debts owing on the bonds in sterling, whereas a forced execution may only be carried out in local currency and in the case of bankruptcy the various operations which it includes require the conversion of the debts into local currency on the day of the judgment adjudicating bankruptcy, as is to be inferred from Articles 883 and 884 of the 1885 Commercial Code;

IV

DENIALS OF JUSTICE STRICTO SENSU

Considering that in the course of the bankruptcy proceedings the rights of the defence were seriously disregarded, that in particular—

(a) the Reus court, in adjudicating Barcelona Traction bankrupt on an *ex parte* petition, inserted in its judgment provisions which went far beyond finding the purported insolvency of or a general cessation of payments by the bankrupt company, the only finding, in addition to one on the capacity of the petitioners, that it was open to it to make in such proceedings;

This disregard of the rights of the defence was particularly flagrant in respect of the subsidiary companies, whose property was ordered by the court to be attached without their having been summoned and without their having been adjudicated bankrupt;

(b) the subsidiary companies that were thus directly affected by the judgment of 12 February 1948 nevertheless had their applications to set aside the order for attachment which concerned them rejected as inadmissible on the grounds of lack of capacity;

(c) the pursuit of those remedies and the introduction of any other such proceedings were also made impossible for the subsidiary companies by the discontinuances effected each time by the solicitors appointed to replace the original solicitors by the new boards of directors directly or indirectly involved; these changes of solicitors and discontinuances were effected by the new boards of directors by virtue of authority conferred upon them by the interim receiver simultaneously with their appointment;

(d) the proceedings for relief brought by those in control of the subsidiary companies who had been dismissed by the commissioner were likewise held inadmissible by the Reus court when they sought to avail themselves of the specific provisions of Article 1363 of the Civil Procedure Code, which provide for proceedings to reverse decisions taken by the commissioner in bankruptcy;

(e) there was discrimination on the part of the first special judge when he refused to admit as a party to the bankruptcy the Canadian National Trust Company, Limited, trustee for the bankrupt company's two sterling loans, even though it relied upon the security of the mortgage which had been given to it by Ebro, whereas at the same time he admitted to the proceedings the Bondholders' Committee
appointed by Juan March, although National Trust and the Committee derived their powers from the same trust deeds;

(f) the complaints against the General Conditions of Sale could be neither amplified nor heard because the order which had approved the General Conditions of Sale was deemed to be one of mere routine;

Considering that many years elapsed after the bankruptcy judgment and even after the ruinous sale of the property of the Barcelona Traction group without either the bankrupt company or those co-interested with it having had an opportunity to be heard on the numerous complaints put forward against the bankruptcy judgment and related decisions in the opposition of 18 June 1948 and in various other applications for relief;

Considering that those delays were caused by the motion contesting jurisdiction fraudulently lodged by a confederate of the petitioners in bankruptcy and by incidental proceedings instituted by other men of straw of the March group, which were, like the motion contesting jurisdiction, regularly admitted by the various courts;

Considering that both general international law and the Spanish-Belgian Treaty of 1927 regard such delays as equivalent to the denial of a hearing;

Considering that the manifest injustice resulting from the movement of the proceedings towards the sale, whilst the actions contesting the bankruptcy judgment and even the jurisdiction of the Spanish courts remained suspended, was brought about by two judgments delivered by the same chamber of the Barcelona court of appeal on the same day, 7 June 1949: in one of them it confirmed the admission, with two effects, of the Boter appeal from the judgment of the special judge rejecting his motion contesting jurisdiction, whereas in the other it reduced the suspensive effect granted to that same appeal by excluding from the suspensive power the general meeting of creditors for the purpose of appointing the trustees in bankruptcy;

V

Damage and Reparation

Considering that the acts and omissions contrary to international law attributed to the organs of the Spanish State had the effect of deposing the Barcelona Traction company of the whole of its property and of depriving it of the very objects of its activity, and thus rendered it practically defunct;

Considering that Belgian nationals, natural and juristic persons, shareholders in the Barcelona Traction, in which they occupied a majority and controlling position, and in particular the Sidro company, the owner of more than 75 per cent. of the registered capital, on this account suffered direct and immediate injury to their interests and rights, which were voided of all value and effectiveness;

Considering that the reparation due to the Belgian State from the Spanish State, as a result of the internationally unlawful acts for which the latter State is responsible, must be complete and must, so far as possible, reflect the damage suffered by its nationals whose case the Belgian State has taken up; and that, since restitutio in integrum is, in the circumstances

of the case, practically and legally impossible, the reparation of the damage suffered can only take place in the form of an all-embracing pecuniary indemnity, in accordance with the provisions of the Spanish-Belgian Treaty of 1927 and with the rules of general international law;

Considering that in the instant case the amount of the indemnity must be fixed by taking as a basis the net value of the Barcelona Traction company’s property at the time of its adjudication in bankruptcy, expressed in a currency which has remained stable, namely the United States dollar;

Considering that the value of that property must be determined by the replacement cost of the subsidiary and sub-subsidiary companies’ plant for the production and distribution of electricity at 12 February 1948, as that cost was calculated by the Ebro company’s engineers in 1946;

Considering that, according to those calculations, and after deduction for depreciation through wear and tear, the value of the plant was at that date U.S. $116,220,000; from this amount there must be deducted the principal of Barcelona Traction’s bonded debt and the interest that had fallen due thereon, that is to say, U.S. $27,619,018, which leaves a net value of about U.S. $88,600,000, this result being confirmed—

(1) by the study submitted on 5 February 1949 and on behalf of Ebro to the Special Technical Office for the Regulation and Distribution of Electricity (Catalan region) (Belgian New Document No. 50);
(2) by capitalization of the 1947 profits;
(3) by the profits made by Fecsa in 1956—the first year after 1948 in which the position of electricity companies was fully stabilized and the last year before the changes made in the undertaking by Fecsa constituted an obstacle to any useful comparison;
(4) by the reports of the experts consulted by the Belgian Government;

Considering that the compensation due to the Belgian Government must be estimated, in the first place, at the percentage of such net value corresponding to the participation of Belgian nationals in the capital of the Barcelona Traction company, namely 88 per cent.;

Considering that on the critical dates of the bankruptcy judgment and the filing of the Application, the capital of the Barcelona Traction was represented by 1,798,854 shares, partly bearer and partly registered; that on 12 February 1948 Sidro owned 1,012,688 registered shares and 349,905 bearer shares; that other Belgian nationals owned 420 registered shares and at least 244,832 bearer shares; that 1,607,845 shares, constituting 89.3 per cent. of the company’s capital, were thus on that date in Belgian hands; that on 14 June 1962 Sidro owned 1,334,514 registered shares and 31,228 bearer shares; that other Belgian nationals owned 2,388 registered shares and at least 200,000 bearer shares; and that 1,588,130 shares, constituting 88 per cent. of the company’s capital, were thus on that date in Belgian hands;

Considering that the compensation claimed must in addition cover all incidental damage suffered by the said Belgian nationals as a result of the acts complained of, including the deprivation of enjoyment of rights, the expenses incurred in the defence of their rights and the equivalent, in capital and interest, of the amount of the Barcelona Traction bonds held by Belgian nationals, and of their other claims on the companies in the
group which it was not possible to recover owing to the acts complained of;

Considering that the amount of such compensation, due to the Belgian State on account of acts contrary to international law attributable to the Spanish State, cannot be affected by the latter's purported charges against the private persons involved, those charges furthermore not having formed the subject of any counterclaim before the Court;

VI

OBJECTION DERIVED FROM THE ALLEGED LACK OF JUS STANDI OF THE BELGIAN GOVERNMENT

Considering that in its Judgment of 24 July 1964 the Court decided to join to the merits the third preliminary objection raised by the Spanish Government;

Considering that the respondent Government wrongly denies to the Belgian Government jus standi in the present proceedings;

Considering that the object of the Belgian Government's Application of 14 June 1962 is reparation for the damage caused to a certain number of its nationals, natural and juristic persons, in their capacity as shareholders in the Barcelona Traction, Light and Power Company, Limited, by the conduct contrary to international law of various organs of the Spanish State towards that company and various other companies in its group;

Considering that the Belgian Government has established that 88 per cent. of Barcelona Traction's capital was in Belgian hands on the critical dates of 12 February 1948 and 14 June 1962 and so remained continuously between those dates, that a single Belgian company, Sidro, possessed more than 75 per cent. of the shares; that the Belgian nationality of that company and the effectiveness of its nationality have not been challenged by the Spanish Government;

Considering that the fact that the Barcelona Traction registered shares possessed by Sidro were registered in Canada in the name of American nominees does not affect their Belgian character; that in this case, under the applicable systems of statutory law, the nominee could exercise the rights attaching to the shares entered in its name only as Sidro's agent;

Considering that the preponderance of Belgian interests in the Barcelona Traction company was well known to the Spanish authorities at the different periods in which the conduct complained of against them occurred, and has been explicitly admitted by them on more than one occasion;

Considering that the diplomatic protection from which the company benefited for a certain time on the part of its national Government ceased in 1952, well before the filing of the Belgian Application, and has never subsequently been resumed;

Considering that by depriving the organs appointed by the Barcelona Traction shareholders under the company's terms of association of their power of control in respect of its subsidiaries, which removed from the company the very objects of its activities, and by depriving it of the whole of its property, the acts and omissions contrary to international law attributed to the Spanish authorities rendered the company practically defunct and directly and immediately injured the rights and interests attaching to the legal situation of shareholder as it is recognized by international law; that they thus caused serious damage to the company's Belgian shareholders and voided the rights which they possessed in that capacity of all useful content;

Considering that in the absence of reparation to the company for the damage inflicted on it, from which they would have benefited at the same time as itself, the Belgian shareholders of Barcelona Traction thus have separate and independent rights and interests to assert; that they did in fact have to take the initiative for and bear the cost of all the proceedings brought through the company's organs to seek relief in the Spanish courts; that Sidro and other Belgian shareholders, after the sale of Barcelona Traction's property, themselves brought actions the dismissal of which is complained of by the Belgian Government as constituting a denial of Justice;

Considering that under the general principles of international law in this field the Belgian Government has jus standi to claim through international judicial proceedings reparation for the damage thus caused to its nationals by the internationally unlawful acts and omissions attributed to the Spanish State;

VII

OBJECTION OF NON-EXHAUSTION OF LOCAL REMEDIES

Considering that no real difference has emerged between the Parties as to the scope and significance of the rule of international law embodied in Article 3 of the Treaty of Conciliation, Judicial Settlement and Arbitration concluded between Spain and Belgium on 19 July 1927, which makes resort to the procedures provided for in that Treaty dependant on the prior use, until a judgment with final effect has been pronounced, of the normal means of redress which are available and which offer genuine possibilities of effectiveness within the limitation of a reasonable time;

Considering that in this case the Respondent itself estimates at 2,736 the number of orders alone made in the case by the Spanish courts as of the date of the Belgian Application;

Considering that in addition the pleadings refer to more than 30 decisions by the Supreme Court;

Considering that it is not contended that the remedies as a whole of which Barcelona Traction and its co-interested parties availed themselves and which gave rise to those decisions were inadequate or were not pursued to the point of exhaustion;

Considering that this circumstance suffices as a bar to the possibility of the fourth objection being upheld as setting aside the Belgian claim;

Considering that the only complaints which could be set aside are those in respect of which the Spanish Government proved failure to make use of means of redress or the insufficiency of those used;

Considering that such proof has not been supplied;

1. With Respect to the Complaints Against the Acts of the Administrative Authorities

Considering that the Spanish Government is wrong in contending that the Belgian complaint concerning the decisions of October and
December 1946 referred to under I (a) above is not admissible on account of Barcelona Traction\'s failure to exercise against them the remedies of appeal to higher authority and contentious administrative proceedings;

Considering that the remedy of appeal to higher authority was inconceivable in this case, being by definition an appeal which may be made from a decision by one administrative authority to another hierarchically superior authority namely the Minister, whereas the decisions complained of were taken with the co-operation and approval of the Minister himself, and even brought to the knowledge of those concerned by the Minister at the same time as by the competent administrative authority;

Considering that it was likewise not possible to envisage contentious administrative proceedings against a decision which patently did not fall within the ambit of Article 1 of the Act of 22 June 1894, which recognizes such a remedy only against administrative decisions emanating from administrative authorities in the exercise of their regulated powers and "infringing a right of an administrative character previously established in favour of the applicant by an Act, a regulation or some other administrative provision", which requirements were patently not satisfied in this case;

2. With Respect to the Complaint concerning the Reus Court\'s Lack of Jurisdiction to Declare the Bankruptcy of Barcelona Traction

Considering that the Spanish Government is wrong in seeking to derive an argument from the fact that Barcelona Traction and its co-interested parties supposedly failed to challenge the jurisdiction of the Reus Court by means of a motion contesting its competence, and allowed the time-limit for entering opposition to expire without having challenged that jurisdiction;

Considering that in fact a motion contesting jurisdiction is not at all the same thing as a motion contesting competence ratione materiae and may properly be presented cumulatively with the case on the merits;

Considering that the bankrupt company contested jurisdiction at the head of the complaints set out in its opposition plea of 18 June 1948;

Considering that it complained again of lack of jurisdiction in its application of 5 July 1948 for a declaration of nullity and in its pleading of 3 September 1948 in which it confirmed its opposition to the bankruptcy judgment;

Considering that National Trust submitted a formal motion contesting jurisdiction in its application of 27 November 1948 for admission to the bankruptcy proceedings;

Considering that Barcelona Traction, after having as early as 23 April 1949 entered an appearance in the proceedings concerning the Boter motion contesting jurisdiction, formally declared its adherence to that motion by a procedural document of 11 April 1953;

Considering that the question of jurisdiction being a matter of ordre public, as is the question of competence ratione materiae, the complaint of belatedness could not be upheld, even in the event of the expiry of the allegedly applicable time-limit for entering a plea of opposition;

3. With Respect to the Complaints concerning the Bankruptcy Judgment and Related Decisions

Considering that the Spanish Government is wrong in contending that the said decisions were not attacked by adequate remedies pursued to the point of exhaustion or for a reasonable length of time;

Considering that in fact, as early as 16 February 1948, the bankruptcy judgment was attacked by an application for its setting aside on the part of the subsidiary companies, Ebro and Barcelonenses;

Considering that while those companies admittedly confined their applications for redress to the parts of the judgment which gave them grounds for complaint, the said remedies were nonetheless adequate and they were brought to nought in circumstances which are themselves the subject of a complaint which has been set out above;

Considering that, contrary to what is asserted by the Spanish Government, the bankrupt company itself entered a plea of opposition to the judgment by a procedural document of 18 June 1948, confirmed on 3 September 1948;

Considering that it is idle for the Spanish Government to criticize the summary character of this procedural document, while the suspension decreed by the special judge on account of the Boter motion contesting jurisdiction prevented the party entering opposition from filing, pursuant to Article 326 of the Civil Procedure Code, the additional pleading developing its case;

Considering that likewise there can be no question of belatedness, since only publication of the bankruptcy at the domicile of the bankrupt company could have caused the time-limit for entering opposition to begin to run, and no such publication took place;

Considering that the bankruptcy judgment and the related decisions were moreover also attacked in the incidental application for a declaration of nullity submitted by Barcelona Traction on 5 July 1948 and amplified on 31 July 1948;

4. With Respect to the Complaints concerning the Blocking of the Remedies

Considering that the various decisions which instituted and prolonged the suspension of the first section of the bankruptcy proceedings were attacked on various occasions by numerous proceedings taken by Barcelona Traction, beginning with the incidental application for a declaration of nullity which it submitted on 5 July 1948;

5. With Respect to the Complaint concerning the Dismissal of the Officers of the Subsidiary Companies by Order of the Commissioner

Considering that this measure was also attacked by applications for its setting aside on the part of the persons concerned, which were quite improperly declared inadmissible; and that the proceedings seeking redress against those decisions were adjourned until 1963;

6. With Respect to the Failure to Observe the No-Action Clause

Considering that this clause was explicitly referred to by National Trust in its application of 27 November 1948 for admission to the proceedings;

7. With Respect to the Measures Preparatory to the Sale and the Sale

Considering that the other side, while implicitly admitting that adequate proceedings were taken to attack the appointment of the trustees and the authorization to sell, is wrong in contending that this was supposedly not so in respect of—
(1) The failure to draw up a list of creditors prior to the convening of the meeting of creditors for the appointment of the trustees, whereas this defect was complained of in the procedural document attacking the appointment of the trustees and in the application that the sale be declared null and void;

(2) Certain acts and omissions on the part of the trustees, whereas they were referred to in the proceedings taken to attack the authorization to sell and the decision approving the method of unilateral valuation of the assets;

(3) The conditions of sale, whereas they were attacked by Barcelona Traction in an application to set aside and on appeal, in the application of 27 December 1951 for a declaration of nullity containing a formal prayer that the order approving the conditions of sale be declared null and void, and in an application of 28 May 1955 (New Documents submitted by the Belgian Government, 1969, No. 30); the same challenge was expressed by Sidro in its action of 7 February 1953 (New Documents submitted by the Spanish Government, 1969) and by two other Belgian shareholders of Barcelona Traction, Mrs. Mathot and Mr. Duvi
tier, in their application of 26 May 1955 (New Documents submitted by the Belgian Government, 1969, No. 29);

8. With Respect to the Exceptional Remedies

Considering that the Spanish Government is wrong in raising as an objection to the Belgian claim the allegation that Barcelona Traction did not make use of certain exceptional remedies against the bankruptcy judgment, such as application for revision, action for civil liability and criminal proceedings against the judges, and application for a hearing by a party in default;

Considering that the first of these remedies could patently not be contemplated, not only on account of the nature of the bankruptcy judgment, but also because until 1953 there was an opposition outstanding against that Judgment and, superabundantly, because Barcelona Traction, its subsidiaries and co-interested parties would not have been in a position to prove the facts of subornation, violence or fraudulent machination which alone could have entitled such proceedings to be taken;

Considering that the remedies of an action for civil liability and criminal proceedings against the judges were not adequate, since they were not capable of bringing about the annulment or setting aside of the decisions constituting denials of justice;

Considering that similarly the remedy of application for a hearing accorded by Spanish law to a party in default was patently in this case neither available to Barcelona Traction nor adequate;

FOR THESE REASONS, and any others which have been adduced by the Belgian Government in the course of the proceedings,

May it please the Court, rejecting any other submissions of the Spanish State which are broader or to a contrary effect,

'To uphold the claims of the Belgian Government expressed in the submissions [in] the Reply.'

The following final submissions were presented on behalf of the Spanish Government, at the hearing of 22 July 1969:

"Considering that the Belgian Government has no jus standi in the present case, either for the protection of the Canadian Barcelona Traction company or for the protection of alleged Belgian 'shareholders' of that company;

Considering that the requirements of the exhaustion of local remedies rule have not been satisfied either by the Barcelona Traction company or by its alleged 'shareholders';

Considering that as no violation of an international rule binding on Spain has been established, Spain has not incurred any responsibility vis-à-vis the applicant State on any account; and that, in particular—

(a) Spain is not responsible for any usurpation of jurisdiction on account of the action of its judicial organs;

(b) the Spanish judicial organs have not violated the rules of international law requiring that foreigners be given access to the courts, that a decision be given on their claims and that their proceedings for redress should not be subjected to unjustified delays;

(c) there have been no acts of the Spanish judiciary capable of giving rise to international responsibility on the part of Spain on account of the content of judicial decisions; and

(d) there has not been on the part of the Spanish administrative authorities any violation of an international obligation on account of abuse of rights or discriminatory acts;

Considering that for these reasons, and any others expounded in the written and oral proceedings, the Belgian claims must be deemed to be inadmissible or unfounded;

The Spanish Government presents to the Court its final submissions:

May it please the Court to adjudge and declare that the Belgian Government's claims are dismissed."

* * *

26. As has been indicated earlier, in opposition to the Belgian Application the Spanish Government advanced four objections of a preliminary nature. In its Judgment of 24 July 1964 the Court rejected the first and second of these (see paragraph 3 above), and decided to join the third and fourth to the merits. The latter were, briefly, to the effect that the Belgian Government lacked capacity to submit any claim in respect of wrongs done to a Canadian company, even if the shareholders were Belgian, and that local remedies available in Spain had not been exhausted.

27. In the subsequent written and oral proceedings the Parties supplied the Court with abundant material and information bearing both on the preliminary objections not decided in 1964 and on the merits of the case. In this connection the Court considers that reference should be made to the unusual length of the present proceedings, which has been due to the
very long time-limits requested by the Parties for the preparation of their written pleadings and in addition to their repeated requests for an extension of these limits. The Court did not find that it should refuse these requests and thus impose limitations on the Parties in the preparation and presentation of the arguments and evidence which they considered necessary. It nonetheless remains convinced of the fact that it is in the interest of the authority and proper functioning of international justice for cases to be decided without unwarranted delay.

28. For the sake of clarity, the Court will briefly recapitulate the claim and identify the entities concerned in it. The claim is presented on behalf of natural and juristic persons, alleged to be Belgian nationals and shareholders in the Barcelona Traction, Light and Power Company, Limited. The submissions of the Belgian Government make it clear that the object of its Application is reparation for damage allegedly caused to these persons by the conduct, said to be contrary to international law, of various organs of the Spanish State towards that company and various other companies in the same group.

29. In the first of its submissions, more specifically in the Counter-Memorial, the Spanish Government contends that the Belgian Application of 1962 seeks, though disguisedly, the same object as the Application of 1958, i.e., the protection of the Barcelona Traction company as such, as a separate corporate entity, and that the claim should in consequence be dismissed. However, in making its new Application, as it has chosen to frame it, the Belgian Government was only exercising the freedom of action of any State to formulate its claim in its own way. The Court is therefore bound to examine the claim in accordance with the explicit content imparted to it by the Belgian Government.

30. The States which the present case principally concerns are Belgium, the national State of the alleged shareholders, Spain, the State whose organs are alleged to have committed the unlawful acts complained of, and Canada, the State under whose laws Barcelona Traction was incorporated and in whose territory it has its registered office ("head office" in the terms of the by-laws of Barcelona Traction).

31. Thus the Court has to deal with a series of problems arising out of a triangular relationship involving the State whose nationals are shareholders in a company incorporated under the laws of another State, in whose territory it has its registered office; the State whose organs are alleged to have committed against the company unlawful acts prejudicial to both it and its shareholders; and the State under whose laws the company is incorporated, and in whose territory it has its registered office.

32. In these circumstances it is logical that the Court should first address itself to what was originally presented as the subject-matter of the third preliminary objection: namely the question of the right of Belgium to exercise diplomatic protection of Belgian shareholders in a company which is a juristic entity incorporated in Canada, the measures complained of having been taken in relation not to any Belgian national but to the company itself.

33. When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character.

35. Obligations the performance of which is the subject of diplomatic protection are not of the same category. It cannot be held, when one such obligation in particular is in question, in a specific case, that all States have a legal interest in its observance. In order to bring a claim in respect of the breach of such an obligation, a State must first establish its right to do so, for the rules on the subject rest on two suppositions:

"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." (Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, pp. 181-182.)

In the present case it is therefore essential to establish whether the losses allegedly suffered by Belgian shareholders in Barcelona Traction were the consequence of the violation of obligations of which they were the beneficiaries. In other words: has a right of Belgium been violated on account
of its nationals' having suffered infringement of their rights as shareholders in a company not of Belgian nationality?

36. Thus it is the existence or absence of a right, belonging to Belgium and recognized as such by international law, which is decisive for the problem of Belgium's capacity.

"This right is necessarily limited to intervention [by a State] on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged." (Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76, p. 16.)

It follows that the same question is determinant in respect of Spain's responsibility towards Belgium. Responsibility is the necessary corollary of a right. In the absence of any treaty on the subject between the Parties, this essential issue has to be decided in the light of the general rules of diplomatic protection.

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37. In seeking to determine the law applicable to this case, the Court has to bear in mind the continuous evolution of international law. Diplomatic protection deals with a very sensitive area of international relations, since the interest of a foreign State in the protection of its nationals confronts the rights of the territorial sovereign, a fact of which the general law on the subject has had to take cognizance in order to prevent abuses and friction. From its origins closely linked with international commerce, diplomatic protection has sustained a particular impact from the growth of international economic relations, and at the same time from the profound transformations which have taken place in the economic life of nations. These latter changes have given birth to municipal institutions, which have transcended frontiers and have begun to exercise considerable influence on international relations. One of these phenomena which has a particular bearing on the present case is the corporate entity.

38. In this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. This does not necessarily imply drawing any analogy between its own institutions and those of municipal law, nor does it amount to making rules of international law dependent upon categories of municipal law. All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law. Consequently, in view of the relevance to the present case of the rights of the corporate entity and its shareholders under municipal law, the Court must devote attention to the nature and interrelation of those rights.

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39. Seen in historical perspective, the corporate personality represents a development brought about by new and expanding requirements in the economic field, an entity which in particular allows of operation in circumstances which exceed the normal capacity of individuals. As such it has become a powerful factor in the economic life of nations. Of this, municipal law has had to take due account, whence the increasing volume of rules governing the creation and operation of corporate entities, endowed with a specific status. These entities have rights and obligations peculiar to themselves.

40. There is, however, no need to investigate the many different forms of legal entity provided for by the municipal laws of States, because the Court is concerned only with that exemplified by the company involved in the present case: Barcelona Traction—a limited liability company whose capital is represented by shares. There are, indeed, other associations, whatever the name attached to them by municipal legal systems, that do not enjoy independent corporate personality. The legal difference between the two kinds of entity is that for the limited liability company it is the overriding tie of legal personality which is determinant; for the other associations, the continuing autonomy of the several members.

41. Municipal law determines the legal situation not only of such limited liability companies but also of those persons who hold shares in them. Separated from the company by numerous barriers, the shareholder cannot be identified with it. The concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights. The separation of property rights as between company and shareholder is an important manifestation of this distinction. So long as the company is in existence the shareholder has no right to the corporate assets.

42. It is a basic characteristic of the corporate structure that the company alone, through its directors or management acting in its name, can take action in respect of matters that are of a corporate character. The underlying justification for this is that, in seeking to serve its own best interests, the company will serve those of the shareholder too. Ordinarily, no individual shareholder can take legal steps, either in the
name of the company or in his own name. If the shareholders disagree with the decisions taken on behalf of the company they may, in accordance with its articles or the relevant provisions of the law, change them or replace its officers, or take such action as is provided by law. Thus to protect the company against abuse by its management or the majority of shareholders, several municipal legal systems have vested in shareholders (sometimes a particular number is specified) the right to bring an action for the defence of the company, and conferred upon the minority of shareholders certain rights to guard against decisions affecting the rights of the company vis-à-vis its management or controlling shareholders. Nonetheless the shareholders’ rights in relation to the company and its assets remain limited, this being, moreover, a corollary of the limited nature of their liability.

43. At this point the Court would recall that in forming a company, its promoters are guided by all the various factors involved, the advantages and disadvantages of which they take into account. So equally does a shareholder, whether he is an original subscriber of capital or a subsequent purchaser of the company’s shares from another shareholder. He may be seeking safety of investment, high dividends or capital appreciation—or a combination of two or more of these. Whichever it is, it does not alter the legal status of the corporate entity or affect the rights of the shareholder. In any event he is bound to take account of the risk of reduced dividends, capital depreciation or even loss, resulting from ordinary commercial hazards or from prejudice caused to the company by illegal treatment of some kind.

44. Notwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation. Thus no legal conclusion can be drawn from the fact that the same event caused damage simultaneously affecting several natural or juristic persons. Creditors do not have any right to claim compensation from a person who, by wronging their debtor, causes them loss. In such cases, no doubt, the interests of the aggrieved are affected, but not their rights. Thus whenever a shareholder’s interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed.

45. However, it has been argued in the present case that a company represents purely a means of achieving the economic purpose of its members, namely the shareholders, while they themselves constitute in fact the reality behind it. It has furthermore been repeatedly emphasized that there exists between a company and its shareholders a relationship describable as a community of destiny. The alleged acts may have been directed at the company and not the shareholders, but only in a formal sense: in reality, company and shareholders are so closely interconnected that prejudicial acts committed against the former necessarily wrong the latter; hence any acts directed against a company can be conceived as directed against its shareholders, because both can be considered in substance, i.e., from the economic viewpoint, identical. Yet even if a company is no more than a means for its shareholders to achieve their economic purpose, so long as it is in esse it enjoys an independent existence. Therefore the interests of the shareholders are both separable and indeed separated from those of the company, so that the possibility of their diverging cannot be denied.

46. It has also been contended that the measures complained of, although taken with respect to Barcelona Traction and causing it direct damage, constituted an unlawful act vis-à-vis Belgium, because they also, though indirectly, caused damage to the Belgian shareholders in Barcelona Traction. This again is merely a different way of presenting the distinction between injury in respect of a right and injury to a simple interest. But, as the Court has indicated, evidence that damage was suffered does not ipso facto justify a diplomatic claim. Persons suffer damage or harm in most varied circumstances. This in itself does not involve the obligation to make reparation. Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company’s rights does not involve responsibility towards the shareholders, even if their interests are affected.

47. The situation is different if the act complained of is aimed at the direct rights of the shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action. On this there is no disagreement between the Parties. But a distinction must be drawn between a direct infringement of the shareholder’s rights, and difficulties or financial losses to which he may be exposed as the result of the situation of the company.

48. The Belgian Government claims that shareholders of Belgian nationality suffered damage in consequence of unlawful acts of the Spanish authorities and, in particular, that the Barcelona Traction shares, though they did not cease to exist, were emptied of all real economic content. It accordingly contends that the shareholders had an
independent right to redress, notwithstanding the fact that the acts complained of were directed against the company as such. Thus the legal issue is reducible to the question of whether it is legitimate to identify an attack on company rights, resulting in damage to shareholders, with the violation of their direct rights.

49. The Court has noted from the Application, and from the reply given by Counsel on 8 July 1969, that the Belgian Government did not base its claim on an infringement of the direct rights of the shareholders. Thus it is not open to the Court to go beyond the claim as formulated by the Belgian Government and it will not pursue its examination of this point any further.

50. In turning now to the international legal aspects of the case, the Court must, as already indicated, start from the fact that the present case essentially involves factors derived from municipal law—the distinction and the community between the company and the shareholder—which the Parties, however widely their interpretations may differ, each take as the point of departure of their reasoning. If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort. Thus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it. It is to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares, and not to the municipal law of a particular State, that international law refers. In referring to such rules, the Court cannot modify, still less deform them.

51. On the international plane, the Belgian Government has advanced the proposition that it is inadmissible to deny the shareholders' national State a right of diplomatic protection merely on the ground that another State possesses a corresponding right in respect of the company itself. In strict logic and law this formulation of the Belgian claim to *jus standi* assumes the existence of the very right that requires demonstration. In fact the Belgian Government has repeatedly stressed that there exists no rule of international law which would deny the national State of the shareholders the right of diplomatic protection for the purpose of seeking redress pursuant to unlawful acts committed by another State against the company in which they hold shares. This, by emphasizing the absence of any express denial of the right, conversely implies the admission that there is no rule of international law which expressly confers such a right on the shareholders' national State.

52. International law may not, in some fields, provide specific rules in particular cases. In the concrete situation, the company against which allegedly unlawful acts were directed is expressly vested with a right, whereas no such right is specifically provided for the shareholder in respect of those acts. Thus the position of the company rests on a positive rule of both municipal and international law. As to the shareholder, while he has certain rights expressly provided for him by municipal law as referred to in paragraph 42 above, appeal can, in the circumstances of the present case, only be made to the silence of international law. Such silence scarcely admits of interpretation in favour of the shareholder.

53. It is quite true, as was recalled in the course of oral argument in the present case, that concurrent claims are not excluded in the case of a person who, having entered the service of an international organization and retained his nationality, enjoys simultaneously the right to be protected by his national State and the right to be protected by the organization to which he belongs. This however is a case of one person in possession of two separate bases of protection, each of which is valid (**Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 185**). There is no analogy between such a situation and that of foreign shareholders in a company which has been the victim of a violation of international law which has caused them damage.

54. Part of the Belgian argument is founded on an attempt to assimilate interests to rights, relying on the use in many treaties and other instruments of such expressions as property, rights and interests. This is not, however, conclusive. Property is normally protected by law. Rights are *ex hypothesi* protected by law, otherwise they would not be rights. According to the Belgian Government, interests, although distinct from rights, are also protected by the aforementioned conventional rules. The Court is of the opinion that, for the purpose of interpreting the general rule of international law concerning diplomatic protection, which is its task, it has no need to determine the meaning of the term interests in the conventional rules, in other words to determine whether by this term the conventional rules refer to rights rather than simple interests.

55. The Court will now examine other grounds on which it is conceivable that the submission by the Belgian Government of a claim on behalf of shareholders in Barcelona Traction may be justified.

56. For the same reasons as before, the Court must here refer to municipal law. Forms of incorporation and their legal personality have
sometimes not been employed for the sole purposes they were originally intended to serve; sometimes the corporate entity has been unable to protect the rights of those who entrusted their financial resources to it; thus inevitably there have arisen dangers of abuse, as in the case of many other institutions of law. Here, then, as elsewhere, the law, confronted with economic realities, has had to provide protective measures and remedies in the interests of those within the corporate entity as well as of those outside who have dealings with it: the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of “lifting the corporate veil” or “disregarding the legal entity” has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.

57. Hence the lifting of the veil is more frequently employed from without, in the interest of those dealing with the corporate entity. However, it has also been operated from within, in the interest of—among others—the shareholders, but only in exceptional circumstances.

58. In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law. It follows that on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders.

* *

59. Before proceeding, however, to consider whether such circumstances exist in the present case, it will be advisable to refer to two specific cases involving encroachment upon the legal entity, instances of which have been cited by the Parties. These are: first, the treatment of enemy and allied property, during and after the First and Second World Wars, in peace treaties and other international instruments; secondly, the treatment of foreign property consequent upon the nationalizations carried out in recent years by many States.

60. With regard to the first, enemy-property legislation was an instrument of economic warfare, aimed at denying the enemy the advantages to be derived from the anonymity and separate personality of corporations. Hence the lifting of the veil was regarded as justified ex necessitate and was extended to all entities which were tainted with enemy character, even the nationals of the State enacting the legislation. The provisions of the peace treaties had a very specific function: to protect allied property, and to seize and pool enemy property with a view to covering reparation claims. Such provisions are basically different in their rationale from those normally applicable.

61. Also distinct are the various arrangements made in respect of compensation for the nationalization of foreign property. Their rationale too, derived as it is from structural changes in a State’s economy, differs from that of any normally applicable provisions. Specific agreements have been reached to meet specific situations, and the terms have varied from case to case. Far from evidencing any norm as to the classes of beneficiaries of compensation, such arrangements are sui generis and provide no guide in the present case.

62. Nevertheless, during the course of the proceedings both Parties relied on international instruments and judgments of international tribunals concerning these two specific areas. It should be clear that the developments in question have to be viewed as distinctive processes, arising out of circumstances peculiar to the respective situations. To seek to draw from them analogies or conclusions held to be valid in other fields is to ignore their specific character as lex specialis and hence to court error.

63. The Parties have also relied on the general arbitral jurisprudence which has accumulated in the last half-century. However, in most cases the decisions cited rested upon the terms of instruments establishing the jurisdiction of the tribunal or claims commission and determining what rights might enjoy protection; they cannot therefore give rise to generalization going beyond the special circumstances of each case. Other decisions, allowing or disallowing claims by way of exception, are not, in view of the particular facts concerned, directly relevant to the present case.

* *

64. The Court will now consider whether there might not be, in the present case, other special circumstances for which the general rule might not take effect. In this connection two particular situations must be studied: the case of the company having ceased to exist and the case of the company’s national State lacking capacity to take action on its behalf.

65. As regards the first of these possibilities the Court observes that the Parties have put forward conflicting interpretations of the present situation of Barcelona Traction. There can, however, be no question but that Barcelona Traction has lost all its assets in Spain, and was placed in receivership in Canada, a receiver and manager having been appointed. It is common ground that from the economic viewpoint the company has been entirely paralyzed. It has been deprived of all its Spanish sources of income, and the Belgian Government has asserted that the company
could no longer find the funds for its legal defence, so that these had to be supplied by the shareholders.

66. It cannot however, be contended that the corporate entity of the company has ceased to exist, or that it has lost its capacity to take corporate action. It was free to exercise such capacity in the Spanish courts and did in fact do so. It has not become incapable in law of defending its own rights and the interests of the shareholders. In particular, a precarious financial situation cannot be equated with the demise of the corporate entity, which is the hypothesis under consideration: the company’s status in law is alone relevant, and not its economic condition, nor even the possibility of its being “practically defunct”—a description on which argument has been based but which lacks all legal precision. Only in the event of the legal demise of the company are the shareholders deprived of the possibility of a remedy available through the company; it is only if they became deprived of all such possibility that an independent right of action for them and their government could arise.

67. In the present case, Barcelona Traction is in receivership in the country of incorporation. Far from implying the demise of the entity or of its rights, this much rather denotes that those rights are preserved for so long as no liquidation has ensued. Though in receivership, the company continues to exist. Moreover, it is a matter of public record that the company’s shares were quoted on the stock-market at a recent date.

68. The reason for the appointment in Canada not only of a receiver but also of a manager was explained as follows:

“In the Barcelona Traction case it was obvious, in view of the Spanish bankruptcy order of 12 February 1948, that the appointment of only a receiver would be useless, as positive steps would have to be taken if any assets seized in the bankruptcy in Spain were to be recovered.” (Hearing of 2 July 1969.)

In brief, a manager was appointed in order to safeguard the company’s rights; he has been in a position directly or indirectly to uphold them. Thus, even if the company is limited in its activity after being placed in receivership, there can be no doubt that it has retained its legal capacity and that the power to exercise it is vested in the manager appointed by the Canadian courts. The Court is thus not confronted with the first hypothesis contemplated in paragraph 64, and need not pronounce upon it.

69. The Court will now turn to the second possibility, that of the lack of capacity of the company’s national State to act on its behalf. The first question which must be asked here is whether Canada—the third apex of the triangular relationship—is, in law, the national State of Barcelona Traction.

70. In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments. This notwithstanding, further or different links are at times said to be required in order that a right of diplomatic protection should exist. Indeed, it has been the practice of some States to give a company incorporated under their law diplomatic protection solely when it has its seat (siège social) or management or centre of control in their territory, or when a majority or a substantial proportion of the shares has been owned by nationals of the State concerned. Only then, it has been held, does there exist between the corporation and the State in question a genuine connection of the kind familiar from other branches of international law. However, in the particular field of the diplomatic protection of corporate entities, no absolute test of the “genuine connection” has found general acceptance. Such tests as have been applied are of a relative nature, and sometimes links with one State have had to be weighed against those with another. In this connection reference has been made to the Nottebohm case. In fact the Parties made frequent reference to it in the course of the proceedings. However, given both the legal and factual aspects of protection in the present case the Court is of the opinion that there can be no analogy with the issues raised or the decision given in that case.

71. In the present case, it is not disputed that the company was incorporated in Canada and has its registered office in that country. The incorporation of the company under the law of Canada was an act of free choice. Not only did the founders of the company seek its incorporation under Canadian law but it has remained under that law for a period of over 50 years. It has maintained in Canada its registered office, its accounts and its share registers. Board meetings were held there for many years; it has been listed in the records of the Canadian tax authorities. Thus a close and permanent connection has been established, fortified by the passage of over half a century. This connection is in no way weakened by the fact that the company engaged from the very outset in commercial activities outside Canada, for that was its declared object. Barcelona Traction’s links with Canada are thus manifold.

72. Furthermore, the Canadian nationality of the company has received general recognition. Prior to the institution of proceedings before the Court, three other governments apart from that of Canada (those of the United Kingdom, the United States and Belgium) made representa-
tions concerning the treatment accorded to Barcelona Traction by the Spanish authorities. The United Kingdom Government intervened on behalf of bondholders and of shareholders. Several representations were also made by the United States Government, but not on behalf of the Barcelona Traction company as such.

73. Both Governments acted at certain stages in close cooperation with the Canadian Government. An agreement was reached in 1950 on the setting-up of an independent committee of experts. While the Belgian and Canadian Governments contemplated a committee composed of Belgian, Canadian and Spanish members, the Spanish Government suggested a committee composed of British, Canadian and Spanish members. This was agreed to by the Canadian and United Kingdom Governments, and the task of the committee was, in particular, to establish the monies imported into Spain by Barcelona Traction or any of its subsidiaries, to determine and appraise the materials and services brought into the country, to determine and appraise the amounts withdrawn from Spain by Barcelona Traction or any of its subsidiaries, and to compute the profits earned in Spain by Barcelona Traction or any of its subsidiaries and the amounts susceptible of being withdrawn from the country at 31 December 1949.

74. As to the Belgian Government, its earlier action was also undertaken in close cooperation with the Canadian Government. The Belgian Government admitted the Canadian character of the company in the course of the present proceedings. It explicitly stated that Barcelona Traction was a company of neither Spanish nor Belgian nationality but a Canadian company incorporated in Canada. The Belgian Government has even conceded that it was not concerned with the injury suffered by Barcelona Traction itself, since that was Canada’s affair.

75. The Canadian Government itself, which never appears to have doubted its right to intervene on the company’s behalf, exercised the protection of Barcelona Traction by diplomatic representation for a number of years, in particular by its note of 27 March 1948, in which it alleged that a denial of justice had been committed in respect of the Barcelona Traction, Ebro and National Trust companies, and requested that the bankruptcy judgment be cancelled. It later invoked the Anglo-Spanish treaty of 1922 and the agreement of 1924, which applied to Canada. Further Canadian notes were addressed to the Spanish Government in 1950, 1951 and 1952. Further approaches were made in 1954, and in 1955 the Canadian Government renewed the expression of its deep interest in the affair of Barcelona Traction and its Canadian subsidiaries.

76. In sum, the record shows that from 1948 onwards the Canadian Government made to the Spanish Government numerous representations which cannot be viewed otherwise than as the exercise of diplomatic protection in respect of the Barcelona Traction company. Therefore this was not a case where diplomatic protection was refused or remained in the sphere of fiction. It is also clear that over the whole period of its diplomatic activity the Canadian Government proceeded in full knowledge of the Belgian attitude and activity.

77. It is true that at a certain point the Canadian Government ceased to act on behalf of Barcelona Traction, for reasons which have not been fully revealed, though a statement made in a letter of 19 July 1955 by the Canadian Secretary of State for External Affairs suggests that it felt the matter should be settled by means of private negotiations. The Canadian Government has nonetheless retained its capacity to exercise diplomatic protection; no legal impediment has prevented it from doing so: no fact has arisen to render this protection impossible. It has discontinued its action of its own free will.

78. The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is to resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress. The municipal legislator may lay upon the State an obligation to protect its citizens abroad, and may also confer upon the national a right to demand the performance of that obligation, and clothe the right with corresponding sanctions. However, all these questions remain within the province of municipal law and do not affect the position internationally.

79. The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action. Whatever the reasons for any change of attitude, the fact cannot in itself constitute a justification for the exercise of diplomatic protection by another government, unless there is some independent and otherwise valid ground for that.

80. This cannot be regarded as amounting to a situation where a violation of law remains without remedy: in short, a legal vacuum.
There is no obligation upon the possessors of rights to exercise them. Sometimes no remedy is sought, though rights are infringed. To equate this with the creation of a vacuum would be to equate a right with an obligation.

81. The cessation by the Canadian Government of the diplomatic protection of Barcelona Traction cannot, then, be interpreted to mean that there is no remedy against the Spanish Government for the damage done by the allegedly unlawful acts of the Spanish authorities. It is not a hypothetical right which was vested in Canada, for there is no legal impediment preventing the Canadian Government from protecting Barcelona Traction. Therefore there is no substance in the argument that for the Belgian Government to bring a claim before the Court represented the only possibility of obtaining redress for the damage suffered by Barcelona Traction and, through it, by its shareholders.

82. Nor can the Court agree with the view that the Canadian Government had of necessity to interrupt the protection it was giving to Barcelona Traction and to refrain from pursuing it by means of other procedures, solely because there existed no link of compulsory jurisdiction between Spain and Canada. International judicial proceedings are but one of the means available to States in pursuit of their right to exercise diplomatic protection (Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 178). The lack of a jurisdictional link cannot be regarded either in this or in other fields of international law as entailing the non-existence of a right.

83. The Canadian Government's right of protection in respect of the Barcelona Traction company remains unaffected by the present proceedings. The Spanish Government has never challenged the Canadian nationality of the company, either in the diplomatic correspondence with the Canadian Government or before the Court. Moreover it has unreservedly recognized Canada as the national State of Barcelona Traction in both written pleadings and oral statements made in the course of the present proceedings. Consequently, the Court considers that the Spanish Government has not questioned Canada's right to protect the company.

84. Though, having regard to the character of the case, the question of Canada's right has not been before it, the Court has considered it necessary to clarify this issue.

85. The Court will now examine the Belgian claim from a different point of view, disregarding municipal law and relying on the rule that in inter-State relations, whether claims are made on behalf of a State's national or on behalf of the State itself, they are always the claims of the State. As the Permanent Court said,

"The question, therefore, whether the ... 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." (Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 12. See also Notteboom, Second Phase, Judgment, I.C.J. Reports 1955, p. 24.)

86. Hence the Belgian Government would be entitled to bring a claim if it could show that one of its rights had been infringed and that the acts complained of involved the breach of an international obligation arising out of a treaty or a general rule of law. The opinion has been expressed that a claim can accordingly be made when investments by a State's nationals abroad are thus prejudicially affected, and that since such investments are part of a State's national economic resources, any prejudice to them directly involves the economic interest of the State.

87. Governments have been known to intervene in such circumstances not only when their interests were affected, but also when they were threatened. However, it must be stressed that this type of action is quite different from and outside the field of diplomatic protection. When a State admits into its territory foreign investments or foreign nationals it is, as indicated in paragraph 33, bound to extend to them the protection of the law. However, it does not thereby become an insurer of that part of another State's wealth which these investments represent. Every investment of this kind carries certain risks. The real question is whether a right has been violated, which right could only be the right of the State to have its nationals enjoy a certain treatment guaranteed by general international law, in the absence of a treaty applicable to the particular case. On the other hand it has been stressed that it must be proved that the investment effectively belongs to a particular economy. This is, as it is admitted, sometimes very difficult, in particular where complex undertakings are involved. Thus the existing concrete test would be replaced by one which might lead to a situation in which no diplomatic protection could be exercised, with the consequence that an unlawful act by another State would remain without remedy.

88. It follows from what has already been stated above that, where it is a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a claim.

89. Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are
often multinational, and considering the way in which the economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane. Nevertheless, a more thorough examination of the facts shows that the law on the subject has been formed in a period characterized by an intense conflict of systems and interests. It is essentially bilateral relations which have been concerned, relations in which the rights of both the State exercising diplomatic protection and the State in respect of which protection is sought have had to be safeguarded. Here as elsewhere, a body of rules could only have developed with the consent of those concerned. The difficulties encountered have been reflected in the evolution of the law on the subject.

90. Thus, in the present state of the law, the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed. States ever more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the framework of wider economic arrangements. Indeed, whether in the form of multilateral or bilateral treaties between States, or in that of agreements between States and companies, there has since the Second World War been considerable development in the protection of foreign investments. The instruments in question contain provisions as to jurisdiction and procedure in case of disputes concerning the treatment of investing companies by the States in which they invest capital. Sometimes companies are themselves vested with a direct right to defend their interests against States through prescribed procedures. No such instrument is in force between the Parties to the present case.

91. With regard more particularly to human rights, to which reference has already been made in paragraph 34 of this Judgment, it should be noted that these also include protection against denial of justice. However, on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality. It is therefore still on the regional level that a solution to this problem has had to be sought; thus, within the Council of Europe, of which Spain is not a member, the problem of admissibility encountered by the claim in the present case has been resolved by the European Convention on Human Rights, which entitles each State which is a party to the Convention to lodge a complaint against any other contracting State for violation of the Convention, irrespective of the nationality of the victim.

92. Since the general rule on the subject does not entitle the Belgian Government to put forward a claim in this case, the question remains to be considered whether nonetheless, as the Belgian Government has contended during the proceedings, considerations of equity do not require that it be held to possess a right of protection. It is quite true that it has been maintained that, for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which has been the victim of a violation of international law. Thus a theory has been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company. Whatever the validity of this theory may be, it is certainly not applicable to the present case, since Spain is not the national State of Barcelona Traction.

93. On the other hand, the Court considers that, in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably. It has been suggested that if in a given case it is not possible to apply the general rule that the right of diplomatic protection of a company belongs to its national State, considerations of equity might call for the possibility of protection of the shareholders in question by their own national State. This hypothesis does not correspond to the circumstances of the present case.

94. In view, however, of the discretionary nature of diplomatic protection, considerations of equity cannot require more than the possibility for some protector State to intervene, whether it be the national State of the company, by virtue of the general rule mentioned above, or, in a secondary capacity, the national State of the shareholders who claim protection. In this connection, account should also be taken of the practical effects of deducing from considerations of equity any broader right of protection for the national State of the shareholders. It must first of all be observed that it would be difficult on an equitable basis to make distinctions according to any quantitative test: it would seem that the owner of 1 per cent. and the owner of 90 per cent. of the share-capital should have the same possibility of enjoying the benefit of diplomatic protection. The protector State may, of course, be disinclined to take up the case of the single small shareholder, but it could scarcely be denied the right to do so in the name of equitable considerations. In that field, protection by the national State of the shareholders can hardly be graduated according to the absolute or relative size of the shareholding involved.

95. The Belgian Government, it is true, has also contended that as high a proportion as 88 per cent. of the shares in Barcelona Traction belonged to natural juristic persons of Belgian nationality, and it has used this as an argument for the purpose not only of determining the amount of the damages which it claims, but also of establishing its right of action on behalf of the Belgian shareholders. Nevertheless, this does
not alter the Belgian Government’s position, as expounded in the course of the proceedings, which implies, in the last analysis, that it might be sufficient for one single share to belong to a national of a given State for the latter to be entitled to exercise its diplomatic protection.

96. The Court considers that the adoption of the theory of diplomatic protection of shareholders as such, by opening the door to competing diplomatic claims, could create an atmosphere of confusion and insecurity in international economic relations. The danger would be all the greater inasmuch as the shares of companies whose activity is international are widely scattered and frequently change hands. It might perhaps be claimed that, if the right of protection belonging to the national States of the shareholders were considered as only secondary to that of the national State of the company, there would be less danger of difficulties of the kind contemplated. However, the Court must state that the essence of a secondary right is that it only comes into existence at the time when the original right ceases to exist. As the right of protection vested in the national State of the company cannot be regarded as extinguished because it is not exercised, it is not possible to accept the proposition that in case of its non-exercise the national States of the shareholders have a right of protection secondary to that of the national State of the company. Furthermore, study of factual situations in which this theory might possibly be applied gives rise to the following observations.

97. The situations in which foreign shareholders in a company wish to have recourse to diplomatic protection by their own national State may vary. It may happen that the national State of the company simply refuses to grant it its diplomatic protection, or that it begins to exercise it (as in the present case) but does not pursue its action to the end. It may also happen that the national State of the company and the State which has committed a violation of international law with regard to the company arrive at a settlement of the matter, by agreeing on compensation for the company, but that the foreign shareholders find the compensation insufficient. Now, as a matter of principle, it would be difficult to draw a distinction between these three cases so far as the protection of foreign shareholders by their national State is concerned, since in each case they may have suffered real damage. Furthermore, the national State of the company is perfectly free to decide how far it is appropriate for it to protect the company, and is not bound to make public the reasons for its decision. To reconcile this discretionary power of the company’s national State with a right of protection falling to the shareholders’ national State would be particularly difficult when the former State has concluded, with the State which has contravened international law with regard to the company, an agreement granting the company compensation which the foreign shareholders find inadequate. If, after such a settlement, the national State of the foreign shareholders could in its turn put forward a claim based on the same facts, this would be likely to introduce into the negotiation of this kind of agreement a lack of security which would be contrary to the stability which it is the object of international law to establish in international relations.

98. It is quite true, as recalled in paragraph 53, that international law recognizes parallel rights of protection in the case of a person in the service of an international organization. Nor is the possibility excluded of concurrent claims being made on behalf of persons having dual nationality, although in that case lack of a genuine link with one of the two States may be set up against the exercise by that State of the right of protection. It must be observed, however, that in these two types of situation the number of possible protectors is necessarily very small, and their identity normally not difficult to determine. In this respect such cases of dual protection are markedly different from the claims to which recognition of a general right of protection of foreign shareholders by their various national States might give rise.

99. It should also be observed that the promoters of a company whose operations will be international must take into account the fact that States have, with regard to their nationals, a discretionary power to grant diplomatic protection or to refuse it. When establishing a company in a foreign country, its promoters are normally impelled by particular considerations; it is often a question of tax or other advantages offered by the host State. It does not seem to be in any way inequitable that the advantages thus obtained should be balanced by the risks arising from the fact that the protection of the company and hence of its shareholders is thus entrusted to a State other than the national State of the shareholders.

100. In the present case, it is clear from what has been said above that Barcelona Traction was never reduced to a position of impotence such that it could not have approached its national State, Canada, to ask for its diplomatic protection, and that, as far as appeared to the Court, there was nothing to prevent Canada from continuing to grant its diplomatic protection to Barcelona Traction if it had considered that it should do so.

101. For the above reasons, the Court is not of the opinion that, in the particular circumstances of the present case, _jus standi_ is conferred on the Belgian Government by considerations of equity.

* 

102. In the course of the proceedings, the Parties have submitted a great amount of documentary and other evidence intended to substantiate
their respective submissions. Of this evidence the Court has taken cognizance. It has been argued on one side that unlawful acts had been committed by the Spanish judicial and administrative authorities, and that as a result of those acts Spain has incurred international responsibility. On the other side it has been argued that the activities of Barcelona Traction and its subsidiaries were conducted in violation of Spanish law and caused damage to the Spanish economy. If both contentions were substantiated, the truth of the latter would in no way provide justification in respect of the former. The Court fully appreciates the importance of the legal problems raised by the allegation, which is at the root of the Belgian claim for reparation, concerning the denial of justice allegedly committed by organs of the Spanish State. However, the possession by the Belgian Government of a right of protection is a prerequisite for the examination of these problems. Since no *jus in re* before the Court has been established, it is not for the Court in its Judgment to pronounce upon any other aspect of the case, on which it should take a decision only if the Belgian Government had a right of protection in respect of its nationals, shareholders in Barcelona Traction.

* * * * *

103. Accordingly,

The Court

rejects the Belgian Government’s claim by fifteen votes to one, twelve votes of the majority being based on the reasons set out in the present Judgment.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fifth day of February, one thousand nine hundred and seventy, in three copies, one of which will be placed in the Archives of the Court and the others transmitted to the Government of the Kingdom of Belgium and to the Government of the Spanish State, respectively.

(Signed) J. L. Bustamante y Rivero,
President.

(Signed) S. Aquirione,
Registrar.

Judge Petren and Judge Onyeama make the following Joint Declaration:

We agree with the operative provision and the reasoning of the Judgment subject to the following declaration:

With regard to the nationality of Barcelona Traction, the Judgment refers to the existence of opinions to the effect that the absence of a genuine connection between a company and the State claiming the right of diplomatic protection of the company might be set up against the exercise of such a right. In this context the Judgment also mentions the decision in the *Nottebohm* case to the effect that the absence of a genuine connecting link between a State and a natural person who has acquired its nationality may be set up against the exercise by that State of diplomatic protection of the person concerned. The present Judgment then concludes that given the legal and factual aspects of protection in the present case there can be no analogy with the issues raised or the decision given in the *Nottebohm* case.

Now in the present case the Spanish Government has asserted and the Belgian Government has not disputed that, Barcelona Traction having been incorporated under Canadian law and having its registered office in Toronto, it is of Canadian nationality and Canada is qualified to protect it.

Canada’s right of protection being thus recognized by both Parties to the proceedings, the first question which the Court has to answer within the framework of the third preliminary objection is simply whether, alongside the right of protection pertaining to the national State of a company, another State may have a right of protection of the shareholders of the company who are its nationals. This being so, the Court has not in this case to consider the question whether the genuine connection principle is applicable to the diplomatic protection of juristic persons, and, still less, to speculate whether, if it is, valid objections could have been raised against the exercise by Canada of diplomatic protection of Barcelona Traction.

Judge Lachs makes the following Declaration:

I am in full agreement with the reasoning and conclusions of the Judgment, but would wish to add the following observation:

The Court has found, in the light of the relevant elements of law and of fact, that the Applicant, the Belgian Government, has no capacity in the present case. At the same time it has stated that the Canadian Government’s right of protection in respect of the Barcelona Traction company has remained unaffected by the proceedings now closed.
I consider that the existence of this right is an essential premise of the Court's reasoning, and that its importance is emphasized by the seriousness of the claim and the particular nature of the unlawful acts with which it charges certain authorities of the respondent State.

President Bustamante y Rivero, Judges Sir Gerald Fitzmaurice, Tanaka, Jessup, Morelli, Padilla Nervo, Gros and Ammoun append Separate Opinions to the Judgment of the Court.

Judge ad hoc Riphagen appends a Dissenting Opinion to the Judgment of the Court.

(Initialled) J. L. B.-R.
(Initialled) S. A.
International Court of Justice

Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy) Judgment

I.C.J. Reports 1989
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REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING
ELETTRONICA SICULA S.p.A. (ELSI)
(UNITED STATES OF AMERICA v. ITALY)

JUDGMENT OF 20 JULY 1989

1989

COUR INTERNATIONALE DE JUSTICE
RECEUIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE
DE L’ELETTRONICA SICULA S.p.A. (ELSI)
(ÉTATS-UNIS D’AMÉRIQUE c. ITALIE)

ARRÊT DU 20 JUILLET 1989

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YEAR 1989
20 July 1989

CASE CONCERNING
ELETTRONICA SICULA S.p.A. (ELSI)
(UNITED STATES OF AMERICA v. ITALY)

Diplomatic protection — Rule of exhaustion of local remedies — Applicability to claim under treaty which does not mention the rule — Applicability to claim for declaratory judgment — Allegation that objection barred by estoppel — Conditions required for the satisfaction of the rule.

Alleged breaches of 1948 Treaty of Friendship, Commerce and Navigation between Italy and United States, the Protocol and the 1951 Supplementary Agreement thereto.

Article III of FCN Treaty — Alleged interference with shareholders' right to "control and manage" company, by requisition of its plant and equipment — Meaning of qualifying phrase "in conformity with the applicable laws and regulations" of Party — Relevance of municipal law — Possibility of disturbance of normal exercise of rights during public emergencies and the like.

Article V, paragraphs 1 and 3, of FCN Treaty — "Constant protection and security" of nationals of each Party "for their persons and property" — Standard of protection required — Identification of "property" to be protected — Complaint of occupation of property — Treaty provision not equivalent to a warranty that property shall never in any circumstances be occupied or disturbed — Complaint of delay in ruling an appeal against requisition.


Article I of Supplementary Agreement to FCN Treaty — Prohibition of "arbitrary or discriminatory measures . . . resulting particularly in" preventing effective control and management of enterprises or impairing legally acquired rights — Effect of word "particularly" — Definition of arbitrariness in international law — Relevance of finding of municipal court to question whether act was to be classed

as arbitrary in international law — Whether order made in context of operating system of law and remedies may be arbitrary measure.

Article VII of FCN Treaty — Right "to acquire, own and dispose of immovable property or interests therein" — Difference between English text ("interests") and Italian text ("diritti reali") — Standards of protection laid down by treaty.

JUDGMENT

Present: President RUDA; Judges ODA, AGO, SCHWEBEL, Sir Robert JENNINGS; Registrar VALENCIA-OSPINA.

In the case concerning Elettronica Sicula S.p.A. (ELSI),

between

the United States of America,

represented by

The Honorable Abraham D. Sofaer, Legal Adviser, Department of State,
Mr. Michael J. Matheson, Deputy Legal Adviser, Department of State,
as Co-Agents;
Mr. Timothy E. Ramish,
as Deputy Agent;
Ms Melinda P. Chandler, Attorney/Adviser, Department of State,
Mr. Sean D. Murphy, Attorney/Adviser, Department of State,
The Honorable Richard N. Gardner, Ambassador to Italy (1977-1981);
Henry L. Moses Professor of Law and International Diplomacy, Columbia University; Counsel to the Law Firm of Coudert Brothers,
as Counsel and Advocates;
Mr. Giuseppe Bisconti, Studio Legale Bisconti, Rome,
Mr. Franco Bonelli, Professor of Law, Genoa University; Partner, Studio Legale Bonelli,
Mr. Elio Fazzalari, Professor of Civil Procedure, Rome University; Partner, Studio Legale Fazzalari,
Mr. Shabtai Rosenne, Member of the Israel Bar; Member of the Institute of International Law; Honorary Member of the American Society of International Law,
as Advisers,

and

the Republic of Italy

represented by

Mr. Luigi Ferrari Bravo, Professor of International Law at the University of Rome; Head of the Legal Service of the Ministry of Foreign Affairs,
as Agent and Counsel;
Mr. Riccardo Monaco, Professor Emeritus at the University of Rome,
as Co-Agent and Counsel;
Mr. Ignazio Caramazza, State Advocate; Secretary-General of the Avvoca-
tura Generale dello Stato,
as Co-Agent and Advocate;
Mr. Michael Joachim Bonell, Professor of Comparative Law at the Univer-
sity of Rome,
Mr. Francesco Capotorti, Professor of International Law at the University of
Rome,
Mr. Giorgio Gaja, Professor of International Law at the University of Floren-
tce,
Mr. Keith Hight, Member of the Bars of New York and the District of
Columbia,
Mr. Bernardino Libonati, Professor of Commercial Law at the University of
Rome,
as Counsel and Advocates;
assisted by
Mr. David Clark, Ll.B. (Hons), Member of the Law Society of Scotland,
Mr. Alberto Colella, Assistant Legal Adviser to the Ministry of Foreign
Affairs,
Mr. Alan Derek Hayward, Fellow of the Institute of Chartered Accountants
in England and Wales,
Mr. Pier Giusto Jaeger, Professor of Commercial Law at the University of
Milan,
Mr. Attila Tanzi, Assistant Legal Adviser to the Ministry of Foreign Affairs,
Mr. Eric Wyler, Maître assistant of Public International Law at the Faculty of
Law of the University of Lausanne,
as Advisers,
THE CHAMBER OF THE INTERNATIONAL COURT OF JUSTICE formed to deal with
the case above mentioned,
composed as above,
after deliberation,
delivers the following Judgment:

1. By a letter dated 6 February 1987, filed in the Registry of the Court the
same day, the Secretary of State of the United States of America transmitted
to the Court an Application instituting proceedings against the Republic of Italy
in respect of a dispute arising out of the requisition by the Government of Italy
of the plant and related assets of Raytheon-Elsi S.p.A., previously known as
Elettronica Sicula S.p.A. (ELSI), an Italian company which was stated to have
been 100 per cent owned by two United States corporations. By the same letter,
the Secretary of State informed the Court that the Government of the United
States requested, pursuant to Article 26 of the Statute of the Court, that the
dispute be resolved by a Chamber of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was at
once communicated to the Government of the Republic of Italy. In accordance
with paragraph 3 of that Article, all other States entitled to appear before the
Court were notified of the Application.

3. By a telegram dated 13 February 1987 the Minister for: Foreign Affairs of
Italy informed the Court that his Government accepted the proposal put for-
ward by the Government of the United States that the case be heard by a Cham-
ber composed in accordance with Article 26 of the Statute; this acceptance was
confirmed by a letter dated 13 February 1987 from the Agent of Italy.

4. By an Order dated 2 March 1987, the Court, after recalling the request for
a Chamber and reciting that the Parties had been duly consulted as to the com-
position of the proposed Chamber in accordance with Article 26, paragraph 2,
of the Statute and Article 17, paragraph 2, of the Rules of Court, decided to
accede to the request of the Governments of the United States of America and
Italy to form a special Chamber of five judges to deal with the case, declared
that at an election held on that day President Nagendra Singh and Judges Oda,
Ago, Schwebel and Sir Robert Jennings had been elected to the Chamber, and
declared a Chamber to deal with the case to have been duly constituted by the
Order, with the composition indicated.

5. The Court further fixed time-limits, by the said Order, for the filing of a
Memorial by the United States of America and a Counter-Memorial by Italy,
which were duly filed within the time-limits. In its Counter-Memorial, Italy
presented an objection to the admissibility of the Application; by letters ad-
dressed to the Registrar on 16 November 1987, the Parties agreed, with refer-
ence to Article 79, paragraph 8, of the Rules of Court, that the objection should
"be heard and determined within the framework of the merits". By an Order
dated 17 November 1987, the Chamber took note of that agreement, found that
the filing of further pleadings by the Parties was necessary, authorized the
filing of a Reply by the United States of America and a Rejoinder by Italy,
and fixed time-limits for these; the Reply and Rejoinder were duly filed
within those time-limits.

6. On 11 December 1988 Judge Nagendra Singh, President of the Chamber,
died. Following further consultations with the Parties with regard to the com-
position of the Chamber in accordance with Article 17, paragraph 2, of the
Rules of Court, the Court, by Order dated 20 December 1988, declared that
Judge Ruda, President of the Court, had that day been elected a Member of
the Chamber to fill the vacancy left by the death of Judge Nagendra Singh. In
accordance with Article 18, paragraph 2, of the Rules of Court, President
Ruda became President of the Chamber.

7. At 12 public sittings held between 13 February and 2 March 1989, the
Chamber was addressed by the following representatives of the Parties:

For the United States of America:
The Honorable A. D. Soifer
Mr. M. J. Matheson
Mr. T. E. Ramish
Ms M. P. Chandler
Mr. S. D. Murphy
The Honorable R. N. Gardner
Mr. G. Bisconti
Professor F. Bonelli
Professor E. Fazzalari
8. The United States called as witnesses Mr. Charles Francis Adams (who was examined by Mr. Sofaeer and cross-examined by Mr. Hidget) and Mr. John Dickens Clare (who was examined by Ms Chandler and cross-examined by Mr. Hidget). The United States called as expert Mr. Timothy Lawrence (who was cross-examined by Professor Bonelli). Mr. Giuseppe Bisconti also addressed the Court on behalf of the United States; since he had occasion to refer to matters of fact within his knowledge as a lawyer acting for Raytheon Company, the President of the Chamber acceded to a request by the Agent of Italy that Mr. Bisconti be treated pro tanto as a witness. Mr. Bisconti, who informed the Chamber that both Raytheon Company and Mr. Bisconti himself waived any relevant privilege, was cross-examined by Mr. Hidget. Italy called as expert Mr. Alan Derek Hayward.

9. During the hearings questions were put to the Parties, and to the witnesses and experts, by the President and Members of the Chamber; replies were given orally or in writing prior to the close of the oral proceedings, with documents in support. The Chamber decided further that each Party might comment in writing on the replies of the other Party to a series of questions, put at a late stage of the oral proceedings, and a time-limit was fixed for that purpose; written comments were duly filed within that time-limit. A further question was put to one Party after the close of the hearings and answered in writing; the other Party was given an opportunity to comment on the answer.

10. In the course of the written proceedings the following submissions were presented by the Parties:

On behalf of the United States of America,

in the Application:

"while reserving the right to supplement and amend this submission as appropriate in the course of further proceedings, the United States requests the Court to adjudge and declare as follows:

(a) that the Government of Italy has violated the Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic of 1948, in particular, Articles II, III, V and VII of the Treaty, and Articles I and V of the 1951 Supplement; and

(b) that the Government of Italy is responsible to pay compensation to the United States, in an amount to be determined by the Court, as measured by the injuries suffered by United States nationals as a result of these violations, including the additional financial losses which Raytheon suffered in repaying the guaranteed loans and in not

recovering amounts due on open accounts, as well as expenses incurred in defending against Italian bank lawsuits, in mitigating the damage to its reputation and credit, and in pursuing its claim for redress";

in the Memorial:

"the United States submits to the Court that it is entitled to a declaration and judgment that:

(a) Italy — by engaging in the acts and omissions described above, which prevented Raytheon and Machlett, United States corporations, from liquidating the assets of their wholly-owned Italian corporation ELSI and caused the latter's bankruptcy, and by its subsequent actions and omissions — violated the international legal obligations which it undertook by the Treaty of Friendship, Commerce and Navigation between the two countries, and the Supplement thereto, and in particular, violated:

— Article III (2), in that Italy's actions and omissions prevented Raytheon and Machlett from exercising their right to manage and control an Italian corporation;

— Article V (1) and (3), in that Italy's actions and omissions constituted a failure to provide the full protection and security as required by the Treaty and by international law;

— Article V (2), in that Italy's actions and omissions constituted a taking of Raytheon's and Machlett's interests in property without just compensation and due process of law;

— Article VII, in that these actions and omissions denied Raytheon and Machlett the right to dispose of their interests in immovable property on terms no less favorable than an Italian corporation would enjoy on a reciprocal basis;

— Article I of the Supplement, in that the treatment afforded Raytheon and Machlett was both arbitrary and discriminatory, prevented their effective control and management of ELSI, and also impaired their other legally acquired rights and interests;

(b) that, owing to these violations of the Treaty and Supplement, singly and in combination, the United States is entitled to compensation in an amount equal to the full amount of the damage suffered by Raytheon and Machlett as a consequence, including their losses on investment, guaranteed loans, and open accounts, the legal expenses incurred by Raytheon in connection with the bankruptcy, in defending against related litigation and in pursuing its claim, and interest on such amounts computed at the United States prime rate from the date of loss to the date of payment of the award, compounded on an annual basis; and

(c) that Italy accordingly should pay to the United States the amount of US$12,679,000, plus interest, computed as described above";
in the Reply:

"the United States submits to the Court that it is entitled to a declaration and judgment that:

(a) the claims brought by the United States are admissible before the Court since all reasonable local remedies have been exhausted;

(b) Italy — by engaging in the acts and omissions described above and in the Memorial, which prevented Raytheon and Machlett, United States corporations, from liquidating the assets of their wholly-owned Italian corporation ELSI and caused the latter’s bankruptcy, and by its subsequent actions and omissions — violated the international legal obligations which it undertook by the Treaty of Friendship, Commerce and Navigation between the two countries, and the Supplement thereto, and in particular, violated:

- Article III (2), in that Italy’s actions and omissions prevented Raytheon and Machlett from exercising their right to manage and control an Italian corporation;
- Article V (1) and (3), in that Italy’s actions and omissions constituted a failure to provide the full protection and security as required by the Treaty and by international law;

- Article V (2), in that Italy’s actions and omissions constituted a taking of Raytheon’s and Machlett’s interests in property without just compensation and due process of law;

- Article VII, in that these actions and omissions denied Raytheon and Machlett the right to dispose of their interests in immovable property on terms no less favorable than an Italian corporation would enjoy on a reciprocal basis;
- Article I of the Supplement, in that the treatment afforded Raytheon and Machlett was both arbitrary and discriminatory, prevented their effective control and management of ELSI, and also impaired their other legally acquired rights and interests;

(c) that, owing to these violations of the Treaty and Supplement, singly and in combination, the United States is entitled to compensation in an amount equal to the full amount of the damage suffered by Raytheon and Machlett as a consequence, including their losses on investment, guaranteed loans, and open accounts, the legal expenses incurred by Raytheon in connection with the bankruptcy, in defending against related litigation and in pursuing its claim, and interest on such amounts computed at the United States prime rate from the date of loss to the date of payment of the award, compounded on an annual basis; and

(d) that Italy accordingly should pay to the United States the amount of US$12,679,000, plus interest, computed as described above and in the Memorial."

On behalf of the United States of America,
at the hearing of 16 February 1989:

"The United States requests that the objection of the Respondent be dismissed and submits to the Court that it is entitled to a declaration and judgment that:

(1) the Respondent violated the international legal obligations which it undertook by the Treaty of Friendship, Commerce and Navigation between the two countries, and the Supplement thereto, and in particular, violated Articles III, V, and VII of the Treaty and Article I of the Supplement; and

(2) that, owing to these violations of the Treaty and Supplement, singly and in combination, the United States is entitled to reparation in an amount equal to the full amount of the damage suffered by Raytheon and Machlett as a consequence, including their losses on investment, guaranteed loans, and open accounts, the legal expenses incurred by Raytheon in connection with the bankruptcy, in defending against related litigation and in pursuing its claim, and interest on such amounts computed at the United States prime rate from the date of loss to the date of payment of the award, compounded on an annual basis; and

(3) that Italy accordingly should pay to the United States the amount of $12,679,000 plus interest."

At the hearing of 27 February 1989 (afternoon) the Agent of the United States confirmed that these were the final submissions of the United States.

On behalf of the Republic of Italy,
at the hearing of 23 February 1989, repeated as final submissions at the hearing of 2 March 1989 (afternoon):

"May it please the Court,

A. To adjudge and declare that the Application filed on 6 February
1987 by the United States Government is inadmissible because local remedies have not been exhausted.

B. If not, to adjudge and declare:

(1) that Article III of the Treaty of Friendship, Commerce and Navigation of 2 February 1948 has not been violated;

(2) that Article V, paragraphs 1 and 3, of the Treaty has not been violated;

(3) that Article V, paragraph 2, of the Treaty, and the related provisions of the Protocol to the Treaty, have not been violated;

(4) that Article VII of the Treaty has not been violated;

(5) that Article I of the Supplementary Agreement of 26 September 1951 has not been violated; and

(6) that no other Article of the Treaty or the Supplementary Agreement has been violated.

C. On a subsidiary and alternative basis only: to adjudge and declare that, even if there had been a violation of obligations under the Treaty or the Supplementary Agreement, such violation caused no injury for which the payment of any indemnity would be justified.

And, accordingly, to dismiss the claim."

* * *

12. The claim of the United States in the present case is that Italy has violated the international legal obligations which it undertook by the Treaty of Friendship, Commerce and Navigation between the two countries concluded on 2 February 1948 ("the FCN Treaty") and the Supplementary Agreement thereto concluded on 26 September 1951, by reason of its acts and omissions in relation to, and its treatment of, two United States corporations, the Raytheon Company ("Raytheon") and The Machlett Laboratories Incorporated ("Machlett"), in relation to the Italian corporation Raytheon-Elsi S.p.A. (previously Elettronica Sicula S.p.A. (ELSI)), which was wholly owned by the two United States corporations. Italy contends certain of the facts alleged by the United States, denies that there has been any violation of the FCN Treaty, and contends, on a subsidiary and alternative basis, that if there was any such violation, no injury was caused for which payment of any indemnity would be justified.

13. In 1955, Raytheon (then known as Raytheon Manufacturing Company) agreed to subscribe for 14 per cent of the shares in Elettronica Sicula S.p.A. Over the period 1956-1967, Raytheon successively increased its holding of ELSI shares (as well as investing capital in the company in other ways) to a total holding of 99.16 per cent of its shares. In April 1963 the name of the company was changed from Elettronica Sicula S.p.A. to "Raytheon-Elsi S.p.A."; it will however be referred to hereafter as "ELSI". The remaining shares (0.84 per cent) in ELSI were acquired in April 1967 by Machlett, which was a wholly-owned subsidiary of Raytheon. ELSI was established in Palermo, Sicily, where it had a plant for the production of electronic components; in 1967 it had a workforce of slightly under 900 employees. Its five major product lines were microwave tubes, cathode-ray tubes, semiconductor rectifiers, X-ray tubes and surge arresters.

14. During the fiscal years 1964 to 1966 inclusive, ELSI made an operating profit, but this profit was insufficient to offset its debt expense or accumulated losses, and no dividends were ever paid to its shareholders. In June 1964, the accumulated losses exceeded one-third of the company's share capital, and ELSI was thus required by Article 2446 of the Italian Civil Code to reduce its equity from 4,300 million lire to 2,000 million lire. The capital stock was therefore devalued by 2,300 million lire and recapitalized by an equal amount subscribed by Raytheon. A similar operation was necessary in March 1967. In February 1967, according to the United States, Raytheon began taking steps to endeavour to make ELSI self-sufficient. Raytheon and Machlett designated a number of highly-qualified personnel to provide financial, managerial and technical expertise, and Raytheon provided a total of over 4,000 million lire in recapitalization and guaranteed credit. By December 1967, according to the United States, major steps had been taken to upgrade plant facilities and operations.

15. At the same time, however, the Chairman of ELSI, and other senior Raytheon officials, held numerous meetings, between February 1967 and March 1968, with cabinet-level officials of the Italian Government and of the Sicilian region, as well as representatives of the Istituto per la Ricostruzione Industriale ("IRI"), the Ente Siciliano per la Produzione Industriale ("ESPI"), and the private sector. IRI was a holding company controlled by Italy with extensive commercial interests, and dominated at this time the telecommunications, electronics and engineering markets. ESPI was the Sicilian Government industrial organization responsible for the promotion of local development. The purpose of these meetings was stated to be to find for ELSI an Italian partner with economic power and influence and to explore the possibilities of other governmental support. The management of Raytheon had formed the view that, "without a partnership with IRI or other equivalent Italian Governmental entity, ELSI would continue to be an outsider to the Italian industrial community"; such a partnership would, it was thought, "positively influence government decision-making in economic planning", and enable ELSI also to secure benefits and incentives under Italian legislation designed to favour industrial development in the southern region, the Mezzogiorno. Evidence has been given that the management of ELSI was advised that the company was entitled to such Mezzogiorno benefits, but the Chamber has been told by Italy that it was not so entitled. The support of the national and regional governments was regarded as particularly important because in numerous markets crucial to ELSI's operations and success
the Italian Government, through IRI or otherwise, played a dominant role as a customer. A detailed "Project for the Financing and Reorganization of the Company" was prepared and submitted to ESPI in May 1967.

16. The management of ELSI took the view that one of the reasons for its lack of success was that it had trained and was employing an excessively large labour force. In June 1967 it was decided to dismiss some 300 employees; under an Italian union agreement this involved a procedure of notifications and negotiations. On the intervention of ESPI, an alternative plan was agreed to whereby 168 workers would be suspended from 10 July 1967, with limited pay by ELSI for a period not exceeding six weeks. After a training programme during which the workers were paid by the Sicilian Government, it was contemplated that ELSI would endeavour to re-employ the suspended employees. The necessary additional business to make this possible was not forthcoming, and the suspended employees were dismissed early in March 1968. A number of random strikes had occurred in early 1968, and as a result of the dismissals a complete strike of the plant occurred on 4 March 1968. According to the Government of Italy, this strike also involved an occupation of the plant by the workforce, which occupation was still continuing when the plant was requisitioned on 1 April 1968 (paragraph 30 below). The United States claims however that strikes and "sit-ins" prior to the requisition were only sporadic and that only after the filing of a petition in bankruptcy on 26 April 1968 (paragraph 36 below) did the workers actually occupy the plant for a sustained period.

17. When it became apparent that the discussions with Italian officials and companies were unlikely to lead to a mutually satisfactory arrangement to resolve ELSI’s difficulties, Raytheon and Machlett, as shareholding in ELSI, began seriously to plan to close and liquidate ELSI to minimize their losses. General planning for the potential liquidation of ELSI began in the latter part of 1967, and in early 1968 detailed plans were made for a shut-down and liquidation at any time after 16 March 1968. On 2 March 1968, the company's books and accounting records, and, according to a witness at the hearings, "quite a lot of inventory", were transferred from its offices in Palermo to a regional office in Milan. On 7 March 1968, Raytheon formally notified ELSI that, notwithstanding ELSI's need for further capital, Raytheon would not "subscribe to any further stock which might be issued by Raytheon-Elsi or to guarantee any additional loans which might be made by others to Raytheon-Elsi".

18. This decision was stated to have been taken, inter alia, on review of the proposed balance sheet showing the position on 30 September 1967; that balance sheet showed the book value of the assets of ELSI as 17,956.3 million lire, its total debt as 13,123.9 million lire; the accumulated losses of 2,681.3 million lire had reduced the value of the equity (capital stock and capital subscription account) from 4,000 million lire to 1,318.7 million lire. The total debt included a number of liabilities to one United States bank and several Italian banks, some (but not all) of which were guaranteed by Raytheon. For the purposes of a possible liquidation, an asset analysis was prepared by the Chief Financial Officer of Raytheon showing the expected position on 31 March 1968. This showed the book value of ELSI's assets as 18,640 million lire; as explained in his affidavit filed in these proceedings, it also showed “the minimum prospects of recovery of values which we could be sure of, in order to ensure an orderly liquidation process”, and the total realizable value of the assets on this basis (the “quick-sale value”) was calculated to be 10,838.8 million lire. A balance sheet subsequently prepared to show the position at 31 March 1968, extrapolated from the balance sheet at 30 September 1967, showed the book value of total assets as 17,053.5 million lire and total debt of 12,970.6 million lire.

19. During the hearings, at the request of the Agent of Italy, the Chamber asked the Government of the United States to produce the financial report showing ELSI's financial position at 30 September 1967, from which the figures for the book value of its assets had been derived. The report, prepared by Raytheon's Italian auditors, and dated 22 March 1968, was produced in evidence. The balance sheet attached thereto showed two sets of figures; the first of these, corresponding to the figures for assets and liabilities set out in paragraph 18 above, gave the figures as recorded in the company's books of account. The second set of figures was based on the first set, but a number of adjustments had been made in accordance with the financial accounting policy of Raytheon "in order to assure comparability of the financial information reported from abroad" by its subsidiary companies. According to the Co-Agent of the United States, the major difference between the accounts on the Italian basis and the Raytheon basis was

"the item of Deferred Charges, which for the most part represented the cost of developing new lines and improving product quality. This asset is carried on the Italian books but is routinely written off by Raytheon Company."

The adjustment of the item for "Deferred Charges" reduced the total assets figure by 1,653 million lire. Taking all adjustments into account,
the second set of figures gave a value of 14,893.9 million lire for the assets, and 15,775.2 million lire for the liabilities. The auditors stated in their covering letter to Raytheon accountants that

"The adjustments made by the company in preparing the above mentioned balance sheet and statement of income and accumulated losses have not, at the date of this report, been recorded in the books, essentially for tax reasons. Accordingly, the accompanying financial statements are not in agreement with the company's books of account."

Among the "Notes on Financial Statements" attached to the accounts by the auditors was the following:

"10. The adjusted accumulated losses at September 30, 1967 exceeded the total of the paid up capital stock, capital reserve and Stockholders' subscription account by an amount of 881.3 million lire. Should this become 'officially' the case (e.g. should the adjustments made in arriving at this total of accumulated losses be entered in the company's books of account), under Articles 2447 and 2448 of the Italian Civil Code the directors would be obliged to convene a Stockholders' Meeting forthwith to take measures either to cover the losses by providing new capital or to put the company into liquidation."

The auditors also expressed reservations on two other items totalling 1,168.5 million lire.

20. The officials of Raytheon and ELSI were nevertheless advised by their Italian counsel in March 1968 that "ELSI's capital, after taking into account losses to date at that time, was well in excess of the minimum statutory requirement" (1 million lire) under Articles 2447 and 2448 of the Italian Civil Code, which provide that if action is not taken to restore the capital to the required minimum, the company is dissolved as a matter of law. In the view of ELSI's counsel, "it was therefore possible under Italian law for ELSI's shareholders to plan an orderly liquidation of the company."

21. Throughout this Judgment this phrase "orderly liquidation" is used solely in the sense in which it was employed by the officers of ELSI and by the representatives of the United States, i.e., to denote the operation planned in 1967-1968 by ELSI's management for the sale of the business or of its assets, en bloc or separately, and the discharge of ELSI's debts, fully or otherwise, out of the proceeds, the whole operation being under the control of ELSI's own management.

22. According to the United States, the chief objectives in the planned orderly liquidation were to conserve the assets and preserve as many of the characteristics of a going concern as possible in order to attract and interest prospective buyers; it was planned to advertise ELSI's assets widely, offering them both as a total package and as separate items — the distinct manufacturing lines of the plant. The intention was, if the sums realized by the sale of the assets were sufficient, to pay all creditors in full. Planning had however also proceeded on the basis of the "quick-sale" valuation of the assets (paragraph 18 above), which, it was recognized, was less than the total liabilities of the company. It was not considered possible to continue normal production; the personnel was to be dismissed, with the exception of some 120 key employees needed for the wind-up operation and for continuing limited production for a time to meet (in particular) military contracts and maintain customer contact.

23. The intended treatment of creditors in the planned liquidation, in the event of only the "quick-sale" value being realized, was stated by the Financial Controller of Raytheon to have been as follows:

"Ideally, we would settle first with the small creditors, subject, of course, to the agreement of the major creditors, in order to minimize the administrative effort during liquidation. Secured and preferred creditors would take priority and would be paid when the assets used for collateral were sold. Major unsecured creditors were to be paid on a pro rata basis from within the funds realized from the sale of assets. Then Raytheon would be called upon to satisfy any guaranteed creditor to the extent not already paid from asset sale proceeds. We calculated that the secured and preferred creditors would receive 100 per cent of their outstanding claims, while the unsecured major creditors who were not covered by Raytheon guarantees would realize about 50 per cent of their claims. The latter creditors were certain banks and Raytheon and its subsidiaries. We were confident that an orderly liquidation of this type would be acceptable to the creditors as it was much more favorable than could be expected through bankruptcy."

According to the United States, settlement with all the smaller creditors was regarded as a priority

"to reduce the creditors to a manageable number and also to eliminate the risk that a small irresponsible creditor would take precipitous action which would raise formidable obstacles in the way of orderly liquidation."

Appended to one of the affidavits by officers of Raytheon and ELSI annexed to the United States Memorial were detailed calculations showing (inter alia) various valuations of ELSI's assets, analysis of the company's
liabilities and their priority in liquidation, and estimated distribution of the proceeds of disposal of assets calculated both on book value and alternatively on a "minimum liquidation value".

24. It is contended by the United States that notwithstanding Raytheon's formal notification on 7 March 1968 that it would not subscribe to any further stock or guarantee any additional loans (paragraph 17 above, in fine), Raytheon was ready to give certain financial support and guarantees to enable the orderly liquidation to proceed, as distinct from making more funds available to ELSI for continued operations. According to officials of ELSI, if Raytheon had handled the liquidation as planned, it would have guaranteed the settlements outlined in the previous paragraph; they stated that

"Demonstrating its support of the liquidation plan, Raytheon organized to provide funds to ELSI in advance of the sale of its assets so that disbursements could easily be made to the small creditors and, as a first step, transferred 150 million lire to the First National City Bank branch in Milan specifically for that purpose."

Evidence was given at the hearing that payment of small creditors out of these funds was begun, but then stopped by the creditor banks because this was "showing preference". It was contemplated that Raytheon would take over ELSI's accounts receivable (subsequently valued at some 2,879 million lire) at face value, thus supplying immediate cash resources.

25. In the view of ELSI's legal counsel at the time (paragraph 20 above) and of Italian lawyers consulted by the United States, ELSI was in March 1968 entitled to engage in orderly liquidation of its assets, was under no obligation to file a petition in bankruptcy, and was never in jeopardy of compulsory dissolution under Article 2447 of the Italian Civil Code, and was at all times in compliance with Article 2446 of the Code. It has however been contended by Italy that ELSI was in March 1968 unable to pay its debts, and its capital of 4,000 million lire was completely lost; accordingly, an orderly liquidation was not available to it, but as an insolvent debtor it was under an obligation to file a petition in bankruptcy. The disagreement turns on the value of ELSI's assets for this purpose at 31 March 1968: the Parties have made conflicting statements of what is correct accounting practice for the purposes of compliance with the relevant requirements of Italian law. It has also been observed by Italy that, whether or not ELSI was insolvent, the procedure contemplated did not correspond to a voluntary liquidation as provided for in Article 2450 of the Italian Civil Code; under that procedure a liquidator has to be appointed by the shareholders, or if they fail to do so, by the Tribunal. According to one expert appearing on behalf of Italy, ELSI being insolvent the only
course open to it in order to avoid the duty of filing a petition in bankruptcy was to request to the tribunal to be admitted to the procedure of judicial settlement ("concordato preventivo") under Articles 160 et seq. of the Italian Bankruptcy Act; this would have required proof that at least 40 per cent of the unsecured claims would be met. The expert appearing on behalf of the United States however stated that apparent inability to pay all creditors at 100 per cent is not fatal to voluntary and orderly liquidation. In this context he mentioned in particular the practice of "private settlement" ("concordato stragiudiziale").

26. The management of ELSI was conscious that a financial crisis was imminent, and during the period from September 1967, the responsible officers of the company were keeping a close watch on the declining funds to ensure that the company did not reach a point where continued operation would be contrary to Italian law. At a meeting held on 21 February 1968 between representatives of Raytheon and ELSI and the President of the Sicilian region, the Chairman of ELSI "drew a precise time chart showing: (a) February 23 — Board Meeting; (b) February 26 to 29 — inevitable bank crisis; (c) March 8 — we run out of money and shut the plant"; the hand-written minutes of that meeting record also that "the date of March 8 was stressed repeatedly as the absolute limit for the shut-down due to a total financial crisis".

27. On 16 March 1968, the Board of Directors of ELSI met to consider a report on the financial situation, and concluded "that there is no alternative to the discontinuation of the company's activities"; the Board

"decided the cessation of the company's operations, to be carried out as follows:
(1) production will be discontinued immediately;
(2) commercial activities and employment contracts will be terminated on March 29, 1968".

This decision was notified to the employees of ELSI by a letter of 16 March 1968. On 28 March 1968, a meeting of shareholders of ELSI was held, at which it was decided (inter alia) "to ratify the resolutions adopted by the Board of Directors at the meeting of March 16, 1968, and hence to agree that the Company cease operations". Meetings with Italian officials however continued up to 29 March 1968; the Italian authorities continued to give broad assurances of an intervention by ESPI, and vigorously pressed ELSI not to close the plant and not to dismiss the workforce, but the officials of the company insisted that this was inevitable unless more capital was forthcoming. On 29 March 1968 letters of dismissal were mailed to the employees of ELSI.
28. The Managing Director of ELSI had a meeting early on the morning of 31 March 1968 with the President of the Sicilian region, Mr. Carollo, at which the latter stated that the Italian Prime Minister had said that a company would be formed by ESPI and IMI (Istituto Mobiliare Italiano) to deal with the acquisition of ELSI’s assets, and that a holding company would be formed which would eventually own ELSI. Mr. Carollo continued by saying that “to keep the people in Palermo and avoid an exodus to other jobs, and to protect the plant and machinery, the plant would be requisitioned...”. On 1 April 1968 representatives of the company met representatives of the bank creditors of ELSI to discuss the company’s plans for an orderly liquidation. According to the United States, ELSI’s representatives stated that Raytheon was not prepared to provide any further financial support to ELSI either by way of capital, loans, advances, or guarantees, but also informed the banks of the arrangement (referred to in paragraph 24 above) which would provide for ELSI’s immediate cash needs in such an orderly liquidation through the sale to Raytheon of ELSI’s accounts receivable at 100 per cent of face value, the proceeds being used to pay off the small creditors and to meet payroll and severance pay claims as well as other pressing priority obligations.

29. No agreement was reached at that meeting; certain of the banks requested more information, and another meeting was to be held later with an agreed agenda. Subsequently ELSI’s representatives learnt that the plant had been requisitioned. According to the United States, and in the view of the officers of Raytheon and ELSI, there was reason to believe that in a liquidation the creditor banks would have accepted a settlement of their claims on payment of 40 to 50 per cent of each, but no independent evidence is available that such was the banks’ attitude at that time. It does not appear from the evidence that the banks were asked specifically at the meeting of 1 April 1968 whether they would co-operate on the basis of a guaranteed 50 per cent of their claims; on the contrary, it was contended on behalf of the United States by ELSI’s then legal adviser that

"There is no evidence of bank negotiations at the time of the requisition because at the time the stockholders were fully confident that ELSI’s assets would have recovered book value, and there was no need at the time to start any such negotiations. What the stockholders and ELSI’s Board were seeking at the time was an understanding with the banks on the manner and timing of an orderly liquidation."

30. On 1 April 1968 the Mayor of Palermo issued an order, effective immediately, requisitioning ELSI’s plant and related assets for a period of six months. The text of this order, in the translation supplied by the United States, was as follows:

"The Mayor of the Municipality of Palermo,

Taking into consideration that Raytheon-Elso of Palermo has decided to close its plant located in this city at Via Villagrazia, 79, because of market difficulties and lack of orders;

That the company has furthermore decided to send dismissal letters to the personnel consisting of about 1,000 persons;

Taking notice that ELSI’s actions, beside provoking the reaction of the workers and of the unions giving rise to strikes (both general and sectional) has caused a wide and general movement of solidarity of all public opinion which has strongly stigmatized the action taken considering that about 1,000 families are suddenly destituted;

That, considering the fact that ELSI is the second firm in order of importance in the District, because of the shutdown of the plant a serious damage will be caused to the District, which has been so severely tried by the earthquakes had during the month of January 1968;

Considering also that the local press is taking a great interest in the situation and that the press is being very critical toward the authorities and is accusing them of indifference to this serious civic problem;

That, furthermore, the present situation is particularly touchy and unforeseeable disturbances of public order could take place;

Taking into consideration that in this particular instance there is sufficient ground for holding that there is a grave public necessity and urgency to protect the general economic public interest (already seriously compromised) and public order, and that these reasons justify requisitioning the plant and all equipment owned by Raytheon-Elso located here at Via Villagrazia 79;

Having noted Article 7 of the law of 20 March 1865 No. 2248 enclosure e;

Having noted Article 69 of the Basic Regional Law EE.LL.,
ORDERS

the requisition, with immediate effect and for the duration of six months, except as may be necessary to extend such period, and without prejudice for the rights of the parties and of third parties, of the plant and relative equipment owned by Raytheon-Elsi of Palermo.

With a subsequent decree, the indemnification to be paid to said company for the requisition will be established."

The order was served on the company on 2 April 1968.

31. On 6 April 1968 the Mayor issued an order entrusting the management of the requisitioned plant to Mr. Aldo Profumo, the Managing Director of ELSI, for the purpose, inter alia, of “avoiding any damage to the equipment and machinery due to the abandonment of all activity, including maintenance”. Mr. Profumo declined to accept this appointment, and on 16 April 1968 the Mayor wrote to Mr. Silvio Laurin, the senior director, appointing him temporarily to replace Mr. Profumo “in the same capacity, with the same powers, functions and limitations”, and Mr. Laurin accepted this appointment. The company management requested another of its directors, Mr. Rico Merluzzo, to stay at the plant night and day “to preclude local authorities from somehow asserting that the plant had been ‘abandoned’ by ELSI”.

32. On 9 April 1968 ELSI addressed a telegram to the Mayor of Palermo, with copies to other Government authorities, claiming (inter alia) that the requisition was illegal and expressing the company’s intention to take all legal steps to have it revoked and to claim damages. On 12 April 1968 the company served on the Mayor a formal document dated 11 April 1968 inviting him to revoke the requisition order. The Mayor did not respond and the order was not revoked, and on 19 April 1968 ELSI brought an administrative appeal against it to the Prefect of Palermo, who was empowered to hear appeals against decisions by local governmental officials. The decision on that appeal was not given until 22 August 1969 (paragraph 41 below); in the meantime however the requisition was not formally prolonged, and therefore ceased to have legal effect after six months, more than four months after the bankruptcy of ELSI had been declared (paragraph 36 below).

33. As noted above (paragraph 16) the Parties disagree over whether, immediately prior to the requisition order, there had been any occupation of ELSI’s plant by the employees, but it is common ground that the plant was so occupied during the period immediately following the requisition. On 19 April 1968 the representatives of the company stated, in an appeal against the requisition addressed to the Prefect of Palermo, that there had at that time been no occupation of the plant as a consequence of the dismissal of the employees on 29 March 1968, but that on 30 March 1968 a group of representatives of the personnel went to the plant to talk to the company executives and “peacefully remained thereafter all day on the premises”, and on subsequent days a small group of employees wandered about on the premises. The Mayor of Palermo, in an affidavit, has stated that

“The occupation of the plant by the employees (which started well before the requisition) turned out to be of a ‘co-operative’ nature after the requisition and was no obstacle to the continuation of those activities which were possible under the circumstances”,

and an official of the Municipality of Palermo has stated, in an affidavit, that “there were no problems such as ‘hard’ picketing” and that one of the production lines was re-activated and “we proceeded regularly with the contracts in hand”. According to an affidavit filed by the United States “the plant sat idle for the remainder of 1968”, but Italy has produced evidence showing that some work in progress was continued and completed in the months following the requisition, in particular for the Nato Hawk programme.

34. On 19 and 20 April 1968 meetings were held between officials of Raytheon and the President of the Sicilian region, Mr. Carollo, who stated that “the Regional and Central Governments had reached agreement to form a management company with IRI participation to operate ELSI” and invited Raytheon to join the management company. The proposal would have entailed the contribution by ELSI of new capital and its assuming complete responsibility for past debts; in the discussion Mr. Carollo stated that “the Region now has a single goal, to keep the workers employed”. At the request of Raytheon, Mr. Carollo, on 20 April 1968 supplied Raytheon with a memorandum to provide the company with “some fundamental elements of judgment”. In that memorandum he explained that it was impossible for the time being for Raytheon to liquidate ELSI, for the following reasons:

“1. Nobody in Italy will purchase [Nessuno in Italia comprerà], that is to say IRI will not purchase, neither for a low nor for a high price, the Region will not purchase, private enterprise will not purchase. Let me add that the Region and IRI and anybody else who has any possibility to influence the market will refuse in the most absolute manner to favor any sale while the plant is closed.

2. The Banks, which have outstanding credits for approximately 16 billion Lire, cannot and will not accept any settlement even at the cost of dragging the Company into litigation on an international level. I mean to refer to Raytheon and not to ELSI because the distinction between ELSI and Raytheon is not found to be admissible, since any and all financing was granted to ELSI based on the moral
guarantee of Raytheon, whose executives have always negotiated said financing.

3. Anyway, it is known in Italy that one can enforce the claims directly against Raytheon because it has interests and revenues in our country also outside ELSI.

It is obvious that every attempt will be made (even at the cost of long litigation) to obtain from Raytheon what is owed by ELSI.

4. In the event that the plant will be kept closed, waiting for Italian buyers who will never materialize, the requisition will be maintained at least until the courts will have resolved the case. Months will go by . . . .

35. On 26 April 1968 the Chairman of the Board of ELSI wrote to Mr. Carollo formally rejecting the proposal for participation in the new management company; in his view the proposal “was a temporary caretaker measure which would not solve the fundamental problem, namely keeping ELSI in Sicily and making it a viable and vital industry”, and that it “would only aggravate ELSI’s critical financial condition”. The letter continued: “We are therefore forced to file [a] voluntary petition for bankruptcy, as required by Italian law.”

36. In view of what had been said by Mr. Carollo that the requisition of the plant would be maintained for months, “at least until the courts will have resolved the case”, ELSI’s Italian counsel advised as follows:

“The disposability of ELSI’s assets was a fundamental prerequisite to ELSI’s shareholders’ ability to take ELSI through an orderly liquidation; they were relying on the proceeds of these sales in large part to pay ELSI’s creditors in an orderly manner. Without the ability to dispose of its assets, ELSI would not have the liquidity needed to pay its debts as they came due and therefore would soon become technically insolvent under Italian law.”

. . . . . . . . . . . .

I advised ELSI’s directors that they had an obligation to file a petition for a declaration of bankruptcy, failing which they could be held personally liable pursuant to Article 217 of the Bankruptcy Law, Royal Decree of March 16, 1942, No. 267.”

On 25 April 1968 the Board of Directors voted to file a voluntary petition in bankruptcy, and the bankruptcy petition was filed on 26 April 1968. The petition referred to the requisition order of 1 April 1968 and stated (inter alia):

“Because of the order of requisition, against which the Company

has in due time filed an appeal, the Company has lost the control of the plant and cannot avail itself of an immediate source of liquid funds; in the meanwhile payments have become due (as for instance instalments of long-term loans; an instalment of Lit. 800,000,000 to Banca Nazionale del Lavoro became due on April 18, 1968 and the note therefor has been or will be protested, etc.); it is acknowledged that it is impossible for the Company to pay such sums with the funds existing or available; such impossibility being due to the events of these last weeks . . . .”

A decree of bankruptcy was issued by the Tribunale di Palermo on 16 May 1968, and a Palermo lawyer was appointed curatore (trustee in bankruptcy). A creditors’ committee of five members was appointed, composed of two representatives of ELSI’s employees, two representatives of bank creditors, and a representative of Raytheon Europe International Company (“Raytheon Europe”) (the European management subsidiary of, and wholly owned by, Raytheon), which had submitted a claim as creditor in the bankruptcy. Raytheon itself and another of its subsidiaries, Raytheon Service Company, had unsecured claims against ELSI of some 1,140 million lire for goods and services they had advanced to ELSI on unsecured open accounts. On advice of Italian counsel, however, Raytheon and Raytheon Service Company did not file claims in the bankruptcy proceedings because it was clear that they would not receive enough in the bankruptcy to justify their filing costs.

37. From April 1968 onwards discussions were held between Raytheon’s Italian counsel, representatives of the creditor banks and officials of the Italian Government, with a view to the takeover of ELSI by a company owned by the Italian Government and a settlement with the ELSI creditors. This proposed settlement involved the grant to the new company by Raytheon of a technical license (to use Raytheon patents and know-how) of the same scope as ELSI had; the payment by Raytheon of the debts of ELSI which it had guaranteed, but no others, and a formal release and indemnity of Raytheon in this latter respect; and a waiver by Raytheon of its rights of subrogation resulting from payment of the guaranteed debts. According to Raytheon’s Italian counsel, he was told by Italian Government officials in October 1968 that the majority of the Italian creditor banks were agreeable to a settlement on payment of 40 per cent of their claims, and that only one bank was holding out for 50 per cent. In July, a statement had been made in the Italian Parliament by the Minister of Industry, Commerce and Crafts, which has been subject to differing interpretations, but which put forward as a fact the establishment by the Sicilian region and other public agencies of a management company, which would allow productive activities to be resumed until such time as the financial problems of ELSI could be
finally resolved, if possible through settlement out of court. On 13 November 1968 the Italian Government issued a press communiqué which stated that

“while the STET Group [Società finanziaria telefonica, an affiliate or subsidiary of IRI] remains committed to build a new plant in Palermo for the production of telecommunication products, the IRI-STET Group, urged by the Government, after the examination of alternative solutions which proved unfeasible, stated its willingness to intervene in the take-over of the [ELSI] plant in the organization of new lines of production”.

According to the communiqué, the conditions of STET’s intervention were to be agreed between the STET Group and the authorities of the Sicilian region.

38. The court dealing with the bankruptcy ordered an auction of ELSI’s premises, plant and equipment to be held on 18 January 1969, and set a minimum bid of 5,000 million lire. This auction, and the subsequent auctions mentioned below, were advertised in leading newspapers both in Italy and in Belgium, Japan, the Netherlands, the United Kingdom and the United States. No bids were received at this auction, and a second auction was set for 22 March 1969, this time with the inclusion also of the entire inventory at the plant and elsewhere, the minimum bid being set at 6,223,293,258 lire. In the meantime negotiations were being carried on for a takeover of the plant by an IRI subsidiary and the re-employment of most of ELSI’s former staff. It was reported in the Sicilian press, first that on 18 March 1969 it had been agreed that IRI would acquire ELSI’s assets, beginning with a lease of the plant for 150 million lire, and secondly that the former President of Sicily, Mr. Carollo, had stated at a public meeting on 5 April 1969 that there had been a written agreement with IRI in October 1968 that

“entailed the acquisition of the [ELSI] factory by IRI for the sum of four billion lire. It was even agreed that IRI would be absent from the first auction, participating instead in the second one, where the basic price was precisely four billion lire”.

39. No bids were received at the second auction. A week later a proposal to lease and re-open the plant was made to the trustee in bankruptcy by ELTEL (Industria Elettronica Telecomunicazioni S.p.A.), a subsidiary of IRI set up in December 1968. The terms proposed for the lease were not acceptable as such to the creditors’ committee, which did however recom-

40. The third auction of ELSI’s premises, plant and equipment and inventory was held on 3 May 1969, the minimum bid being set at 5,000 million lire, but again no bids were received. ELTEL had informed the bankruptcy court on 16 April 1969 that it was willing to offer 3,205 million lire for the premises, plant and equipment, excluding the supplies — “merchandise, raw materials and semifinished goods” — which it did not regard as indispensable. On 3 May 1969, the trustee in bankruptcy requested the bankruptcy court to approve a sale of the work in progress to ELTEL on the terms proposed by ELTEL and approved by the creditors’ committee. On 9 May 1969, Raytheon Europe’s appeal against the decision authorizing the lease of the premises and plant to ELTEL was rejected. On 27 May 1969 ELTEL made an offer to the bankruptcy court to buy the remaining plant, equipment and supplies for 4,000 million lire. The trustee in bankruptcy proposed acceptance (subject to minor changes in the terms), and the creditors’ committee decided on 6 June 1969 to approve the proposal, the Raytheon Europe representative voting against. On 7 June 1969 the bankruptcy judge set 12 July 1969 as date for an auction on the terms approved by the creditors’ committee. On 9 June 1969 Raytheon Europe appealed against this decision, but the appeal was rejected on 20 June 1969. The auction was held on 12 July 1969, and ELTEL purchased the auctioned property at the total price of 4,006 million lire.

41. The appeal filed by ELSI on 19 April 1968 (paragraph 32 above) against the requisition order of 1 April 1968 was determined by the Prefect of Palermo by a decision given on 22 August 1969. The Parties are at issue on the question whether this period of time was or was not normal for an appeal of this character. The decision on the appeal was given following a request to that effect by the trustee in bankruptcy made on 9 July 1969, in exercise of a right to request a decision conferred by an Italian Law of 3 March 1934. That Law provides that if the appeal has not been heard 120 days after it has been filed (i.e., in this case by 17 August 1968), a request
may be served on the Prefect requiring him to render a decision within 60 days thereafter; if he fails to do so, this is treated as a dismissal of the appeal. The decision of the Prefect was to uphold the appeal and thus to annul the requisition order made by the Mayor of Palermo; the precise terms of the decision will be considered later in this Judgment (paragraphs 75, 96, 125 and 126). The Mayor of Palermo appealed against the Prefect’s decision to the President of Italy who, having been advised by the Council of State that the Mayor’s appeal was inadmissible, so ruled on 22 April 1972.

42. In the meantime, on 16 June 1970 the trustee in bankruptcy had brought proceedings in the Tribunale di Palermo (“the Court of Palermo”) against the Minister of the Interior of Italy and the Mayor of Palermo for damages resulting from the requisition. The damages claimed were identified as

“the considerable decrease in value of the plant and the electronic equipment existing in Palermo at 79 Via Villagrazia, which results from the difference between the book value at the date of the bankruptcy of Raytheon-Elsi, of Lire 6,623,000,000 and the evaluation made on October 11, 1968 (that is, immediately after the six-month period of requisition had elapsed) by the Court Appraiser, Prof. Mario Puglisi, appointed by the Judge by Decree of September 19, 1968, of Lire 4,564,588,400, with a real loss of value of Lire 2,062,411,600 and as the lack of disposability of the plant and relative equipment for six months which, on the basis of the amortization rate for the industrial plants, equal to 10% per year, can be determined in Lire 33,150,000, and, therefore, in the aggregate amount of Lire 2,395,561,600, plus the interest at the legal rate from October 1, 1968 to the payment.”

43. On 2 February 1973, the Court of Palermo, in a decision to be examined more fully below (paragraphs 57, 58, 97 and 127), ruled that the trustee was not entitled to compensation for the requisition, either in respect of the alleged decrease in value of the plant and equipment, or of the alleged lack of disposability thereof. On appeal, the Corte di Appello di Palermo (“the Court of Appeal of Palermo”), in its decision of 24 January 1974, upheld the conclusion of the lower court as regards the damages claimed for the alleged decrease in value of the plant and equipment. It however reversed the finding of the lower court on the second head of damage, and found that the trustee was entitled to compensation from the Minister of the Interior for loss of use and possession of ELSI’s plant and assets during the six-month requisition period. It therefore awarded, in effect, a “rental” payment of some 114 million lire, computed as half the annual rate of 5 per cent of the total value of the assets. This decision, which will be examined in more detail below (paragraphs 97, 98 and 127), was upheld by the Court of Cassation on 26 April 1975. The amount of

the judgment was ultimately received by the trustee and, less costs and expenses, distributed to ELSI’s creditors.

44. In the bankruptcy proceedings, creditors presented claims against ELSI totalling some 13,000 million lire; these did not include amounts due to Raytheon and Raytheon Service Company (see paragraph 36 above). The bankruptcy proceedings closed in November 1985. According to the bankruptcy reports, the bankruptcy realized only some 6,370 million lire for ELSI’s assets, as compared with the minimum liquidation value estimated by ELSI’s management in March 1968 at 10,840 million lire. Of the amount realized, some 6,080 million lire went to pay banks, employees, and other creditors. The remainder went to pay bankruptcy administration, tax, registry, and customs charges. All of the secured and preferred creditors who filed claims in the bankruptcy were paid in full. The unsecured creditors received less than one per cent of their claims; accordingly no surplus remained for distribution to the shareholders, Raytheon and Machlett.

45. Raytheon had guaranteed the indebtedness of ELSI to a number of banks, and on the bankruptcy of ELSI it was accordingly liable for, and paid, the sum of 5,787.6 million lire to the banks in accordance with the terms of the guarantees. Five of the seven banks which had also made unguaranteed loans to ELSI brought proceedings in the Italian courts seeking payment of these loans by Raytheon, on the basis primarily of Article 2362 of the Italian Civil Code, which renders a sole shareholder liable for the debts of the company. It was argued that Raytheon was in effect sole shareholder, since Machlett was its wholly-owned subsidiary. Three of these cases were ultimately resolved by the Italian Court of Cassation in favour of Raytheon, and two were discontinued by the plaintiffs.

* * *

46. On 7 February 1974, the Embassy in Rome of the United States transmitted to the Italian Ministry of Foreign Affairs a note enclosing the “claim of the Government of the United States of America on behalf of Raytheon Company and Machlett Laboratories, Incorporated”. That claim, which was based not only on the FCN Treaty but also on customary international law, incorporated a Memorandum of Law, Chapter VI of which was devoted to “Exhaustion of Local Remedies”. It was there noted that it was “generally recognized that local remedies must be exhausted before a claim may be formally espoused under principles of international law”; an account was given of the relevant litigation in Italy (some of which was at the time still pending) and, in the light of annexed opinions
of two Italian legal experts, it was concluded that “Raytheon and Machlett have exhausted every meaningful legal remedy available to them in Italy”. At the time this claim was submitted, the Court of Appeal of Palermo had ruled on the action by the trustee in bankruptcy, but the case was thereafter brought before the Court of Cassation (paragraph 43 above); it is recognized by both Parties that any other action arising out of the requisition would by then have been barred by limitation of time. It appears that the United States received no formal response from Italy to the claim until 13 June 1978, when Italy denied the claim in a written aide-mémoire, the text of which has been supplied to the Chamber. The aide-mémoire contained no suggestion that local remedies had not been exhausted, and indeed stated that “the claim is juridically groundless, both from the international and domestic point of view”. During the oral proceedings in the present case, counsel for Italy asserted that at an unspecified date prior to the institution of the present proceedings the Italian Government “had made it clear to the United States Government that as a Respondent it would raise the objection of non-exhaustion of local remedies in judicial proceedings”. No evidence to that effect has however been supplied to the Chamber.

* * *

47. Many of the documents constituting evidence submitted to the Chamber are in the Italian language. Where the Chamber relies in the present Judgment on passages in these documents, it will, for the sake of clarity, set out the original Italian together with an English translation, which is not always the translation supplied by one of the Parties pursuant to Article 51, paragraph 3, of the Rules of Court.

* * *

48. It is common ground between the Parties that the Court has jurisdiction in the present case, under Article 36, paragraph 1, of its Statute, and Article XXVI of the Treaty of Friendship, Commerce and Navigation, of 2 June 1948 (“the FCN Treaty”), between Italy and the United States; which Article reads:

“Any dispute between the High Contracting Parties as to the interpretation or the application of this Treaty, which the High Contracting Parties shall not satisfactorily adjust by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties shall agree to settlement by some other pacific means.”

50. The United States questioned whether the rule of the exhaustion of local remedies could apply at all to a case brought under Article XXVI of the FCN Treaty. That Article, it was pointed out, is categorical in its terms, and unqualified by any reference to the local remedies rule; and it seemed right, therefore, to conclude that the parties to the FCN Treaty, had they intended the jurisdiction conferred upon the Court to be qualified by the local remedies rule in cases of diplomatic protection, would have used express words to that effect; as was done in an Economic Co-operation Agreement between Italy and the United States of America also concluded in 1948. The Chamber has no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so. This part of the United States response to the Italian objection must therefore be rejected.

51. The United States further argued that the local remedies rule would not apply in any event to the part of the United States claim which requested a declaratory judgment finding that the FCN Treaty had been violated. The argument of the United States is that such a judgment would declare that the United States own rights under the FCN Treaty had been infringed; and that to such a direct injury the local remedies rule, which is a rule of customary international law developed in the context of the espousal by a State of the claim of one of its nationals, would not apply. The Chamber, however, has not found it possible in the present case to
find a dispute over alleged violation of the FCN Treaty resulting in direct injury to the United States, that is both distinct from, and independent of, the dispute over the alleged violation in respect of Raytheon and Machlett. The case arises from a dispute which the Parties did not “satisfactorily adjust by diplomacy”; and that dispute was described in the 1974 United States claim made at the diplomatic level as a “claim of the Government of the United States of America on behalf of Raytheon Company and Machlett Laboratories, Incorporated”. The Agent of the United States told the Chamber in the oral proceedings that “the United States seeks reparation for injuries suffered by Raytheon and Machlett”. And indeed, as will appear later, the question whether there has been a breach of the FCN Treaty is itself much involved with the financial position of the Italian company, ELSI, which was controlled by Raytheon and Machlett.

52. Moreover, when the Court was, in the Interhandel case, faced with a not dissimilar argument by Switzerland that in that case its “principal submission” was in respect of a “direct breach of international law” and therefore not subject to the local remedies rule, the Court, having analysed that “principal submission”, found that it was bound up with the diplomatic protection claim, and that the Applicant’s arguments “do not deprive the dispute . . . of the character of a dispute in which the Swiss Government appears as having adopted the cause of its national . . .” (Interhandel, Judgment, I.C.J. Reports 1959, p. 28). In the present case, likewise, the Chamber has no doubt that the matter which colours and pervades the United States claim as a whole, is the alleged damage to Raytheon and Machlett, said to have resulted from the actions of the Respondent. Accordingly, the Chamber rejects the argument that in the present case there is a part of the Applicant’s claim which can be severed so as to render the local remedies rule inapplicable to that part.

53. There was a further argument of the Applicant, based on estoppel in relation to the application of the local remedies rule, which should be examined. In the “Memorandum of Law” elaborating the United States claim on the diplomatic plane, transmitted to the Italian Government by Note Verbale of 7 February 1974, one finds that the whole of Part VI (pp. 53 et seq.) deals generally and at some length with the “Exhaustion of Local Remedies”. There were also annexed the opinions of the lawyers advising the Applicant, which dealt directly with the position of Raytheon and Machlett in relation to the local remedies rule. The Memorandum concluded that Raytheon and Machlett had indeed exhausted “every meaningful legal remedy available to them in Italy” (paragraph 46 above). In view of this evidence that the United States was very much aware that it must satisfy the local remedies rule, that it evidently believed that the rule had been satisfied, and that it had been advised that the shareholders of

ELSI had no direct action against the Italian Government under Italian law, it was argued by the Applicant that Italy, if it was indeed at that time of the opinion that the local remedies had not been exhausted, should have apprised the United States of its opinion. According to the United States, however, at no time until the filing of the Respondent’s Counter-Memorial in the present proceedings did Italy suggest that Raytheon and Machlett should sue in the Italian courts on the basis of the Treaty. The written aide-mémoire of 13 June 1978, by which Italy rejected the 1974 claim, had contained no suggestion that the local remedies had not been exhausted, nor indeed any mention of the matter.

54. It was argued by the Applicant that this absence of riposte from Italy amounts to an estoppel. There are however difficulties about drawing any such conclusion from the exchanges of correspondence when the matter was still being pursued on the diplomatic level. In the Interhandel case, when Switzerland argued that the United States had at one time actually “admitted that Interhandel had exhausted the remedies available in the United States courts”, the Court, far from seeing in this admission an estoppel, dismissed the argument by merely observing that “This opinion was based upon a view which has proved unfounded” (Interhandel, Judgment, I.C.J. Reports 1959, p. 27). Furthermore, although it cannot be excluded that an estoppel could in certain circumstances arise from a silence when something ought to have been said, there are obvious difficulties in constructing an estoppel from a mere failure to mention a matter at a particular point in somewhat desultory diplomatic exchanges.

55. On the basis that the local remedies rule does apply in this case, this Judgment may now turn to the question whether local remedies were, or were not, exhausted by Raytheon and Machlett.

* * *

56. The damage claimed in this case to have been caused to Raytheon and Machlett is said to have resulted from the “losses incurred by ELSI’s owners as a result of the involuntary change in the manner of disposing of ELSI’s assets”: and it is the requisition order that is said to have caused this change, and which is therefore at the core of the United States complaint. It was, therefore, right that any local remedy against the Italian authorities, calling in question the validity of the requisition of ELSI’s plant and related assets, and raising the matter of the losses said to result from it, should be pursued by ELSI itself. In any event, both in order to attempt to recover control of ELSI’s plant and assets, and to mitigate any damage flowing from the alleged frustration of the liquidation plan, the first step was for ELSI — and only ELSI could do this — to appeal to
the Prefect against the requisition order. After the bankruptcy, however, the pursuit of local remedies was no longer a matter for ELSI's management but for the trustee in bankruptcy (Raytheon could, even after the bankruptcy, have influenced decisions of the committee of creditors, had it not decided against claiming in bankruptcy in respect of sums due to it as creditor; it did exercise some influence however through its subsidiary company, Raytheon Europe, which did claim as a creditor).

57. After the trustee in bankruptcy was appointed, he, acting for ELSI, by no means left the Italian authorities and courts unoccupied with ELSI's affairs. It was he who, under an Italian law of 1934, formally requested the Prefect to make his decision within 60 days of that request; which decision was itself the subject of an unsuccessful appeal by the Mayor to the President of Italy. On 16 June 1970, the trustee, acting for the bankrupt ELSI, brought a suit against the Acting Minister of the Interior and the Acting Mayor of Palermo, asking the court to adjudge that the defendants should

"pay to the bankrupt estate of Raytheon-Elsi ... damages for the illegal requisition of the plant machinery and equipment ... for the period from April 1 to September 30, 1968, in the aggregate amount of Lire 2,395,561,600 plus interests ..."

On 2 February 1973, the Court of Palermo, as indicated above (paragraph 43), rejected the claim. The trustee in bankruptcy then appealed to the Court of Appeal of Palermo; which Court gave a judgment on 24 January 1974 which "partly revising the judgment of the Court of Palermo" ordered payment by the Ministry of the Interior of damages of 114,014,711 lire with interest. Appeal was taken finally to the Court of Cassation which upheld the decision of the Court of Appeal, by a decision of 26 April 1975.

58. It is pertinent to note that this claim for damages (paragraph 42 above), as it came before the Court of Palermo in the action brought by the trustee, was described by that Court as being based \textit{inter alia} upon the argument of the trustee in bankruptcy

"that the requisition order caused an economic situation of such gravity that it immediately and directly triggered the bankruptcy of the company"

("il provvedimento di requisizione avrebbe determinato una situazione economica di tale pesantezza da farne scaturire immediatamente e direttamente il fallimento della società").

Similarly the Court of Appeal of Palermo had to consider whether there was a "causal link between the requisition order and the company's bankruptcy". It is thus apparent that the substance of the claim brought to the

adjudication of the Italian courts is essentially the claim which the United States now brings before this Chamber. The arguments were different, because the municipal court was applying Italian law, whereas this Chamber applies international law; and, of course, the parties were different. Yet it would seem that the municipal courts had been fully seized of the matter which is the substance of the Applicant's claim before the Chamber. For both claims turn on the allegation that the requisition, by frustrating the orderly liquidation, triggered the bankruptcy, and so caused the alleged losses.

59. With such a deal of litigation in the municipal courts about what is in substance the claim now before the Chamber, it was for Italy to demonstrate that there was nevertheless some local remedy that had not been tried; or at least, not exhausted. This burden Italy never sought to deny. It contended that it was possible for the matter to have been brought before the municipal courts, citing the provisions of the treaties themselves, and alleging their violation. This was never done. In the actions brought before the Court of Palermo, and subsequently the Court of Appeal of Palermo, and the Court of Cassation, the FCN Treaty and its Supplementary Agreement were never mentioned. This is not surprising, for, as Italy recognizes, the way in which the matter was pleaded before the courts of Palermo was not for Raytheon and Machlett to decide but for the trustee. Furthermore, the local remedies rule does not, indeed cannot, require that a claim be presented to the municipal courts in a form, and with arguments, suited to an international tribunal, applying different law to different parties: for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.

60. The question, therefore, reduces itself to this: ought Raytheon and Machlett, suing in their own right, as United States corporations allegedly injured by the requisition of property of an Italian company whose shares they held, have brought an action in the Italian courts, within the general limitation-period (five years), alleging violation of certain provisions of the FCN Treaty between Italy and the United States; this mindful of the fact that the very question of the consequences of the requisition was already in issue in the action brought by its trustee in bankruptcy, and that any damages that might there be awarded would pass into the pool of realized assets, for an appropriate part of which Raytheon and Machlett had the right to claim as creditors?

61. Italy contends that Raytheon and Machlett could have based such an action before the Italian courts on Article 2043 of the Italian Civil Code, which provides that "Any act committed either wilfully or through fault which causes wrongful damages to another person implies that the wrongdoer is under an obligation to pay compensation for those dam-
ages.” According to Italy, this provision is frequently invoked by individuals against the Italian State, and substantial sums have been awarded to claimants where appropriate. If Raytheon and Machlett suffered damage caused by violations by Italian public authorities of the FCN Treaty and the Supplementary Agreement, an Italian court would, it was contended, have been bound to conclude that the relevant acts of the public authorities were wrongful acts for the purposes of Article 2043. It is common ground between the Parties that implementing legislation (“ordini di esecuzione”) was enacted (Law No. 385 of 15 June 1949 and Law No. 910 of 1 August 1960), to give effect in Italy to the FCN Treaty and Supplementary Agreement, but that their provisions cannot be invoked in protection of individual rights before the Italian courts unless those provisions are regarded by the courts as self-executing. In order to show that the relevant provisions would be so regarded, decisions of the Court of Cassation have been cited by Italy in which provisions of the FCN Treaty (not the provisions relied on in the present case) have been applied for the benefit of United States nationals who have invoked them before Italian courts, and a provision of a treaty between Italy and the Federal Republic of Germany, said to be comparable with Article V of the FCN Treaty, was given effect.

62. However, those decisions were not based on Article 2043 of the Italian Civil Code; and the treaty provisions applied were given effect in conjunction with municipal legislation or the provisions of other treaties, through the mechanism of a most-favoured-nation provision. In none of the cases cited was the FCN Treaty provision relied on to establish the wrongfulness of conduct of Italian public officials. When in 1971 Raytheon consulted two Italian jurists on the question of local remedies for the purposes of a diplomatic claim, it apparently did not occur to either of them to refer even as a possibility to action under Article 2043 in conjunction with the FCN Treaty. It thus appears to the Chamber to be impossible to deduce, from the recent jurisprudence cited, what the attitude of the Italian courts would have been had Raytheon and Machlett brought an action, some 20 years ago, in reliance on Article 2043 of the Civil Code in conjunction with the provisions of the FCN Treaty and the Supplementary Agreement. Where the determination of a question of municipal law is essential to the Court’s decision in a case, the Court will have to weigh the jurisprudence of the municipal courts, and “If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law” (Brazilian Loans, P.C.I.J., Series A, Nos. 20/21, p. 124). In the present case, however, it was for Italy to show, as a matter of fact, the existence of a remedy which was open to the United States stockholders and which they failed to employ. The Chamber does not consider that Italy has discharged that burden.

63. It is never easy to decide, in a case where there has in fact been much resort to the municipal courts, whether local remedies have truly been “exhausted”. But in this case Italy has not been able to satisfy the

Chamber that there clearly remained some remedy which Raytheon and Machlett, independently of ELSI, and of ELSI’s trustee in bankruptcy, ought to have pursued and exhausted. Accordingly, the Chamber will now proceed to consider the merits of the case.

* * *

64. Paragraph 1 of the United States final submissions claims that:

“(1) the Respondent violated the international legal obligations which it undertook by the Treaty of Friendship, Commerce and Navigation between the two countries, and the Supplement thereto, and in particular, violated Articles III, V, and VII of the Treaty and Article I of the Supplement”.

It is necessary therefore to examine these Articles of the FCN Treaty and the Supplementary Agreement, against the conduct which is said to have been a violation of the obligations set out in these Articles. In doing so, it will be kept in mind that although the stated purposes of the FCN Treaty were those normally to be found in treaties of that kind, nevertheless a purpose of the Supplementary Agreement, which is to “constitute an integral part” of the FCN Treaty, was to give “added encouragement to investments of the one country in useful undertakings in the other country”.

65. The acts of the Respondent which are thus alleged to violate its treaty obligations were described by the Applicant’s counsel in terms which it is convenient to cite here:

“First, the Respondent violated its legal obligations when it unlawfully requisitioned the ELSI plant on 1 April 1968 which denied the ELSI stockholders their direct right to liquidate the ELSI assets in an orderly fashion. Second, the Respondent violated its obligations when it allowed ELSI workers to occupy the plant. Third, the Respondent violated its obligations when it unreasonably delayed ruling on the lawfulness of the requisition for 16 months until immediately after the ELSI plant, equipment and work-in-process had all been acquired by ELTELE. Fourth and finally, the Respondent violated its obligations when it interfered with the ELSI bankruptcy proceedings, which allowed the Respondent to realize its previously expressed intention of acquiring ELSI for a price far less than its fair market value.”

66. The most important of these acts of the Respondent which the Applicant claims to have been in violation of the FCN Treaty is the requisition of the ELSI plant by the Mayor of Palermo on 1 April 1968, which is claimed to have frustrated the plan for what the Applicant terms an “orderly liquidation” of the company as set out in paragraphs 22-25
above. It is fair to describe the other impugned acts of the Respondent, to be explained more fully below (paragraph 115), as ancillary to this core claim based on the requisition and its effects.

67. The Chamber is faced with a situation of mixed fact and law of considerable complexity, wherein several different strands of fact and law have to be examined both separately and for their effect on each other: the meaning and effect of the relevant Articles of the FCN Treaty and Supplementary Agreement; the legal status of the Mayor’s requisition of ELSI’s plant and assets; and the legal and practical significance of the financial position of ELSI at material times, and its effect, if any, upon ELSI’s plan for orderly liquidation of the company. It will be convenient to begin by examining these considerations in relation to the Applicant’s claim that the requisition order was a violation of Article II of the FCN Treaty.

* * *

68. Article III of the FCN Treaty is in two paragraphs. Paragraph 1 provides for rights of participation of nationals of one High Contracting Party, in corporations and associations of the other High Contracting Party, and for the exercise by such corporations and associations of their functions. Since there is no allegation of treatment less favourable than is required according to the standards set by this paragraph, it need not detain the Chamber. Paragraph 2 of Article III is however important for the Applicant’s claim; it provides:

“The nationals, corporations and associations of either High Contracting Party shall be permitted, in conformity with the applicable laws and regulations within the territories of the other High Contracting Party, to organize, control and manage corporations and associations of such other High Contracting Party for engaging in commercial, manufacturing, processing, mining, educational, philanthropic, religious and scientific activities. Corporations and associations, controlled by nationals, corporations and associations of either High Contracting Party and created or organized under the applicable laws and regulations within the territories of the other High Contracting Party, shall be permitted to engage in the aforementioned activities therein, in conformity with the applicable laws and regulations, upon terms no less favorable than those now or hereafter accorded to corporations and associations of such other High Contracting Party controlled by its own nationals, corporations and associations.”

Again there is no allegation of treatment of ELSI according to standards less favourable than those laid down in the second sentence of the para-
lations’ cannot mean that, if an act is in conformity with the municipal law and regulations, that would of itself exclude any possibility that it was an act in breach of the FCN Treaty.

72. The reference to conformity with “the applicable laws and regulations” surely means no more than that Italian corporations and associations controlled by United States nationals must conform to the local applicable laws and regulations; moreover, they must do so even if they believe a law or regulation to be in breach of the FCN Treaty, and, indeed, even if it were in breach of the FCN Treaty. This the Applicant has never denied. Raytheon and Machlett did conform to the terms of the requisition. Indeed they had no other choice.

73. The question still remains, therefore, whether the requisition was or was not a violation of Article III, paragraph 2. This question arises irrespective of the position in municipal law. Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty.

74. This question whether or not certain acts could constitute a breach of the treaty right to be permitted to control and manage is one which must be appreciated in each case having regard to the meaning and purpose of the FCN Treaty. Clearly the right cannot be interpreted as a sort of warranty that the normal exercise of control and management shall never be disturbed. Every system of law must provide, for example, for interferences with the normal exercise of rights during public emergencies and the like. In this respect considerable interest must attach to the reasons given by the Prefect in his decision, and to the legal analysis of that decision by the Court of Appeal of Palermo.

75. The Prefect took note in his decision of the fact that the Mayor had relied on legislative authority empowering him to act in cases of “grave public necessity and unforeseen urgency”. He did not find that those conditions were absent; he however annulled the requisition on the basis primarily of the following considerations:

“Non v’ha dubbio che anche se possono considerarsi, in linea del tutto teorica, suscettibili, nella fattispecie, gli estremi della grave necessità pubblica e della contingibilità ed urgenza che determinarono l’adozione del provvedimento, il fine cui tendeva la requisizione non poteva trovare pratica realizzazione con il provvedimento stesso, tanto è vero che nessuna ripresa di attività dell’azienda vi è stata a seguito della requisizione, né avrebbe potuto esserci. Manca, pertanto, nel provvedimento, genericamente, la causa giuridica che possa giustificarlo e renderlo operante.”

There has been some controversy between the Parties as to the translation of this passage (see paragraph 123 below); in the view of the Chamber it may be translated as follows:

“There is no doubt that, even though, from the purely theoretical standpoint, the conditions of grave public necessity and of unforeseen urgency warranting adoption of the measure may be considered to exist in the case in point, the intended purpose of the requisition could not in practice be achieved by the order itself, since in fact there was no resumption of the company’s activity following the requisition, nor could there have been such resumption. The order therefore lacks, generically, the juridical cause which might justify it and make it operative.”

The Court of Appeal of Palermo, for reasons to be examined more fully below (paragraph 127), considered that the Prefect’s finding had been one of

“un tipico caso di eccesso di potere, che è, come è noto, un vizio di legittimità dell’atto amministrativo”

(“a typical case of excess of power, which is of course a defect of lawfulness of an administrative act”).

The requisition was thus found not to have been justified in the applicable local law; if therefore, as seems to be the case, it deprived Raytheon and Machlett of what were at the moment their most crucial rights to control and manage, it might appear prima facie a violation of Article III, paragraph 2.

76. There remains however a crucial question to be considered. According to the Respondent, Raytheon and Machlett were, because of ELSI’s financial position, already naked of those very rights of control and management of which they claim to have been deprived. It is necessary now, therefore, to consider what effect, if any, the financial position of ELSI may have had in that respect, first as a practical matter, and then also as a question of Italian law.

77. The essence of the Applicant’s claim has been throughout that Raytheon and Machlett, which controlled ELSI, were by the requisition deprived of the right, and of the practical possibility, of conducting an orderly liquidation of ELSI’s assets. This plan for an orderly liquidation was however very much bound up with the financial state of ELSI, and the two need to be considered together.

78. ELSI’s lack of success was attributed by its management at least in part to the fact that it was over-manned in relation to its order book; it had needed repeated injections of fresh capital, and was never able to produce an operating profit sufficient to offset its debt expense and its accumul-
ing losses. No dividends were ever paid to its shareholders. The 30 September 1966 balance sheet already showed accumulated losses of some 2,000 million lire.

79. The position was worsening, moreover, as the balance sheet for 30 September 1967 (above at paragraphs 18-19) showed. Raytheon's Italian auditors pointed out that the balance sheet, when "adjusted" to Raytheon's own accounting requirements for internal purposes (the unadjusted statement, however, appears to have satisfied Italian legal requirements), then showed adjusted accumulated losses, actually exceeding "the total of the paid up capital stock, capital reserve and Stockholders' subscription account" by 881.3 million lire; and warned that if these adjustments to the total of accumulated losses were entered in the company's books of account,

"under Articles 2447 and 2448 of the Italian Civil Code, the directors would be obliged to convene a Stockholders' meeting forthwith to take measures either to cover the losses by providing new capital or to put the company into liquidation".

80. On 7 March 1968, Raytheon formally notified ELSI of its decision that Raytheon would not provide any further capital, whether in the form of subscribing to new stock or guaranteeing additional loans. At a board meeting of ELSI held in Rome on 16 March 1968, it was decided on the "cessation of the company's operations"; that production would be "discontinued immediately"; that "commercial activities and employment contracts" would be terminated on 29 March 1968; and that "a shareholders' meeting be called for 28 March 1968, to adopt the necessary resolutions". This was not, however, in ELSI's plans, to involve a liquidation under Article 2450 of the Italian Civil Code, which requires a liquidator to be appointed. The plan for an orderly liquidation, as conceived by the ELSI management, was to be managed by them. At a special meeting of shareholders, held on 28 March 1968, in Palermo, it was resolved to ratify the resolutions adopted by the Board of Directors at the meeting of 16 March 1968; and

"to empower the Board of Directors to make contacts with the banks and principal creditors of the company to reach an agreement on procedures to be followed in the interest of all the creditors for the orderly disposal of the company's assets at their highest realizable value . . ." 

("di dare mandato al Consiglio di Amministrazione di prendere contatti con gli istituti di credito e con i maggiori creditori della Società per concordare procedure che consentano nell'interesse di tutti i creditori una ordinata alienazione delle attività sociali al massimo valore di realizzazione").

81. This policy of the ELSI management during the months prior to the requisition had, however, a Janus-like character. Although the orderly liquidation contemplated closure of the plant, and dismissal of the workforce, an alternative aim of the management and of Raytheon was to keep the place going, the hope being that the threat of closure and dismissal of the workforce might bring such pressures to bear on the Italian authorities as to persuade them to provide what Raytheon had long hoped for: an influential Italian partner, new capital, and Mezzogiorno benefits. The "Project for the Financing and Reorganization of the Company" prepared in May 1967 spelled out the need for additional capital, new products from Italian Government sources, and financial help for transport costs, capital investment and training; the Project made it clear that the alternative was that Raytheon would decline to invest more funds, over 300 people would become redundant forthwith, and dwindling markets would reduce the employment level still further; as stated in that Project, "The alternative is really the actual destruction of the existing asset with the undesirable social effects which must follow."

82. Right up to the eve of the requisition the company's representatives went on talking to Italian officials; but at the same time the company's management, according to an affidavit by one of its officials,

"were aware of the need to have back-up plans in case these efforts were not successful. In the latter part of 1967, we reluctantly began to plan in general for the potential liquidation of ELSI."

In the words of the affidavit of another company official, Raytheon had

"developed a plan for the orderly disposal of ELSI over about six months during 1968. While this plan was being developed, Raytheon and ELSI representatives continued to meet with Italian Government representatives in an ongoing attempt to find a way for the company to continue to operate."

The company no doubt wished to postpone liquidation as long as possible, both in the hope of avoiding it, and because the threat of closure of the plant would be a means of pressure on the Italian authorities so long as it remained only a threat. The risk, of which the company was well aware, was that to carry on too long might topple the company into insolvency under Italian law. In the event the Italian authorities did not come to the rescue, at least not with terms acceptable to ELSI's management; and the management was left at the last minute with the orderly liquidation plan to be put into effect as seemingly the only way of avoiding bankruptcy or liquidation under the supervision of the Italian court; and the
bankruptcy of its subsidiary was undoubtedly a most unwelcome prospect for Raytheon.

83. The crucial question is whether Raytheon, on the eve of the requisition, and after the closure of the plant and the dismissal, on 29 March 1968, of the majority of the employees, was in a position to carry out its orderly liquidation plan, even apart from its alleged frustration by the requisition. That plan, as originally conceived, contemplated that the disposal of plant and assets might produce enough to pay all creditors 100 per cent of their dues, with a modest residue for the shareholders. In one of the affidavits quoted above it is stated: “If the assets had been disposed of at book value all liabilities, including the payables to Raytheon Company, would have been paid in full.” And, indeed, the trustee in bankruptcy, in his report of 28 October 1968 to the bankruptcy judge, explained that in March 1968:

“the management of Raytheon-Elsi decided, and publicly stated their intention (which was later adopted by the Board of Directors), to suggest to the shareholders the liquidation of the company. The intention was to proceed with an orderly liquidation of all assets in order to pay all the Company’s creditors 100 per cent.”

This must have seemed a reasonable aim, for the “book value” may well have been a conservative figure. It has not been demonstrated that ELSI was, until shortly before the bankruptcy petition, ever in default. Moreover, Raytheon had opened an account in Milan for the payment at 100 per cent of small creditors.

84. Nevertheless since no new investment capital was forthcoming, the possibility of paying creditors in full depended upon putting the orderly liquidation plan into operation in good time. Time was running out because money was running out. As the position worsened daily, the moment might at any time arrive when liabilities exceeded assets, or default resulted from lack of liquidity. ELSI's management had prepared the assessment of the “quick-sale value” (see paragraph 18 above), which was markedly less than book value, being aware that the sale of the company's assets might fail to provide sums approximating to book value. There were plans also to approach the large bank creditors in the hope of securing their agreement to settlements of 50 per cent.

85. Did ELSI, in this precarious position at the end of March 1968, still have the practical possibility to proceed with an orderly liquidation plan? The successful implementation of a plan of orderly liquidation would have depended upon a number of factors not under the control of ELSI's management. Since the company's coffers were dangerously low, funds had to be forthcoming to maintain the cash flow necessary while the plan was being carried out. Evidence has been produced by the Applicant that Raytheon was prepared to supply cash flow and other assistance necessary to effect the orderly liquidation, and the Chamber sees no reason to question that Raytheon had entered or was ready to enter into such a commitment. Other factors governing the matter however give rise to some doubt.

86. First, for the success of the plan it was necessary that the major creditors (i.e., the banks) would be willing to wait for payment of their claims until the sale of the assets released funds to settle them: and this applied not only to the capital sums outstanding, which may not at the time have yet been legally due for repayment, but also the agreed payments of interest or instalments of capital. Though the Chamber has been given no specific information on the point, this is of the essence of such a liquidation plan: the creditors had to be asked to give the company time. If ELSI had been confident of continuing to meet all its obligations promptly and regularly while seeking a buyer for its assets, no negotiations with creditors, and no elaborate calculations of division of the proceeds, on different hypotheses, such as have been produced to the Chamber, would have been needed.

87. Secondly, the management were by no means certain that the sale of the assets would realize enough to pay all creditors in full; in fact, the existence of the calculation of a “quick-sale value” suggests perhaps more than uncertainty. Thus the creditors had to be asked to give time in return for an assurance, not that 100 per cent would be paid, but that a minimum of 50 per cent would be paid. While in general it might be in the creditors' interest to agree to such a proposal, this does not mean in this case that ELSI could count on such agreement. At the date of the requisition, it seems apparent that the banks, while informed of the financial position, had not yet even been consulted on whether they would accept a guaranteed 50 per cent (see paragraphs 28-29 above), so their reaction remains a matter of speculation.

88. Nor should it be overlooked that the dismissed employees of ELSI ranked as preferential creditors for such sums as might be due to them for severance pay or arrears. In this respect Italy has drawn attention to the Sicilian regional law of 13 May 1968, providing for the payment

“For the months of March, April and May 1968, to the dismissed employees of Raytheon-Elsi of Palermo of a special monthly indemnity equal to the actual monthly pay received until the month of February 1968”.

From this it could be inferred, said Italy, that ELSI did not pay its employees for the month of March 1968. Further it was conceded by the former
Chairman of ELSI, when he appeared as a witness and was cross-
examined, that the cash available at 31 March 1968 (“22 million in the
kitty”), would have been insufficient to meet the payroll of the full staff
even for the first week of April (“at least 25 million”): The suggestion that
ELSI did not meet its March 1968 payroll was not put to the witness;
and counsel for the United States later stated that the assertion that “ELSI
could not make its March payroll”, was “simply wrong”. It is in any event
certain that when the company ceased activity there were still severance
payments due to the dismissed staff; those, the Applicant suggested,
would have been covered by funds to be provided by Raytheon (para-
graph 28 above). They could not have been met from the money still
remaining in ELSI’s coffers at the time.

89. Thirdly, the plan as formulated by ELSI’s management involved a
potential inequality among creditors: unless enough was realized to cover
the liabilities fully, the major creditors were to be content with some
50 per cent of their claims; but the smaller creditors were still to be paid in
full. Whether or not this would have been legally objectionable as a breach
of the rule of par condicio creditorum (it appears that Raytheon contem-
plated accepting a smaller share in the eventual distribution so that the
small creditors could receive 100 per cent without affecting the share attributed
to the banks), it was an additional factor which might have caused
a major creditor to hesitate to agree. According to the evidence, when in late
March 1968 ELSI started using funds made available by Raytheon to pay
off the small creditors in full, “the banks intervened and said that they did
not want that to happen as that was showing preference”. Once the banks
adopted this attitude, the whole orderly liquidation plan was jeopardized,
because of the settlement with small creditors was, according to the
1974 diplomatic claim, “to eliminate the risk that a small irresponsible
creditor would take precipitous action which would raise formidable
obstacles in the way of orderly liquidation”.

90. Fourthly, the assets of the company had to be sold with the mini-
mum delay and at the best price obtainable — desiderata which are often
in practice irreconcilable. The United States has emphasized the dam-
aging effect of the requisition on attempts to realize the assets; after the
requisition it was no longer possible for prospective buyers to view the
plant, nor to assure them that if they bought they would obtain immediate
possession. It is however not at all certain that the company could have
counted on unfettered access to its premises and plant, and the opportun-
ity of showing it to buyers without disturbance, even if the requisition
had not been made. There has been argument between the Parties on the
question whether and to what extent the plant was occupied by employees
of ELSI both before and after the requisition; but what is clear is that the
company was expecting trouble at the plant when its closure plans became
known: the books had been removed to Milan, according to the evidence
given at the hearings, “so that if we did have problems we could at least
control the books” and “we had moved quite a lot of inventory [to Milan]
so that we could sell it from there if we had to”.

91. Fifthly, there was the attitude of the Sicilian administration: the
company was well aware that the administration was strongly opposed to
a closure of the plant, or more specifically, to a dismissal of the workers.
True, the measure used to try to prevent this — the requisition order —
was found by the Prefect to have lacked the “juridical cause which might
justify it and make it operative” (paragraph 75 above). But ELSI’s
management in March 1968 could not have been certain that the hostility
of the local authorities to their plan of closure and dismissals would not
take practical form in a legal manner. The company’s management had
been told before the staff dismissal letters were sent out that such dis-
missals would lead to a requisition of the plant.

92. All these factors point towards a conclusion that the feasibility at
31 March 1968 of a plan of orderly liquidation, an essential link in the
chain of reasoning upon which the United States claim rests, has not been
sufficiently established.
93. Finally there was, beside the practicalities, the position in Italian
bankruptcy law. Article 5 of the Italian Bankruptcy Act of 1942 provides
that

“An entrepreneur who is in a state of insolvency shall be declared
bankrupt.

The state of insolvency, moreover, becomes apparent not only by
default but also by other external acts which show that the debtor is
no longer in a position regularly to discharge his obligations.”

(“L’imprenditore che si trova in stato d’insolvenza è dichiarato
fallito.

Lo stato d’insolvenza si manifesta con inadempimenti od altri fatti
esteriori, i quali dimostrino che il debitore non è più in grado di sod-
disfare regolarmente le proprie obbligazioni.”)

This formula excludes a merely momentary or temporary disability, and
refers to one which shows every sign of going on. “Regular” payment (“re-
golarmente”) apparently refers to payment in full at the due time. Given
this definition it is apparent that ELSI could have been “insolvent” in the
sense of Italian bankruptcy law, at the end of March, even though not
actually in default. The Chamber has been given conflicting evidence on
the question whether a debtor in such a position is bound under Italian
law to go into bankruptcy, or whether he may still enter into voluntary
composition with his creditors outside the supervision of the bankruptcy
court (paragraph 25 above).
94. If however ELSI was in a state of legal insolvency at 31 March 1968, and if, as contended by Italy, a state of insolvency entailed an obligation on the company to petition for its own bankruptcy, then the relevant rights of control and management would not have existed to be protected by the FCN Treaty. While not essential to the Chamber's conclusion, already stated in paragraph 92 above, an assessment of ELSI's solvency as a matter of Italian law is thus highly material.

95. Italy has argued that even before the requisition, ELSI was insolvent in the sense that its liabilities exceeded the value of its assets, and in support of this has pointed to, first, the “quick-sale” value calculated for the purposes of the liquidation plan, and secondly the observations of the auditors on the September 1967 balance sheet. The Chamber does not however consider that it has to conclude from this that ELSI was insolvent as early as 1967. The value of assets of this kind, until they are actually sold, must be a matter for assessment by informed opinion, and different views, and the use of different accounting conventions, may lead to different results. The company’s management was clearly of the view that it could legally continue trading up to the end of March 1968, since its former Chairman has told the Chamber that the company’s legal and financial advisers were keeping a close and continuous watch on the position to ensure that Italian legal requirements were respected. But there is no doubt that ELSI was indeed in a state of insolvency when on 25 April 1968 its Board of Directors voted to file a petition in bankruptcy. The conclusion then made that “The company’s financial situation has worsened and has now reached a state of insolvency” was based, according to the minutes of the board meeting, on the fact that “There are payments on long-term loans that fell due a few days ago, and other payments which the company cannot make as a result of lack of liquidity . . .” In the bankruptcy petition, it was specified that “an instalment of Lit. 800,000,000 to Banca Nazionale del Lavoro became due on 18 April 1968 and the note therefor has been or will be protested, etc.” In other words, the company had by then committed a default (“inadempimento”), by failing to meet its debts as they became due.

96. On this matter of insolvency in Italian law, consideration must also be given to the reasons employed by the Prefect of Palermo for his decision to annul the requisition order, and the findings of the Court of Palermo and the Court of Appeal of Palermo on the action brought by ELSI’s trustee in bankruptcy, for damages following the decision of the Prefect annulling the requisition order. As indicated above (paragraph 75), the Prefect considered that the purpose of the requisition could not be achieved, since the company’s activity could not be resumed. He explained that

“Io stato dell'azienda era tale, per circostanze di carattere economico-funzionale e di mercato, da non consentire la prosecuzione dell'atti-

97. The Court of Palermo was faced with the argument, mentioned in paragraph 58 above, that “the requisition order caused an economic situation of such gravity that it immediately and directly triggered the bankruptcy of the company”. It dealt with this by pointing to the situation of the company on the eve of the requisition:

“A 31 marzo 1968, in sostanza, lo stabilimento dell’Elisi non era più in fase produttiva, fermata per deliberazione dell’organo sociale competente che . . . aveva . . . opinato, non potendo trovare altro rimedio, per la soluzione più drastica, evidentemente reputandola più conforme agli interessi della società e che aveva come oggetto preciso l’arresto totale della produzione . . . Devesi a ciò aggiungere . . . che proprio dai primi dell’anno 1968 vi era stato un notevole peggioramento della situazione generale dell’azienda, che via via si andava aggravando per le sfavorevoli condizioni del mercato, avversata, altresì, dai fatti sismici del gennaio e da una serie di scioperi che, per l’appunto, nel mese di marzo ebbero a carattere ora di continuità ora di intermittenza, con la conseguenza della perdita di un considerevole numero di ore lavorative . . .”

(“On March 31, 1968, the Elisi plant was for all practical purposes no longer in operation, stopped in accordance with a decision of the competent organ of the company which . . . had decided, in the absence of any other solution, to go for the most drastic solution, evidently considering it most conducive to the interests of the company, a solution which meant the total shutdown of production . . . To this must be added . . . that in the early part of 1968, there was a notable deterioration of the general situation of the company, which was further aggravated by unfavourable market conditions as well as the January earthquakes and a series of strikes which in March were sometimes continuous and sometimes intermittent, causing the loss of a considerable amount of production hours . . .”)

From this the Court was able to conclude that

“Dalle condizioni premesse discende che l’aggancio del fallimento della società all’intervenuta requisizione non ha fondamento, siccome, esattamente, è stato sostenuto coll’amministrazione convenuta, essendo la situazione economica della Raythe-e-Elisi già gravemente compromessa da anni per esplicito riconoscimento dei suoi stessi dirigenti.”
("It is clear from these conditions that the connection between the company's bankruptcy and the requisition is unfounded, as the defendant administration correctly maintained, since Raytheon--Elsi's economic situation had for years already been seriously compromised, as its own management explicitly admitted.")

The Court of Palermo did not however go so far as to state that ELSI was legally insolvent prior to the requisition. 98. However the Court of Appeal of Palermo, in its judgment, states that ELSI was insolvent before the requisition order was made. The salient passage on this point in the Court of Appeal's judgment states:

"per quanto riguarda i danni che si fanno consistere nell'avere la requisizione provocato il fallimento della società, la conclusione negativa del tribunale è ampiamente e convincentemente motivata e . . . le considerazioni critiche dell'appellante non valgono a provocare un convincimento diverso; . . . La circostanza certa della insolvenza della società in tempo immediatamente anteriore allo intervento del Sindaco . . . è sufficiente per escludere il collegamento causale fra il successivo provvedimento di requisizione e il fallimento della società, per il quale ultimo quello stato di insolvenza è causa determinante e sufficiente (Art. 5 legge fallim.)."

("as regards the damages consisting in the fact that the order triggered the company's bankruptcy, the negative conclusion arrived at by the court below is amply and convincingly motivated and the critical considerations of the appellant are not sufficient to lead to a different determination . . . The certain circumstance that the company was insolvent during the time immediately prior to the Mayor's intervention . . . is sufficient to rule out any causal link between the subsequent requisition order and the company's bankruptcy of which the company's state of insolvency was the decisive and sufficient cause (Art. 5, Bankruptcy Law).")

The Court of Appeal also refers to the "prior insolvency" ("precedente insolvenza") of the company, and to "the decisive effect of the state of insolvency" ("l'efficacia determinante dello stato di insolvenza").

99. Whether these findings by the municipal courts are to be regarded as determinations as a matter of Italian law that ELSI had been insolvent, within the meaning of the relevant legislative provisions, on 31 March 1968, or whether they are no more than findings that the financial position of ELSI on that date was so desperate that it was past saving, so that it was not the requisition which "caused an economic situation of such gravity that it immediately and directly triggered the bankruptcy of the company" makes no difference to the conclusion to be drawn. If ELSI was legally insolvent, then even if the liquidation plan could in fact have been implemented with co-operation from the creditors, the stockholders no longer had rights of control and management to be protected by the FCN Treaty. If, as the Prefect of Palermo stated, and the courts of Palermo certainly thought, the factual situation at least was such that the requisition

changed nothing, then the United States has failed to prove that there was any interference with control and management in any real sense. The Chamber has no need to go into the question of the extent to which it could or should question the validity of a finding of Italian law, the law governing the matter, by the appropriate Italian courts. It is sufficient to note that the conclusion above, that the feasibility of an orderly liquidation plan is not sufficiently established, is reinforced by reference to the decision of the courts of Palermo on the claim by the trustee in bankruptcy for damages for the injury caused by the requisition. Whether regarded as findings of Italian law or as findings of fact, the decisions of the courts of Palermo simply constitute additional evidence of the situation which the Chamber has to assess.

100. It is important, in the consideration of so much detail, not to get the matter out of perspective: given an under-capitalized, consistently loss-making company, crippled by the need to service large loans, which company its stockholders had themselves decided not to finance further but to close and sell off because, as they were anxious to make clear to everybody concerned, the money was running out fast, it cannot be a matter of surprise if, several days after the date at which the management itself had predicted that the money would run out, the company should be considered to have been actually or virtually in a state of insolvency for the purposes of Italian bankruptcy law.

101. If, therefore, the management of ELSI, at the material time, had no practical possibility of carrying out successfully a scheme of orderly liquidation under its own management, and may indeed already have forfeited any right to do so under Italian law, it cannot be said that it was the requisition that deprived it of this faculty of control and management. Furthermore, one feature of ELSI's position stands out: the uncertain and speculative character of the causal connection, on which the Applicant's case relies, between the requisition and the results attributed to it by the Applicant. There were several causes acting together that led to the disaster to ELSI. No doubt the effects of the requisition might have been one of the factors involved. But the underlying cause was ELSI's headlong course towards insolvency; which state of affairs it seems to have attained even prior to the requisition. There was the warning loudly proclaimed about its precarious position; there was the socially damaging decision to terminate the business, close the plant, and dismiss the workforce; there was the position of the banks as major creditors. In short, the possibility of that solution of orderly liquidation, which Raytheon and Machlett claim to have been deprived of as a result of the requisition, is purely a matter of speculation. The Chamber is therefore unable to see here anything which can be said to amount to a violation by Italy of Article III, paragraph 2, of the FCN Treaty.

* * *
102. There are two claims of the Applicant that are based upon the provisions of Article V of the FCN Treaty: one relates to paragraphs 1 and 3, and is concerned with protection and security of nationals and their property; another relates to paragraph 2, and is concerned with the taking or expropriation of property. No claim is based upon paragraph 4 of Article V. The Applicant’s claim under paragraphs 1 and 3 will be dealt with first.

103. Paragraph 1 of Article V provides as follows:

"1. The nationals of each High Contracting Party shall receive, within the territories of the other High Contracting Party, the most constant protection and security for their persons and property, and shall enjoy in this respect the full protection and security required by international law. To these ends, persons accused of crime shall be brought to trial promptly, and shall enjoy all the rights and privileges which are or may hereafter be accorded by the applicable laws and regulations; and nationals of either High Contracting Party, while within the custody of the authorities of the other High Contracting Party, shall receive reasonable and humane treatment. In so far as the term ‘nationals’ where used in this paragraph is applicable in relation to property it shall be construed to include corporations and associations."

Paragraph 2 of this Article is not relevant here, but is set out in paragraph 113 of this Judgment. Paragraph 3 provides as follows:

"3. The nationals, corporations and associations of either High Contracting Party shall within the territories of the other High Contracting Party receive protection and security with respect to the matters enumerated in paragraphs 1 and 2 of this Article, upon compliance with the applicable laws and regulations, no less than the protection and security which is or may hereafter be accorded to the nationals, corporations and associations of such other High Contracting Party and no less than that which is or may hereafter be accorded to the nationals, corporations and associations of any third country. Moreover, in all matters relating to the taking of privately owned enterprises into public ownership and the placing of such enterprises under public control, enterprises in which nationals, corporations and associations of either High Contracting Party have a substantial interest shall be accorded, within the territories of the other High Contracting Party, treatment no less favorable than that which is or may hereafter be accorded to similar enterprises in which nationals, corporations and associations of such other High Contracting Party have a substantial interest, and no less favorable than that which is or may hereafter be accorded to similar enterprises in which nationals, corporations and associations of any third country have a substantial interest.”

104. Paragraph 1 thus provides for “the most constant protection and security” for nationals of each High Contracting Party, both “for their persons and property”; and also that, in relation to property, the term “nationals” shall be construed to “include corporations and associations”; and in defining the nature of the protection, the required standard is established by a reference to “the full protection and security required by international law”. Paragraph 3 elaborates this notion of protection and security further, by requiring no less than the standard accorded to the nationals, corporations and associations of the other High Contracting Party; and no less than that accorded to the nationals, corporations and associations of any third country. There are, accordingly, three different standards of protection, all of which have to be satisfied.

105. A breach of these provisions is seen by the Applicant to have been committed when the Respondent “allowed ELSI workers to occupy the plant” (see paragraph 65 above). It is the contention of the United States that once the plant had been requisitioned, ELSI’s employees began an occupation of the premises which continued, so far as the United States was aware, up to the re-opening of the plant by ELTEL; and that this occupation had the tacit approval of local authorities, who made no effort to prevent or to end it, or otherwise to protect the premises. To this occupation the United States attributes as injurious consequences, first a deterioration of the plant and related material and equipment, and secondly that it impeded the efforts of the trustee in bankruptcy to dispose of the plant.

106. Italy has objected that Article V, paragraphs 1 and 3, guarantees the protection and security of property belonging to United States companies in Italy, but the plant in Palermo which, according to the United States, should have been protected under the FCN Treaty belonged to the Italian company ELSI. The United States replies that the “property of Raytheon and Machlett in Italy” was ELSI itself, and Italy was obligated to protect the entire entity of ELSI from the deleterious effects of the requisition. While there may be doubts whether the word “property” in Article V, paragraph 1, extends, in the case of shareholders, beyond the shares themselves, to the company or its assets, the Chamber will nevertheless examine the matter on the basis argued by the United States that the “property” to be protected under this provision of the FCN Treaty was not the plant and equipment the subject of the requisition, but the entity of ELSI itself.

107. That there was some occupation of the plant by the workers after the requisition is something that Italy has not sought to deny, and the Court of Appeal of Palermo referred in passing to the circumstance of the requisitioning authority having tolerated the “unlawful” act of occupation of the plant by the workers (“la autorità requirente avesse tollerato l’illecito penale di una occupazione dei reparti di lavorazione da parte delle maestranze”). It appears, nevertheless, to have been a peaceful occupation, as may be learned from ELSI’s own administrative appeal of 19 April 1968 to
the Prefect against the requisition, and the affidavits of the Mayor of Palermo and one of his officials (see paragraph 33 above). It is difficult to accept that the occupation seriously harmed the interests of ELSI in view of the evidence produced by Italy that measures taken by the Mayor of Palermo for the temporary management of the plant permitted the continuation and completion of work in progress in the months following the requisition. The United States has asserted that the continued production was very limited, and cannot be equated with resumption of full production in the plant, and continues to contend that the plant and machinery fell into disuse following the requisition and deteriorated rapidly in value. The Court of Palermo however found itself unable to establish that any damage to the plant had been caused by the occupying workers.

108. The reference in Article V to the provision of “constant protection and security” cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed. The dismissal of some 800 workers could not reasonably be expected to pass without some protest. Indeed, the management of ELSI seems to have been very much aware that the closure of the plant and dismissal of the workforce could not be expected to pass without disturbance; as is apparent from the removal of the company’s books and “quite a lot of inventory” to Milan (paragraph 17 above). In any event, considering that it is not established that any deterioration in the plant and machinery was due to the presence of the workers, and that the authorities were able not merely to protect the plant but even to some measure to continue production, the protection provided by the authorities could not be regarded as falling below “the full protection and security required by international law”; or indeed as less than the national or third-State standards. The mere fact that the occupation was referred to by the Court of Appeal of Palermo as unlawful does not, in the Chamber’s view, necessarily mean that the protection afforded fell short of the national standard to which the FCN Treaty refers. The essential question is whether the local law, either in its terms or its application, has treated United States nationals less well than Italian nationals. This, in the opinion of the Chamber, has not been shown. The Chamber must, therefore, reject the charge of any violation of Article V, paragraphs 1 and 3.

109. The Applicant sees a further breach of Article V, paragraphs 1 and 3, of the FCN Treaty, in the time taken — 16 months — before the Prefect ruled on ELSI’s administrative appeal against the Mayor’s requi-

sition order, or, to cite the words of counsel for the Applicant (paragraph 65 above),

“the Respondent violated its obligations when it unnecessarily delayed ruling on the lawfulness of the requisition for 16 months until immediately after the ELSI plant, equipment and work-in-process had all been acquired by ELTEL”.

The time taken by the Prefect was undoubtedly long; and the Chamber was not entirely convinced by the Respondent’s suggestion that such lengthy delays by Prefects were quite usual. Yet it must be remembered that the requisition in fact lapsed after six months and that Italian law did provide a safeguard against delays by the Prefect. It was possible after 120 days from the filing of the appeal to serve on the Prefect a request requiring him to render a decision within 60 days (paragraph 41 above). Raytheon and Machlett were never in a position to take advantage of this procedure, because by the time the 120 days had elapsed the trustee in bankruptcy was in control of the company; on the other hand, the trustee in bankruptcy did employ this procedure, and the Prefect shortly afterwards gave his decision on the appeal.

110. Counsel for the Applicant has referred to this delay as “a denial of the level of procedural justice accorded by international law”. Its claim in this respect is however not founded on the rules of customary international law concerning denial of justice, nor on the text of the FCN Treaty (Article V, paragraph 4) which provides for access to justice. The relevance of the delay of the Prefect’s ruling has been expressed in two ways. First, it is said, had there been a speedy decision by the Prefect, the bankruptcy of ELSI could have been avoided; the Chamber is unable to accept this argument, for the reasons already explained in connection with the claim under Article III, paragraph 2, of the FCN Treaty. Secondly, it is contended that once the requisition occurred, the Respondent had an obligation to protect ELSI from its deleterious effects, and one of the ways in which it fell short of this obligation was by failing to provide an adequate method of overturning the requisition.

111. The primary standard laid down by Article V is “the full protection and security required by international law”, in short the “protection and security” must conform to the minimum international standard. As noted above, this is supplemented by the criteria of national treatment and most-favoured-nation treatment. The Chamber is here called upon to apply the provisions of a treaty which sets standards — in addition to the reference to general international law — which may go further in protecting nationals of the High Contracting Parties than general international law requires; but the United States has not — save in one respect — suggested that these requirements do in this respect set higher standards than the international standard. It must be doubted whether in all the circumstances, the delay in the Prefect’s ruling in this case can be regarded as falling below that standard. Certainly, the Applicant’s use
of so serious a charge as to call it a “denial of procedural justice” might be thought exaggerated.

112. The United States has also alleged that the delay in ELSI’s case was far in excess of the delay experienced in prior suits involving companies owned by Italian nationals, and that it therefore constituted a failure to accord a national standard of protection. As already stated, the Chamber was not entirely convinced by the contention that such a lengthy delay was quite usual (paragraph 109 above); nevertheless, it is not satisfied that a “national standard” of more rapid determination of administrative appeals has been shown to have existed. The Chamber is therefore unable to see in this delay a violation of paragraphs 1 and 3 of Article V of the FCN Treaty.

* * *

113. The Chamber now turns to the United States claim based on Article V, paragraph 2, of the FCN Treaty, which provides as follows:

“2. The property of nationals, corporations and associations of either High Contracting Party shall not be taken within the territories of the other High Contracting Party without due process of law and without the prompt payment of just and effective compensation. The recipient of such compensation shall, in conformity with such applicable laws and regulations as are not inconsistent with paragraph 3 of Article XVII of this Treaty, be permitted without interference to withdraw the compensation by obtaining foreign exchange, in the currency of the High Contracting Party of which such recipient is a national, corporation or association, upon the most favorable terms applicable to such currency at the time of the taking of the property, and exempt from any transfer or remittance tax, provided application for such exchange is made within one year after receipt of the compensation to which it relates.”

This is a most important paragraph, of a kind that is central to many investment treaties. Where the English version begins by providing that the corresponding Italian text reads as follows:

“I beni dei cittadini e delle persone giuridiche ed associazioni di ciascuna Alta Parte Contraente non saranno espropriati entro i territori dell’altra Alta Parte Contraente, senza una debita procedura legale e senza il pronto pagamento di giusto ed effettivo indennizzo.”

There was considerable argument before the Chamber over the difference between the English version of the provision, which uses the word “taken”, and the Italian, which uses the word “espropriato”. Both versions are authentic. Obviously there is some difference between the two versions. The word “taking” is wider and looser than “espropriazione”.

114. The United States argued that, however the provision is read, the result is the same in this case; which is not the same as arguing that the two versions mean the same thing; and if one looks at the acts and conduct which the Applicant claims to constitute a violation of Article V, paragraph 2, one finds this claim expressed in the following terms. In the contention of the United States, both the Respondent’s act of requisitioning the ELSI plant and its subsequent acts in acquiring the plant, assets, and work in progress, singly and in combination, constitute takings of property without due process of law and just compensation. The requisition in itself is, in the view of the United States, such a taking, because Italy physically seized ELSI’s property with the object and effect of ending Raytheon and Machlett’s control and management, in order to prevent them from conducting the planned liquidation; and according to the United States, in international law a “taking” is generally recognized as including not merely outright expropriation of property, but also unreasonable interference with its use, enjoyment or disposal. Secondly, the United States claims that the Respondent, after the requisition and before the Prefect ruled on the administrative appeal, proceeded through ELTEL to acquire the ELSI plant and assets for less than fair market value. The matter was summed up by counsel at the hearings as follows:

“The requisition and the delay in overturning the requisition not only interfered with Raytheon and Machlett’s control of ELSI, not only impaired Raytheon and Machlett’s legally acquired interests in ELSI, but also resulted in what can only be described as the taking of the property.”

115. The specific United States allegations of interference by the Italian Government with the ELSI bankruptcy proceedings may be summarized as follows. The object in view is said to have been to secure ELSI’s facilities for IRI, on the terms and at the below-market price which IRI desired, while responding to the political pressure brought by ELSI’s former workers. Having requisitioned the plant and caused ELSI’s bank-
ruptu, the Government of Italy discouraged private bidders at the auctions held to dispose of ELSI’s assets, by informing the public at large that the Government would be taking over ELSI’s facilities. While proceeding with plans to take over ELSI, for example by negotiating agreements for rehiring the staff, IRI is said to have “boycotted” the first three auctions of the assets, at which the terms set by the bankruptcy judge were not to its liking. ELTEI proposed to the trustee in bankruptcy that it be permitted to lease the plant, and to purchase the work in progress, and this was agreed to by the bankruptcy authorities on terms which, it is claimed, were adverse to ELSI’s interests, both because the sums involved were too low and because ELTEI was placed in a position to dictate the terms of the final sale. At the final auction, ELTEI, already in possession under the lease, acquired the plant and related equipment for 4,000 million lire, the figure reported in the press to have been previously agreed on between IRI and the Italian authorities. As a result of the arrangements made with the bankruptcy authorities for a piecemeal take-over, the total amount received for ELSI’s assets was slightly over 4,000 million lire, as compared with the company’s book valuation of over 12,000 million lire.

116. Thus, the charge based on the combination of the requisition and subsequent acts is really that the requisition was the beginning of a process that led to the acquisition of the bulk of the assets of ELSI (which was wholly owned by Raytheon and Machlett) for far less than market value. That is a charge, not of mere temporary taking — though the United States also contended that a temporary requisition can constitute an indirect taking — but of a process by which title to ELSI’s assets itself was in the end transferred. So far as the requisition is concerned, counsel put the United States argument this way:

"the fact that the requisition was for an extendable six-month period does not make this any less of an expropriation of interests in property, given the fact that the requisition drove ELSI into bankruptcy".

What is thus alleged by the Applicant, if not an overt expropriation, might be regarded as a disguised expropriation; because, at the end of the process, it is indeed title to property itself that is at stake. The argument is that if a series of acts or omissions of the Italian authorities had the end result, whether intended or not and whether the result of collusion or not, of causing United States property in Italy to be ultimately transferred into the ownership of Italy, without proper compensation, there would be a violation of Article V, paragraph 2, of the FCN Treaty.

117. It must immediately be added that the United States, in the course of the oral proceedings, in response to an Italian assertion that it was attempting to establish a conspiracy to bring about the change of ownership, made it very clear that this part of its case did not depend upon, or in any way involve, any allegation that the Italian authorities were parties to such a conspiracy. The United States stated formally that it "has never argued and does not now argue that the acts and omissions of the Respondent that violated the Treaty amount to a 'conspiracy'”. Moreover, it was added that whilst the relief sought was "based on the acts and omissions of the Respondent's agents and officials at the federal and local levels (including IRI), without any allegation that these officials were working in conspiracy", the United States did not "speculate as to why these agents and officials of the Respondent acted in the manner they did"; or, as the United States Agent put it in his argument:

"These acts and omissions constituted Treaty violations ... whether or not the Italian Government entities involved knew of each other's actions, and whether or not they were acting in concert or at cross purposes."

118. The argument that there was a "taking" involving transfer of title gives rise to a number of difficulties. Even assuming, though without deciding, that "espropriazione" might be wide enough to include not only formal and open expropriation, but also a disguised expropriation, there would still be a question whether the paragraph can be extended to include even a "taking" of an Italian corporation in Italy, of which, strictly speaking, Raytheon and Machlett only held the shares. This, however, is where account must also be taken of the first paragraph of the Protocol appended to the FCN Treaty, which provides:

"1. The provisions of paragraph 2 of Article V, providing for the payment of compensation, shall extend to interests held directly or indirectly [si estenderanno ai diritti spettanti direttamente od indirettamente ai cittadini ...] by nationals, corporations and associations of either High Contracting Party in property which is taken within the territories of the other High Contracting Party."

The English text of this provision suggests that it was designed precisely to resolve the doubts just described. The interests of shareholders in the assets of a company, and in their residuary value on liquidation, would appear to fall in the category of "interests" to be protected by Article V, paragraph 2, and the Protocol. Italy has however drawn attention to the use in the Italian text — which is equally authentic — of the narrower term
“diritti” (rights), and has argued that, on the basis of the principle expressed in Article 33, paragraph 4, of the Vienna Convention on the Law of Treaties, the correct interpretation of the Protocol must be in the more restrictive sense of the Italian text.

119. In the view of the Chamber, however, neither this question of interpretation of the two texts of the Protocol, nor the questions raised as to the possibilities of disguised expropriation or of a “taking” amounting ultimately to expropriation, have to be resolved in the present case, because it is simply not possible to say that the ultimate result was the consequence of the acts or omissions of the Italian authorities, yet at the same time to ignore the most important factor, namely ELSI’s financial situation, and the consequent decision of its shareholders to close the plant and put an end to the company’s activities. As explained above (paragraphs 96-98), the municipal courts considered that ELSI, if not already insolvent in Italian law before the requisition, was in so precarious a state that bankruptcy was inevitable. The Chamber cannot regard any of the acts complained of which occurred subsequent to the bankruptcy as breaches of Article V, paragraph 2, in the absence of any evidence of collusion, which is now no longer even alleged. Even if it were possible to see the requisition as having been designed to bring about bankruptcy, as a step towards disguised expropriation, then, if ELSI was already under an obligation to file a petition of bankruptcy, or in such a financial state that such a petition could not be long delayed, the requisition was an act of supererogation. Furthermore this requisition, independently of the motives which allegedly inspired it, being by its terms for a limited period, and liable to be overturned by administrative appeal, could not, in the Chamber’s view, amount to a “taking” contrary to Article V unless it constituted a significant deprivation of Raytheon and Machlett’s interest in ELSI’s plant; as might have been the case if, while ELSI remained solvent, the requisition had been extended and the hearing of the administrative appeal delayed. In fact the bankruptcy of ELSI transformed the situation less than a month after the requisition. The requisition could therefore only be regarded as significant for this purpose if it caused or triggered the bankruptcy. This is precisely the proposition which is irreconcilable with the findings of the municipal courts, and with the Chamber’s conclusions in paragraphs 99-100 above.

* * *

120. Article I of the Supplementary Agreement to the FCN Treaty, which confers rights not qualified by national or most-favoured-nation standards, provides as follows:

The United States bases its claims upon allegations that measures were taken which were both “arbitrary” and “discriminatory” in the sense of this text.

121. The Applicant pressed strongly the claim that the requisition was an arbitrary or discriminatory act which violated both the “(a)” and the “(b)” clauses of the Article. The requisition, it is said, clearly prevented Raytheon and Machlett from exercising their control and management of ELSI and also resulted in an impairment of their legally acquired rights and interests in ELSI, inasmuch as it prevented the voluntary liquidation of ELSI and caused it to file for bankruptcy. To the claim as it is presented in those terms, however, the Chamber has already given its answer: the absence of a sufficiently palpable connection between the effects of the requisition and the failure of ELSI to carry out its planned orderly liquidation (paragraph 101 above). Accordingly, it cannot be said that it was the requisition in argo which either prevented Raytheon’s effective control and management of ELSI, or which resulted in impairing legally acquired rights, in the sense of the clauses called “(a)” and “(b)” in Article I of the Supplementary Agreement. Yet, although this is an answer to the claim as it is presented in terms of those clauses of Article I, it is not the end of the matter. The effect of the word “particularly”, introducing the clauses “(a)” and “(b)”, suggests that the prohibition of arbitrary (and discriminatory) acts is not confined to those resulting in the situations described in “(a)” and “(b)”, but is in effect a prohibition of such acts whether or not they produce such results. It is necessary, therefore, to examine whether the requisition was, or was not, an arbitrary or discriminatory act of itself.

122. The allegation of the United States that Raytheon and Machlett were subjected to “discriminatory” measures can be dealt with shortly. It is common ground that the requisition order was not made because of the nationality of the shareholders; there have been many cases of requisition
orders made in similar circumstances against wholly Italian-owned companies. But the United States claims that there was “discrimination” in favour of IRI, an entity controlled by Italy; and this was, in the view of the United States, contrary to the FCN Treaty and Supplementary Agreement. It is contended that the interests of IRI were directly contrary to those of Raytheon and Machlett, and the Italian Government intervened to advance its own commercial interests at the latter’s expense. However, the requisition order in itself did not serve any interest of IRI; it is only if the requisition is regarded as a step in a process destined to transfer ELSI’s assets to IRI that the factual situation would afford any basis for the argument now under examination. As indicated above, the United States stated formally during the oral proceedings that it was not arguing that the acts and omissions complained of amount to a “conspiracy,” and did not speculate as to why the relevant agents and officials of the Respondent acted as they did (see paragraph 117 above). There is no sufficient evidence before the Chamber to support the suggestion that there was a plan to favour IRI at the expense of ELSI, and the claim of “discriminatory measures” in the sense of Article I of the Supplementary Agreement must therefore be rejected.

123. In order to show that the requisition order was an “arbitrary” act in the sense of the Supplementary Agreement to the FCN Treaty, the Applicant has relied (inter alia) upon the status of that order in Italian law. It contends that the requisition “was precisely the sort of arbitrary action which was prohibited” by Article I of the Supplementary Agreement, in that “under both the Treaty and Italian law, the requisition was unreasonable and improperly motivated”; it was “found to be illegal under Italian domestic law for precisely this reason”. Relying on its own English translation of the decision of the Prefect of Palermo of 22 August 1969, the Applicant concludes that the Prefect found that the order was “destitute of any juridical cause which may justify it or make it enforceable”. Italy first contended that the word “or” in the translation of this passage should be replaced by “and”, and subsequently put forward the alternative translation that “the order, generically speaking, lacks the proper motivation that could justify it and make it effective”. It may be noted in passing that when ELSI, immediately after the making of the requisition order, formally invited the Mayor of Palermo to revoke the order, it referred to it throughout as “the said illegal and arbitrary order” (“detto illegale ed arbitrario provvedimento”); but the appeal submitted to the Prefect, while citing numerous legal grounds for annulment, including “eccesso di potere persiamento del fine” (“excess of power by deviation from the purpose”), contained no claim that the order had been “arbitrary”. It is therefore appropriate for the Chamber to examine the legal grounds given by the Prefect of Palermo for his decision, as well as what was said by the Court of Appeal of Palermo on the legal impact of the Prefect’s decision on the requisition order, and consider whether the findings of the

Prefect or of the Court of Appeal are equivalent to, or suggest, a conclusion that the requisition was an “arbitrary” action.

124. Yet it must be borne in mind that the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness. It would be absurd if measures later quashed by higher authority or a superior court could, for that reason, be said to have been arbitrary in the sense of international law. To identify arbitrariness with mere unlawfulness would be to deprive it of any useful meaning in its own right. Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.

125. The principal passage from the decision of the Prefect which is relevant here has already been quoted (paragraph 75 above), but it is convenient to set it out again here:

“Non v’ha dubbio che anche se possono considerarsi, in linea del tutto teorica, sussistenti, nella fattispecie, gli estremi della grave necessità pubblica e della contingibilità ed urgenza che determinarono l’adozione del provvedimento, il fine cui tendeva la requisizione non poteva trovare pratica realizzazione con il provvedimento stesso, tanto è vero che nessuna ripresa di attività dell’azienda vi è stata a seguito della requisizione, né avrebbe potuto esserci. Manca, pertanto, nel provvedimento, genericamente, la causa giuridica che possa giustificarlo e renderlo operante.”

The differing translations offered by the Parties of the sentence upon which the Applicant places considerable reliance are set out in paragraph 123 above. In the Chamber’s translation, the passage reads:

“There is no doubt that, even though, from the purely theoretical standpoint, the conditions of grave public necessity and of unforeseen urgency warranting adoption of the measure may be considered to exist in the case in point, the intended purpose of the requisition could not in practice be achieved by the order itself, since in fact there was no resumption of the company’s activity following the requisition, nor could there have been such resumption. The order therefore
lacks, generically, the juridical cause which might justify it and make it operative."

126. In support of this conclusion, the Prefect explained that the Mayor had believed that he could deal with the situation by means of a requisition, without appreciating that

"the state of the company as a result of circumstances of a functional-economic and market nature, was such as not to permit of the continuation of its activity".

He also emphasized the shutdown of the plant and the protest actions of the staff, and the fact that the requisition had not succeeded in preserving public order. Finally the Prefect also observed that the order had been adopted

"anche sotto l'influsso delle pressioni e dei rilievi formulati dalla stampa cittadina, per cui è da ritenere che il Sindaco, anche per sottrarsi e dimostrare l'intendimento della Pubblica Amministrazione di intervenire in qualche modo, addivenne alla requisizione quale provvedimento diretto più che altro a porre in evidenza la sua intenzione di affrontare comunque il problema".

In the translation of the Prefect's decision supplied by the Applicant:

"also under the influence of the pressure created by, and of the remarks made by the local press; therefore we have to hold that the Mayor, also in order to get out of the above and to show the intent of the Public Administration to intervene in one way or another, issued the order of requisition as a measure mainly directed to emphasize his intent to face the problem in some way [or, as quoted in the judgment of the Court of Appeal of Palermo, in the translation supplied by the Applicant: ‘his intention to tackle the problem just the same’]".

It was of course understandable that the Mayor, as a public official, should have made his order, in some measure, as a response to local public pressures; and the Chamber does not see, in this passage of the Prefect's decision, any ground on which it might be suggested that the order was therefore arbitrary.

127. In the action brought by the trustee in bankruptcy for damages on account of the requisition, the Court of Palermo and subsequently the Court of Appeal of Palermo had to consider the legal significance of the decision of the Prefect. The Court of Palermo accepted the argument of the respondent administration that "il provvedimento prefettizio è sostanzialmente di revoca dell'atto richiamato essendo stati ritenuti irrealizzabili gli scopi cui lo stesso miravano", i.e., that "the Prefect's order is in substance a revocation of the act in question, the objectives which were contemplated by it having been adjudged to have been impossible to achieve". When the matter came before the Court of Appeal, it observed that this argument was contrary to the argument of the trustee in bankruptcy "che ravvisa in detto decreto una dichiarazione di illegittimità del provvedimento di requisizione", i.e., "who regarded the [Prefect's] decree as a declaration of the unlawfulness of the requisition order". The Court of Appeal understood the lower court as meaning simply that "i vizi del provvedimento di requisizione, rilevati dal Prefetto, sono vizi di merito e non vizi di legittimità", i.e., "the defects found by the Prefect in the requisition order were defects in respect of the merits and not defects in respect of lawfulness"; it found that this finding was incorrect because the reasoning of the Prefect was, in its view, a clear finding of "un tipico caso di eccesso di potere, che è, come è noto, un vizio di legittimità dell'atto amministrativo”, i.e., "a typical case of excess of power, which is of course a defect in respect of lawfulness of an administrative act". Having reached this conclusion, the Court of Appeal refers later in its judgment to the requisition as having been "unlawful" ("illecito"). The analysis of the Prefect's decision as a finding of excess of power, with the result that the order was subject to a defect of lawfulness does not, in the Chamber's view, necessarily and in itself signify any view by the Prefect, or by the Court of Appeal of Palermo, that the Mayor's act was unreasonable or arbitrary.

128. Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the Asylum case, when it spoke of "arbitrary action" being "substituted for the rule of law" (Asylum, Judgment. I.C.J. Reports 1950, p. 284). It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety. Nothing in the decision of the Prefect, or in the judgment of the Court of Appeal of Palermo, conveys any indication that the requisition order of the Mayor was to be regarded in that light.

129. The United States argument is not of course based solely on the findings of the Prefect or of the local courts. United States counsel felt able to describe the requisition generally as being an "unreasonable or capricious exercise of authority". Yet one must remember the situation in Palermo at the moment of the requisition, with the threatened sudden unemployment of some 800 workers at one factory. It cannot be said to have been unreasonable or merely capricious for the Mayor to seek to use the powers conferred on him by the law in an attempt to do something about a difficult and distressing situation. Moreover, if one looks at the requisition order itself, one finds an instrument which in its terms recites not only the reasons for its being made but also the provisions of the law on which it is based: one finds that, although later annulled by the Prefect because "the intended purpose of the requisition could not in practice be achieved by the order itself" (paragraph 125 above), it was nonetheless within the competence of the Mayor of Palermo, according to the very provisions of the law cited in it; one finds the Court of Appeal of Palermo, which did not differ from the conclusion that the requisition was intra vires, ruling that it was unlawful as falling into the recognized category of administrative law of acts of "eccesso di potere". Furthermore, here was an act belong-
ing to a category of public acts from which appeal on juridical grounds was provided in law (and indeed in the event used, not without success). Thus, the Mayor's order was consciously made in the context of an operating system of law and of appropriate remedies of appeal, and treated as such by the superior administrative authority and the local courts. These are not at all the marks of an "arbitrary" act.

130. The Chamber does not, therefore, see in the requisition a measure which could reasonably be said to earn the qualification "arbitrary", as it is employed in Article I of the Supplementary Agreement. Accordingly, there was no violation of that Article.

* * *

131. Finally, the United States claims that there has been a violation by Italy of Article VII of the FCN Treaty. This long and elaborately drafted Article, in four paragraphs, is principally concerned with ensuring the right "to acquire, own and dispose of immovable property or interests therein within the territories of the other High Contracting Party". The full text is as follows:

"1. The nationals, corporations and associations of either High Contracting Party shall be permitted to acquire, own and dispose of immovable property or interests therein within the territories of the other High Contracting Party upon the following terms:

(a) in the case of nationals, corporations and associations of the Italian Republic, the right to acquire, own and dispose of such property and interests shall be dependent upon the laws and regulations which are or may hereafter be in force within the state, territory or possession of the United States of America wherein such property or interests are situated; and

(b) in the case of nationals, corporations and associations of the United States of America, the right to acquire, own and dispose of such property and interests shall be upon terms no less favorable than those which are or may hereafter be accorded by the state, territory or possession of the United States of America in which such national is domiciled, or under the laws of which such corporation or association is created or organized, to nationals, corporations and associations of the Italian Republic; provided that the Italian Republic shall not be obligated to accord to nationals, corporations and associations of the United States of America rights in this connection more extensive than those which are or may hereafter be accorded within the territories of such Republic to nationals, corporations and associations of such Republic.

2. If a national, corporation or association of either High Contracting Party, whether or not resident and whether or not engaged in business or other activities within the territories of the other High Contracting Party, is on account of alienage prevented by the applicable laws and regulations within such territories from succeeding as devisee, or as heir in the case of a national, to immovable property situated therein, or to interests in such property, then such national, corporation or association shall be allowed a term of three years in which to sell or otherwise dispose of such property or interests, this term to be reasonably prolonged if circumstances render it necessary. The transmission or receipt of such property or interests shall be exempt from the payment of any estate, succession, probate or administrative taxes or charges higher than those now or hereafter imposed in like cases of nationals, corporations or associations of the High Contracting Party in whose territory the property is or the interests therein are situated.

3. The nationals of either High Contracting Party shall have full power to dispose of personal property of every kind within the territories of the other High Contracting Party, by testament, donation or otherwise and their heirs, legatees or donees, being persons of whatever nationality or corporations or associations wherever created or organized, whether resident or non-resident and whether or not engaged in business within the territories of the High Contracting Party where such property is situated, shall succeed to such property, and shall themselves or by their agents be permitted to take possession thereof, and to retain or dispose of it at their pleasure. Such disposition, succession and retention shall be subject to the provisions of Article IX and exempt from any other charges higher, and from any restrictions more burdensome, than those applicable in like cases of nationals, corporations and associations of such other High Contracting Party. The nationals, corporations and associations of either High Contracting Party, shall be permitted to succeed, as heirs, legatees and donees, to personal property of every kind within the territories of the other High Contracting Party, left or given to them by nationals of either High Contracting Party or by nationals of any third country, and shall themselves or by their agents be permitted to take possession thereof, and to retain or dispose of it at their pleasure. Such disposition, succession and retention shall be subject to the provisions of Article IX and exempt from any other charges, and from any restrictions, other or higher than those applicable in like cases of nationals, corporations and associations of such other High Contracting Party. Nothing in this paragraph shall be construed to affect the laws and regulations of either High Contracting Party prohibiting or restricting the direct or indirect ownership by
aliens or foreign corporations and associations of the shares in, or instruments of indebtedness of, corporations and associations of such High Contracting Party carrying on particular types of activities.

4. The nationals, corporations and associations of either High Contracting Party shall, subject to the exceptions in paragraph 3 of Article IX, receive treatment in respect of all matters which relate to the acquisition, ownership, lease, possession or disposition of personal property, no less favorable than the treatment which is or may hereafter be accorded to nationals, corporations and associations of any third country."

The Italian text of the opening sentence of paragraph 1 is as follows:

"I cittadini e le persone giuridiche ed associazioni di ciascuna Alta Parte Contraente avranno facilità di acquistare, possedere e disporre di beni immobili o di altri diritti reali nei territori dell' altra Alta Parte Contraente alle seguenti condizioni . . . ."

132. It was objected by Italy that this Article does not apply at all to Raytheon and Machlett because their own property rights ("diritti reali") were limited to shares in ELSI, and the immovable property in question (the plant in Palermo) was owned by ELSI, an Italian company. The United States contended that "immovable property or interests therein" is a phrase sufficiently broad to include indirect ownership of property rights held through a subsidiary that is not a United States corporation. The argument turned to a considerable extent on the difference in meaning between the English, "interests" and the Italian, "diritti reali". "Interest" in English no doubt has several possible meanings. But since it is in English usage a term commonly used to denote different kinds of rights in land (for example rights such as charges, or easements, and many kinds of "future interests"), it is possible to interpret the English and Italian versions of Article VII as meaning much the same thing; especially as the clause in question is in any event limited to immovable property. The Chamber however has some sympathy with the contention of the United States, as being more in accord with the general purpose of the FCN Treaty. The United States argument is further that Raytheon and Machlett, being the owners of all the shares, were in practice the persons who alone could decide (before the bankruptcy), whether to dispose of the immovable property of the company; accordingly, if the requisition did, by triggering the bankruptcy, deprive ELSI of the possibility of disposing of its immovable property, it was really Raytheon and Machlett who were deprived; and allegedly in violation of Article VII.

133. There are however problems in any attempt to apply the provisions of Article VII to the actual facts of this case. First, the protection which paragraph 1 of Article VII affords to this group of rights is not unqualified. The qualification designated "(a)" refers to the rights enjoyed by Italian nationals in the territory of the United States of America, which in effect simply subjects Italian nationals to the municipal laws in the United States, and does not concern us. Qualification "(b)" does, for this applies to the rights enjoyed by United States nationals in the territory of the Republic of Italy. It is a convoluted qualification because it lays down alternative standards, which standards are themselves then both qualified by the same proviso. The terms governing the rights are to be no less favourable than those which are or may hereafter be accorded by the "state, territory or possession of the United States of America in which such national is domiciled, or under the laws of which such corporation or association is created or organized" — which in the case of Raytheon is the State of Delaware and in the case of Machlett the State of Connecticut — "to nationals, corporations and associations of the Italian Republic". The proviso is:

"that the Italian Republic shall not be obligated to accord to nationals, corporations and associations of the United States of America rights in this connection more extensive than those which are or may hereafter be accorded within the territories of such Republic to nationals, corporations and associations of such Republic".

134. The Chamber has thus to make the somewhat elaborate juridical calculus which this provision in the FCN Treaty appears to demand for its application. No very cogent evidence was put before the Chamber to show that the application of Italian law in this matter was less favourable than the treatment accorded by Italy to its own nationals, corporations and associations, in Italy. Indeed it appeared that, particularly during the troubled times of 1968, requisitions of Italian companies by the local Mayors had happened rather frequently. The claim must therefore be taken to be that ELSI was given less favourable treatment than might have been enjoyed by an Italian company under the laws of Delaware and Connecticut in similar circumstances. The United States drew attention to texts showing that

"Under the laws of both Delaware and Connecticut, corporations may be dissolved and their assets sold pursuant to determinations by their boards of directors and shareholders", 

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and that if those States were to take the immovable property of a corporation for a lawful public use, they would have to make compensation; Italy has not disputed these legislative provisions.

135. Secondly, however, even so there remains precisely the same difficulty as in trying to apply Article III, paragraph 2, of the FCN Treaty: what really deprived Raytheon and Machlett, as shareholders, of their right to dispose of ELSI's real property, was not the requisition but the precarious financial state of ELSI, ultimately leading inescapably to bankruptcy. In bankruptcy the right to dispose of the property of a corporation no longer belongs even to the company, but to the trustee acting for it; and the Chamber has already decided that ELSI was on a course to bankruptcy even before the requisition. The Chamber therefore does not find that Article VII of the FCN Treaty has been violated.

* * *

136. Having found that the Respondent has not violated the FCN Treaty in the manner asserted by the Applicant, it follows that the Chamber rejects also the claim for reparation made in the submissions of the Applicant.

* * *

137. For these reasons,

THE CHAMBER,

(1) Unanimously,

Rejects the objection presented by the Italian Republic to the admissibility of the Application filed in this case by the United States of America on 6 February 1987;

(2) By four votes to one,

Finds that the Italian Republic has not committed any of the breaches, alleged in the said Application, of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Rome on 2 February 1948, or of the Agreement Supplementing that Treaty signed by the Parties at Washington on 26 September 1951.

IN FAVOUR: President Ruda; Judges Oda, Ago and Sir Robert Jennings;
AGAINST: Judge Schwebel.

(3) By four votes to one,

Rejects, accordingly, the claim for reparation made against the Republic of Italy by the United States of America.

IN FAVOUR: President Ruda; Judges Oda, Ago and Sir Robert Jennings;
AGAINST: Judge Schwebel.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twentieth day of July, one thousand nine hundred and eighty-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 United States of America and the Government of the Republic of Italy, respectively.

(Signed) José María RUDA,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

Judge ODA appends a separate opinion to the Judgment of the Chamber.

Judge SCHWEBEL appends a dissenting opinion to the Judgment of the Chamber.

(Initialled) J.M.R.
(Initialled) E.V.O.
Delagoa Bay and East African Railway Co.,
Arbitral award of 29 March 1900

Lafontaine, *Pasiecrisie internationale 1794-1900*

(French version only)
Limite de Costa-Rica et de Colombie; Costa-Rica y Costa de Mosquitos; Jurisdiction territoriale de Costa-Rica; De l'exposé des titres territoriaux de la république de Costa-Rica; De la réplique à l'exposé de la république de Colombie; De l'atlas historico-geographique de Costa-Rica, Veraguas y costa de Mosquitos; Du volume de M. de Peralta: Geographie historique et droits territoriaux de Costa-Rica; Etc., etc.;

Et, en général, de tous et toutes décisions, capitulations, ordres royaux, provisions, cédules royales, lois, édités et promulgués par l'ancienne monarchie espagnole, souveraine absolu et libre dépositaire des territoires qui ont fait partie, dans la suite, des deux républiques;

Ayant procédé à une étude minutieuse et approfondie des dits actes, à nous soumis par les parties, notamment: des cédules royales du 27 juillet 1513, du 6 septembre 1521, de la profession royale du 21 avril 1526, des cédules royales du 2 mars 1537, des 11 janvier et 9 mai 1541, du 21 janvier 1557, des 23 février et 8 septembre 1558, des 8 septembre 1563, du 28 juin 1568, du 17 juillet 1572, de la capitulation du Pardo du 1er décembre 1573, de la Récolpación des les Leyes de Indias de 1600, particulièrement des lois IV, VI et IX de ce recueil, des cédules royales des 21 juillet et 13 novembre 1722, du 20 août 1739, du 24 mai 1740, du 31 octobre 1742, du 30 novembre 1756, des différentes instructions émanant du souverain espagnol et adressées tant aux autorités supérieures de la vice-royauté de Santa-Fé qu'à celles de la capitainerie générale de Guatemal au cours du dix-huitième siècle et dans les années suivantes des ordres royaux de 1803 et 1805, des stipulations du traité conclu en 1825 entre les deux républiques indépendantes, etc., etc.;

Et conscient de l'importance de notre haute mission, ainsi que du très grand honneur qui nous a été fait d'être choisi comme juge dans le présent débat, n'ayant rien négligé pour nous rendre un compte exact de la valeur des titres invoqués par l'un et l'autre pays,

Arrêtons:

La frontière entre les républiques de Colombie et de Costa-Rica sera formée par le contrefort de la Cordillère, qui part du cap Mona sur l’océan Atlantique et ferme au nord la vallée du Rio-Tarre ou Rio-Sioux, puis le chenal de partage des eaux entre l’Atlantique et le Pacifique jusqu’à 9 degrés environ de latitude; elle

suivra ensuite la ligne de partage des eaux entre le Chiriqui-Viejo et les abords du golfe Dulce, pour aboutir à la pointe Burica sur l’océan Pacifique.

En ce qui concerne les îles, groupes d’îles, lots, bancs, situés dans l’océan Atlantique, à proximité de la côte, à l’est et au sud-est de la pointe Mona, ces îles, quels que soient leur nombre et leur étendue, feront partie du domaine de la Colombie, et celles qui sont situées à l’ouest et au nord-ouest de la dite pointe appartiendront à la république de Costa-Rica.

Quant aux îles les plus éloignées du continent et comprises entre la côte de Mosquitos et l’île de Panama, nommée: Mangle-Chico, Mangle-Grande, Cayos de-Abuquerque, San-Andrés, Santa-Catalina, Providencia, Escudo-de-Veraguas, ainsi que toutes autres îles, lots et bancs relevant de l’ancienne province de Carthagène, sous la dénomination de canton de San-Andrés, il est entendu que le territoire de ces îles, sans en excepter une, appartient aux Etats-Unis de Colombie.

Du côté de l’océan Pacifique, la Colombie possédera également, à partir des îles Burica et y comprises celles-ci, toutes les îles situées à l’est de la pointe du même nom, celles qui sont situées à l’ouest de cette pointe étant attribuées au Costa-Rica.

CV. Etats-Unis d’Amérique, Grande-Bretagne, Portugal.

13 juin 1891.

Il s’agit en cette affaire de la résolution d’une concession de chemin de fer, cédée par le concessionnaire primitif à une compagnie anglaise. Il était réclamé par les intéressés une somme totale de 1,989,500 £; il leur fut accordé 15,314,000 francs, en plus des 28,000 £ versées à compter par le Portugal en 1890.

Protocole signé à Berne le 13 juin 1891, pour soumettre, à l’arbitrage l’indemnité résultant de la résolution de la concession du chemin de fer de Lourenço Marques.

Le président de la Conféderation suisse ayant fait connaître au Gouvernement des Etats-Unis de l’Amérique du Nord, de la Grande-Bretagne et du Portugal que le Conseil fédéral suisse avait pris en considération la demande que ces gouvernements lui ont faite, de bien vouloir nommer trois juristes consultifs, choisis parmi les plus distingués, pour composer un tribunal arbitral chargé de fixer le montant de l’indemnité due par le Portugal aux ayants droit des deux autres pays à raison de la résolution de la concession du chemin de fer de Lourenço Marques et de la prise de possession de ce chemin de fer par le même gouvernement.

Article IV. Le jugement sera définitif et sans appel.

Le président du Tribunal arbitral délivrera aux représentants de chacun des trois gouvernements une explication authentique de la sentence.

Les trois gouvernements s’engagent d’avance, pour leur propre part et pour la part de leurs ressortissants respectifs, à accepter et exécuter la sentence, comme règlement final de tous leurs différends sur cette question.

Il est entendu que, bien qu’il appartiennet au Tribunal arbitral de désigner les personnes privées ou les personnes morales ayant droit à l’indemnité, le montant de cette indemnité sera remis par le gouvernement portugais aux deux autres gouvernements pour qu’ils en fassent la distribution aux ayants droit.

La quittance délivrée par ces deux gouvernements constituera pour le gouvernement portugais une décharge complète et valable.

Le montant sera remis par le gouvernement portugais aux deux autres gouvernements dans le délai de six mois à compter du prononcé du jugement.

Article V. Le président du Tribunal arbitral sera prié de présenter le compte de tous les frais occasionnés par l’arbitrage, et les trois gouvernements s’engagent à les faire payer à l’époque que le président désignera.

En foi de quoi, les soussignés ont dressé ce protocole et y ont apposé leurs signatures et leurs sceaux.

Fait à Berne, en triple expédition, le 13 juin 1891.

Sentence finale du Tribunal arbitral du Delagoe, prononcée à Berne, le 29 mars 1900.

I. OBJET DU JUGEMENT ARBITRAL.

Le différend sur lequel les arbitres sont appelés à statuer et qui fait l’objet de leur jugement est déterminé par le compromis arbitral. L’article premier de celui-ci leur donne pour mandat de fixer le montant de la compensation due par le gouvernement portugais aux ayants droit des deux autres pays par suite de la résolution du chemin de fer de Lourenço Marques et de la prise de possession de ce chemin de fer par le même gouvernement.

Sentence finale du Tribunal arbitral du Delagoe, p. 88.
Il résulte des termes ci-dessus que la rescision de la concession et la prise de possession du chemin de fer demeuraient portuaires et sont considérées comme des faits acquis et irrévocables. Il n'est plus question de rapporter ces mesures si elle s'autorise à fixer la somme à attribuer aux demandeurs en compensation de la perte de leur concession et de leur propriété.

II. LE DROIT APPLICABLE.

Aux termes de l'article premier du compromis, le Tribunal arbitral a pour mandat de fixer le montant de la compensation en question "comme il jugera le plus juste" à Lisbonne et pour tous les effets. En réalité, c'est cette société portugaise qui a été desmouche concessionnaire jusqu'à la rescision de la concession. C'est le dernier qui a subi le changement de droit et c'est elle seule qui est demeuree en rapport avec le gouvernement.

L'entreprise n'ayant ainsi jamais cessé d'être portugaise, il en suit qu'elle est régie par le droit portugais ainsi que le statut de toujours compris dans l'article 50 de la concession. Donc aussi le droit portugais qui fait loi dans le présent litige. Mais cette question, qu'il importait de bien fixer, n'aurait pas d'effet sur la portée de la compensation qui, selon lui, "n'oppose à la théorie des dommages et intérêts."

Tel n'est pas l'avis du tribunal arbitral. Rien dans le texte du compromis n'indique que les parties aient entendu restreindre en quoi que ce soit le liberté d'appréciation des arbitres quant à la nature juridique de la "compensation" à allouer. C'est le cas qui, dans le compromis, alterne indifféremment avec celui d'indemnité, est dépourvu, dans l'intention de ceux qui l'ont employé, d'une acception technique précise ; c'est un terme vague et général, choisi comme à dessein pour s'adapter à toutes les constructions juridiques possibles. Si, dans l'esprit des parties, le terme de compensation n'avait dû signifier que l'enchaissement ou le prix de revient, on ne voit guère quelle était cette mission d'arbiter que les parties s'accorderaient à choisir "parmi les jurisconsultes," comme il est dit dans le préambule du compromis : une estimation des frais et des pertes que les parties eût été faites peut-être, mieux rendre le même service.

Cela admet, la question primordiale et dont la solution découlera du choix entre les trois systèmes susmentionnés, est celle-ci :

Le décret de rescision a-t-il été rendu et la prise de possession du chemin de fer opérée, oui ou non, en conformité de l'acte de concession ?

Cet acte, en effet, prévoit des cas où l'État aurait le droit et l'intérêt de résilier la concession de sa seule autorité. Ce sont — à part la faculté de rachat après 35 ans (art. 28) qui n'est pas en cause ici — deux cas énoncés aux articles 42 et 45 : ou bien le chemin de fer a continuer les travaux sur une échelle proportionnelle à l'étendue de la ligne, ou défaut de terminer le chemin de fer dans les termes et les délais fixés à l'art. 40 (art. 42);

Interruption totale ou partielle de l'exploitation pendant plus de trois mois, après une sommation de la part du gouvernement (art. 45) ;

"Les cas de force majeure dûment justifiée" faisant exception dans l'un comme dans l'autre des cas.

La partie défenderesse s'est, au cours du présent procès, prévalu cumulativement de l'article 42 et de l'article 45. Mais le décret de rescision, du 25 juin 1889, n'a point fait état de l'article 45 : il a invoqué uniquement l'article 42.

L'article 45 et les conséquences qu'on eût pu en tirer ne doivent donc pas être pris en considération, quitte même à se référer à l'article 42 de l'acte précisant que le gouvernement avait de ailleurs omis de remplir les formalités spéciales prescrites au paragraphe 3.

La question se réduit donc à ces termes : le gouvernement était-il, lors de la rescision, oui ou non, fondé à affirmer que l'entreprise n'avait point continué les travaux sur une échelle proportionnelle à l'étendue de la ligne ou qu'elle n'avait pas terminé le chemin de fer dans les termes et les délais fixés à l'art. 40 ?

C'est sur ce point essentiel que les avis des parties diffèrent au tour et au tour.

En fait, il y a eu deux approbations de plans : celle du 30 octobre 1884, pour les 82 premiers kilomètres, "donnée sans préjudice de la défectuosité de l'ancien projet pour la partie de la voie ferrée jusqu'à la frontière," et celle du 23 février 1889, pour les huit derniers kilomètres.

Cette défenderesse fait courir les trois ans "bénéfèvement" prolongés par elle de la première de ces dates ; les demandeurs les compotent à dater de la seconde. La défenderesse, pour déposer sa manière de voir, soutient que le concessionnaire avait l'obligation de se reseigner lui-même sur la longueur réelle de la ligne et que, dès lors, si les plans présentés par lui avaient pour base les cent jours visés à l'art. 38 de la concession, ont été incomplets, ce défaut qui fit l'objet d'une réserve insérée dans l'arrêt de l'approbation lui demeurait imputable et engagait sa responsabilité ; c'était, dit le Portugal, à lui de seizer d'emblée présentant le complément de plans et en exécutant le complément de travaux avant l'expiration du délai qui courait, une fois pour toutes, du 30 octobre 1884.

Cette argumentation ne paraît compatible que avec le texte ni avec l'esprit de l'art. 38 précité. Le texte de cet article vise un tracé déjà étudié par ordre du gouvernement portugais et dont les projets devraient être fournis à l'association qui, n'aurait plus qu'à étudier, dans les cent jours, les modifications désirables. Or, un prolongement de huit à sept kilomètres est plus qu'une simple modification ; et l'interprétation logique corrobore ici le sens littéral : il serait par trop malaisé, sinon impossible, de livrer un tracé de 90 kilomètres, étudié directement sur le terrain. Il faut donc admettre que, suivant le article 38, le gouvernement portugais était tenu de fournir un tracé intégralement préparé pour que ce dernier n'avait plus qu'à contrôler. En tout cas, le concessionnaire était tenu de se prononcer sur le tracé qui, à la fin, ne divergeait pas de l'article 38, mais au final, il paraissait être bien évident.

En effet, l'entreprise s'est faite connaître du gouvernement que, du 82e kilomètre au 90e, aucun tracé primitif n'avait été fourni et que le tracé du 40e kilomètre avait été modifié par la suite.

Or, il est avéré que les plans de la dernière section n'ont été livrés que le 23 juillet 1887, et le major Machado, dans la même lettre du 24 juillet 1887, a signalé qu'il n'avait pas eu de nouvelles communes à l'entreprise, constituait d'autre part, qu'il était impossible de fixer le point final de la ligne sans un accord préalable avec le gouvernement portugais et que les courants doivent être pris sur ces conditions ? Le Tribunal estime qu'il avait le choix entre deux modes de procéder : ou bien
renoncer, comme il le fit plus tard, à l’entente préalable avec le Transvaal et fixer, de son propre chef, le point terminus, sauf à indemniser l’entrepreneur si, dans la suite, le déplacement de ce point venait à lui causer quelque préjudice, et inviter celle-ci à lui soumettre, pour approbation, les plans de la dernière section ; ou bien laisser les choses en suspens jusqu’à ce que l’entente avec le Transvaal intervienne. C’est à ce dernier parti que s’arrêta d’abord le gouvernement, parce qu’il attendait d’un moment à l’autre la réussite des négociations entamées. Et le ministre de la marine et des colonies déclara expressément que « la délimitation de la frontière, une fois arrêtée, le gouvernement ne s’opposera pas à ce qu’il soit établi un délai raisonnable pour l’achèvement de la ligne. » Le ministre ajoutait, il est vrai, qu’il serait « possible et convenable, de soumettre dès à présent au gouvernement le projet des sept kilomètres à l’abri de tout changement, mais il n’insistait pas et il émit même l’avis, sinon à l’adresse de l’entrepris, du moins vis-à-vis de son collègue des affaires étrangères, que s’il ne serait pas raison- nable d’obliger la Compagnie à construire 7 ou 8 kilomètres pour renvoyer jusqu’au moment où la frontière serait fixée la construction de la petite partie restante. 

10. L’inaction de l’entrepris pendant cette période se trouvait donc couverte par l’acquéris- sement pour le moins tacite du gouvernement. Celui-ci, cependant, finit par se lasser d’atteindre que l’accord avec le Transvaal aboutit et il prit sur lui lui de son chef le point terminus devant faire règle pour l’entrepris : appareil parfaitement légitime et que les parties demanderesses ont critiqué à tort ; car elles n’avaient pas à s’insinuer dans les relations internationales du Portugal, pour l’intérêt de sa sûreté, désignait une ligne de frontière, cette désignation devait être tenue pour valable, sauf à la compagnie à lui demander dans la suite la réparation du préjudice qu’aurait causé, le cas échéant, le déplacement ultérieur de cette ligne.

Mais le gouvernement portugais ne s’en tint pas là. Il fixa en même temps, par son arrêté du 24 octobre 1888, un délai global péremptoire de dix mois pour la présentation des plans de la dernière section, pour leur approbation et pour leur exécution, et il maintint dans les remontées de la compagnie concessionnaire. Cette mesure prise unilatéralement se renforcerait-elle dans les limites des droits attribués au gouvernement défendeur par l’acte de concession, ou excéderait-elle ? Telle est la question de

droit, primordiale et décisive, que ce tribunal est appelé à trancher.

Or, il est inévitable que la concession ne couvrirait pas toutes les exigences de l’entrepris pour le gouvernement à fixer de son chef un délai d’achèvement et à décréter que le délai ainsi fixé, « remplaçera pour tous les effets la période indiquée à l’art. 40 du contrat ».

Cette période, le gouvernement pouvait, à la vérité, la prolonger de son plein gré ; aussi s’est-il efforcé, depuis, d’interpréter son acte comme une prolongation de délai ; mais cette explication est repoussée, à la suite du délai que le rap- port a été démontré, le délai pour la construc- tion du dernier tronçon n’avait pas même commencé à courir tant que les plans n’en étaient pas approuvés.

Il s’agissait donc bien, en l’espèce, d’impartir et non de prolonger un délai. Aussi bien, pour rester dans le cadre de la concession, qui formait sur ce point la loi des parties et attribuait notamment à la compagnie des garanties de nature civile, la fixation du délai d’achèvement ne pouvait-elle avoir lieu qu’en conformité de l’art. 40.

Est-ce à dire que, en vertu de cet article, l’entrepris et dû absolument bénéficier de ce délai, dont l’affirmation les affirment, pour la construction de ces huit derniers kilomètres, du délai de trois ans plus six mois fixé par l’art. 40 en vue d’un tracé de ce Tronçon ?

Le Tribunal ne le pense pas. Il estime que pour ce cas non spécialement prévu d’un tronçon complémentaire à construire, l’art. 40 n’était pas applicable que par analogie ; c’est-à-dire que de même que les parties avaient convenu à l’origine d’un délai de trois ans pour construire environ 80 kilomètres de ligne, elles auraient dû s’en- tendre à nouveau au sujet du temps nécessaire pour la construction de cette section, et non par défaut d’entente provoquer sur ce point une décision des arbitrés prévus par l’article 53 du contrat.

En revanche, il était décidément inadmissible et contraire au texte de la concession, ainsi qu’au caractère bilatéral de celle-ci, que le gouverne- ment portugais, cumulant les rôles de juge et de partie, fixât le délai lui seul, en remplacement de celui indiqué dans la concession. Il suit de là qu’en procédant ainsi qu’il l’a fait, le gouvernement a agi en dehors de la concession et notamment de l’art. 42 de celle-ci. Il n’était dès lors pas fondé à déclarer, comme il l’a fait dans son arrêt du 15 juin 1889, que l’entreprise n’avait jamais existé la construction... dans les termes et aux époques convenus... et à se prévaloir expressément dudit art. 42 pour prononcer la résiliation du contrat de concession.

Et si le gouvernement du Portugal soutient aujourd’hui que même dans le premier tronçon, soit-disant achevé, de 82 kilomètres, il manquait beaucoup de choses à faire, ce qui n’est pas non plus été invoqué par lui comme un motif de rescission, attendu que lors de l’ouverture de la première section de la ligne, le 14 septembre 1889, il n’avait été dressé aucun protocole officiel indiquant les ouvrages manquants ou defectueux ; aussi il est absolument impossible de distinguer les defectuosités originales de celles occasionnées plus tard par les difficultés de l’exécution de 1889. Les imperfections originales se confondent dès lors avec les causes d’interruption ultérieures dont il n’y a pas à tenir compte, puisque, comme il a déjà été exposé plus haut, de l’article 45 de la concession, traitant des cas d’interruption n’a pas été allégué dans le décret de rescission.

Il résulte de toutes ces considérations que la question primordiale posée plus haut doit être résolue en ce sens que le décret de rescission et la prise de possession du chemin de fer n’ont pas été opérés en conformité du contrat de concession.

Il n’est d’ores le plus nécessaire de spécifier la nature juridique de ces actes. Du moment qu’ils ne peuvent se justifier par des clauses mêmes de la concession et que par conséquent les concessionnaires les ait encourus en vertu même de celle-ci, il ne reste plus qu’un seul principe de droit qui puissie être appliqué à la fixation de la compensation due à ces précipitations, c’est celui du dédommagement, et non celui de la nullité du contrat. On ne peut pas estimer que celui des dommages et intérêts, du id quod intend, comprenant d’après les règles de droit universellement admises, le damnum emergens et le lucrum cessans : le point d’estimation le plus éloigné de nous.

Qu’il en veuille, en effet, taxer l’acte gou- vernemental de mesure arbitraire et spoliatoire, ou acte souverain dit par la raison d’Etat à la charge de la construction et de la concession. Ce principe ne peut être que celui des dommages et intérêts, du id quod intend, comprenant d’après les règles de droit universellement admises, le damnum emergens et le lucrum cessans : le point d’estimation le plus éloigné de nous.

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IV. DES PRINCIPES REGISSANT LA FIXATION DES DOMMAGES ET INTÉRÊTS.

4. D’après le système des demandeurs, le pré- judice épruvé par les ayants droit serait représenté par la valeur des titres de la compagnie anglaise : valeur nominale des obligations et valeur marchande attribuées aux actions, à l’époque qui précéda l’arrêté assignant le délai de huit mois. Cette dernière valeur est indiquée à 25 pour les actions en général et à 25 environ pour le lot d’actions réuni entre les mains de Mr. Murdo.

Ce mode de calcul de l’indemnité parait inadmis- sible pour plusieurs raisons.

Tout d’abord il se heurte au motif de forme suivant, qui a été invoqué à bon droit par le Portugal. Les ayants droit demandeurs, qui s’opposent d’ailleurs, ne font pas valoir un droit qui soit né en leur personne, mais seulement un droit dérivé. Ils ne sont parties aux procès qu’en leur qualité de représentants de la compagnie portugaise ; or, celle-ci n’a rien de commun avec les titres de la compagnie anglaise.

Mais voulait-on même, avec les demandeurs, identifier les deux compagnies, que l’on ne sau-rait qualifier de préjudice réel ni la perte d’un capital-actions purement nominal, sur lequel.
notoirement, pas un liard n’a été versé, ni celle
d’un capital-obligations de £ 750,000 dont une
partie seulement équivalait à d’un-
prise, puisque, même d’après les informations
incontrôlées des demandeurs, il n’y aurait eu
que £ 399,816 employées à des buts intéressant
tels que les loyers de la maison dont il se
rattache à d’Aubers, et qui, en principe, devrait être calculé d’après le rende-
ment capitalisé.
Or d’après une loi économique qui repose
sur un principe d’expérience, il est évident que
les experts ont vérifié, est aussi applicable
cas particulier, le rendement du chemin de
litigeux, comme celui des chemins de fer
rappelons, ne se augmente pas d’une façon
constante. L’expérience prouve en effet qu’une
telle augmentation se produit régulièrement, en-
core qu’il ne soit guère possible d’apprécier sûre-
ment d’une façon précise, mais pour un intervalle
fruits de la courbe ascendante qui la représente. En
l’état des choses, et bien que le fait de l’aug-
mentation du trafic et du rendement corresponde
da terre, la proportion dans laquelle elle se
produit est éminemment variable, ce qui se tra-
duit alors graphiquement par des ondulations et
des inflexions imprévues de la courbe. Le tri-
busa ne peut être ainsi de faire évoluer en ligne de compte, dans l’évaluation du
chemin de fer objet du litige, la perspective
d’une augmentation graduelle de son rendement.
En l’espèce, cela s’impose tout particulièrement.
Il est tout à fait évident que, si un chemin de fer
est exploité et aboutissant dans un pays neuf, suscep-
tible d’un grand développement. Il convient toute-
fois de ne pas perdre de vue qu’un pareil calcul,
fait d’avance sur la base de données purement thêoriques, ne saurait prétendre à une certitude
rigoureuse, mais seulement à une vraisemblance
relative. Aussi bien le tribunal doit-il se ré-
server de tenir tel compte que de justes, dans ce
calcul de probabilités, de toutes les autres
chances favorables ou défavorables qui pourront
influer à l’avenir sur la valeur commerciale de la
courbe.
Ces réserves faites, la durée théorique de la
période qui doit être prise en considération à cet
égard peut, tout d’abord, se déduire de la con-
fession même de l’État du Portugal ayant, aux
terme de l’article 28, le droit de racheter la ligne
au bout de 35 ans, ce n’est que pendant cette
croissance de 35 ans que la compagnie concession-
naire avait la perspective certaine et justifiée en
droit d’exploiter la ligne dont la concession lui
avait été accordée et de bénéficier de la plus-
value due à une augmentation graduelle de son
rendement. Et le laps de temps échelonné sur la
de la ligne par le gouvernement portugais en-
suite du décret du 29 juin 1889 apparaît comme
un rachat anticipé qui prive les ayants droit des
francs, et qui, pendant cette période de 35 ans.
The王牌 intégrale consiste donc dans la bonification:
1° des bénéfices réels ou, du moins, vraisem-
blables de ces 35 exercices (sous déduction de
tous les frais de réorganisation ou de recons-
cier, qui, au sol, sont soldés par un dé-
ficit); 2° du prix que le Portugal devrait payer dans
35 ans pour racheter la ligne. A cet effet, on
l’article 28 de la concession, ce prix serait
ergal au rendement moyen des sept dé-
nières années multiplié par 20. Pour se faire, le
chiffre de l’indemnite globale due à une date déterminée,
ici de la rescission par exemple, il suffit d’ad-
ditionner les diverses sommes échelonnées sur
les 35 ans de la concession. Les experts se
sentient toutefois de réduire les hypothèses de
consequences aussi osées: on a vu qu’il s’ar-
et à la limite de capacité de transport réelle, avec la simple voie actuelle, limi-
teux que s’il s’agissait de 1807. Ce
Ce procédé a suscité les critiques des deux
parties: le Portugal taxe d’exagéré le coefficient
d’augmentation annuelle que les experts ont fixé à
à ce pourcentage, il serait déjà dé-
ment par les faits et ne tiendrait d’ailleurs pas
compte des aléas de toute sorte auxquels est
exposé le trafic d’une ligne dans un pays neuf,
sujet à des bouleversements imprévus. Les par-
fois demanderesses, au contraire, affirment que
Transvaal dédoublera certainement sa voie,
une fois la limite de capacité de la ligne simple
atteinte, et en tirent cette conséquence que la ca-
pacité de transport doit être considérée comme
limitée et la progression de 10% acceptée
comme vraisemblable jusqu’à l’expiration du termi-
35 ans.
Le Tribunal a le sentiment que les arguments
pour et contre que font valoir ces critiques se
contrebalaient: s’il est, d’une part, assez plaus-
ible que les propriétaires de la ligne du Trans-
vaal se prétendent, le moment venu, à un
à défaut de libre, le coefficient de 10%'
semble, d’autre part, n’avoir été admis que sous
l’influence d’une opinion générale que l’on peut
de l’année 1866, année de prospérité exceptionnelle,
et être plutôt exagéré, en ce sens du moins qu’il ne
sera pas toujours atteint et qu’il ne se main-
tiendra en tous cas pas infiniment.
La seule chose qui paraît hors de doute,
revenue, c’est que, tôt ou tard, la capacité
actuelle de transport et le maximum de rende-
ment qu’elle comporte seront atteints, et cela
avant l’expiration de 35 ans de la concession.
Et si, avec les experts, on suppose que ce rès-
sultat sera acquis déjà en 1907, l’admission de
cette hypothèse, peut-être trop favorable aux dé-
ments, que dans le cas où le Portugal réclamerait ce
qu’en revanche l’hypothèse d’un dédoublement
de la voie a été jugée trop problématique par
les experts pour être prise en considération par
Le Tribunal se rallie en conséquence au sys-
tème des experts, d’après lequel le maximum de
du calcul du prix de rachat, sera déjà atteint en
1907, de telle sorte qu’à partir de cette date le rendement
sera constant et que, par conséquent, la valeur
de la ligne et son prix de rachat resteront, dès
jours, stationnaires.
L’admission de cette hypothèse a pour effet
que l’on peut prendre comme année de rachat n’importe quelle année postérieure à 1906 et faire
quelques répercussions, le bénéfice de bien qu’une année postérieure est compensé par le
escompte qu’il faudrait déduire en plus du capital de rachat pour tenir compte de la valorisation
nière anticipée. En d’autres termes, on peut, en
faisant abstraction de la période postérieure à
1907, dont les résultats financiers ne modifie-
rent plus en rien le calcul, supposer le rachat
opéré déjà au 31 décembre 1906 sur la base du
rendement maximum admis par les experts, c’est-
à-dire sur les résultats de 1907. Le value inté-
grale du chemin de fer, établie de cette façon,
se trouvera ainsi être équivalente au prix que
le gouvernement portugais aurait à payer dans le
cas d’un rachat concessionnel opéré à l’expira-
tion de la 35e année sur la base du rendement
capitalisé de l’année 1907 (égal au produit moyen
capitalisé des sept dernières années précédant
l’année de rachat, sous déduction des deux an-
nées moins productives), plus les bénéfices,
suppétés ou réels, des années intermédiaires de
1891 à 1906, et moins les déficits de 1889 à
1891, le tout ramené, par déduction de l’escompte
l’impôt, sur la base de l’intérêt capitalisé à
25 juin 1889. La somme ainsi obt-
tenue, représentant la valeur intégrale du chemin de
fer, revendrait, de droit, tout entière à la
compagnie déposant l’acte du 20 aout 1858, année
du raccordement avec le Transvaal. C’est
donc à la lumière du rapport des experts tech-

experts, le capital provenant de la Compagnie au remboursement de la somme versée, avec les sommes exigées en justice par la Compagnie anglo-portugaise, les indemnités allouées par la Compagnie portugaise. La ligne de la Compagnie correspondant au remboursement de l'indemnité versée, avec les sommes exigées en justice par la Compagnie anglo-portugaise, les indemnités allouées par la Compagnie portugaise. La ligne de la Compagnie correspondant au remboursement de l'indemnité versée, avec les sommes exigées en justice par la Compagnie anglo-portugaise, les indemnités allouées par la Compagnie portugaise. La ligne de la Compagnie correspondant au remboursement de l'indemnité versée, avec les sommes exigées en justice par la Compagnie anglo-portugaise, les indemnités allouées par la Compagnie portugaise. 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concession. Ce capital atteignait en 1907 le chiffre de 21,450,000 dont à déduire la valeur du matériel roulant, non sujet à l'amortissement, de 3,000,000. Ce capital à amortir étant ainsi de 18,450,000, l'annuité à placer à des intérêts composés, à 6 %, pour amortir cette somme en 36 ans, l'amortissement commencant à partir du 1er janvier 1900, sera de 6,800 à prélever sur le rendement annuel.

b. Le 5 % du gouvernement.

A teneur de l'article 26 de la concession, l'entreprise devait verser au gouvernement portugais le 5 % du dividende distribué à ses actionnaires. Cette redevance grevait le rendement de l'entreprise et doit également être déduite pour le calcul du produit net.

Le Tribunal se trouvant ainsi obligé de déterminer quel aurait dû être, sans la redevance, le dividende de l'année 1897, ne peut naturellement procéder, ici aussi, que par conjectures.

L'hypothèse ci-après, qui fait abstraction des conditions extraordinaires dans lesquelles les Compagnies portugaise et anglaise ont été financées, lui paraît répondre assez exactement à la consignation normale d'une compagnie de chemin de fer établie sur des bases solides.

On suppose que le capital d'établissement de l'année 1897 (21,450,000) devait être représenté pour 7/8 par des obligations et pour 1/8 par des actions, ce qui donne un capital-actions de 12,875,000 et un capital-actions de 8,575,000. Le service de la dette, supposé contractée à 6 %, exigait donc en 1897 une dépense de 775,000.

En déduisant du rendement de 1907, qui est de 3,216,000, cette somme de 775,000 reprise par le service de la dette, et les 6,800 de l'annuité d'amortissement, il reste à la disposition du dividende de 2,454,600 dont l'Etat prélève 5/8, soit 1,221,000.

c. Résumé.

Il résulte des calculs exposés aux lettres a, b et c ci-dessus que:

Du rendement 1907 estime à 3,216,000.

Vendu en déduction:

a. l'annuité d'amortissement de 6 %, 6,800
b. la redevance de 5 % au gouvernement, 1,221,000

Total des déductions 128,800

Ce qui laisse un produit net de 3,087,200

Cette somme, capitalisée à 5 % (c'est à dire multipliée par 20, donne comme prix de rachat au 31 décembre 1896 la somme de 61,744,000.

2. Calcul de la valeur du chemin de fer au 31 décembre 1886.

On obtient la valeur du chemin de fer au 31 décembre 1896 en ajoutant au prix de rachat de 1886 le produit net des dix ans précédents, tel qu'ils ont été évalués par les experts, le tout ramené par déduction de l'escompte au 31 décembre 1896.

On obtient ainsi, en déduisant des 10,000,000 de dépenses de construction présumées qui sont couvertes rémunérées au Portugal, sur le produit net de cette période, par un paiement de 10,000,000 à la date moyenne du 31 décembre 1901.

Cette déduction, ramenée à la date initiale du 31 décembre 1891 (escompte de 6 %) représente une somme de 7,473,000.

Le taux de 6 % pour le calcul de l'escompte ramenant les valeurs jusqu'en 1896 à une époque antérieure se justifie par le fait qu'il constitue une moyenne entre le taux de 7 % consenti aux oblitérations de la Compagnie anglaise et celui que l'on admet pour le rachat concessionnel de la ligne.

L'opération qui vient d'être relatée donne les chiffres que voici:

Valeur de rachat au 31 décembre 1906 61,744,000

Ce capital ramené au 31 décembre 1896 (escompte 6 %) donne 34,478,000

Produits nets annuels de 1897 à 1900:


(Date de la recision.)

Pour obtenir finalement la valeur du chemin de fer à la date de la recision, le procedé est le même que pour le calcul précédent, ainsi qu'il appert du tableau ci-après.

Valeur de la ligne au 31 décembre 1896 42,318,000

Ce capital ramené à 1890 (escompte 6 %) est de 29,833,000

Produits nets annuels de 1891 à 1897:

1891 3,640,000 48,600 1,354,000 955,000
1892 71,417,000 17,500 690,000 522,000
1893 521,300 6,700 514,000 408,000
1894 58,840,000 15,500 668,000 561,000
1895 23,600 39,000 23,600 21,000
1896 139,000 539,000 539,000 519,000

Total 1,028,000

Valeur au 31 décembre 1890 31,761,000

Ce capital ramené au 31 décembre 1889 équivaut à 29,065,000

A déduire: Pentes sur l'exploitation de 1890 694,000

Valeur au 31 décembre 1889 29,371,000

Ce capital ramené au 25 juin 1889 équivaut à 28,418,000

A déduire: Pentes sur l'exploitation de 1889 375,000

Valeur au 25 juin 1889 28,043,000

4. Répartition.

Comme il a été exposé plus haut, la somme de 28,160,000, représentant la valeur de la ligne ramenée à la date de la recision (25 juin 1889), doit être répartie entre la Compagnie concessionnaire et le Portugal au prorata de leurs apports de fonds respectifs, soit dans la proportion de 5,500,000 à la Compagnie, et de 5,570,000 au Portugal.

Cette répartition doit pour la part revenant à la Compagnie concessionnaire, valeur au 25 juin 1889, la somme de 13,980,000.

VI. Indemnité pour les terrains.

Le fait que, de l'avis du Tribunal, la recision de la concession a eu lieu contrairement aux clauses de l'acte du 14 décembre 1883, im-

plicite pour le Portugal l'obligation de payer aussi une indemnité pour les terrains que l'entreprise concessionnaire avait choisi en vertu de l'article 21 de la concession ou qu'elle avait le droit de choisir à teneur dudit article.

Les experts ont estimé ces terrains (100,000 ha) en bloc à la somme de 200,000, et ils ont maintenu cette appréciation très basse en dépit des critiques des parties demanderes, en affirmant catégoriquement qu'en dehors du périmètre de 2 km, qui est le chemin de fer, les terrains n'ont de valeur ni pour la construction, ni pour l'agriculture, ni pour l'exploitation minère.

Le Tribunal n'a pas de mot pour mettre en doute la justesse d'une appréciation passée sur les lieux par un expert objectif et impartial. Il croit cependant devoir tenir un certain compte du fait que les terrains en question étaient considérés pour un temps illimité et que la Compagnie concessionnaire a par conséquent obtenu par la recision de la possibilité de spéculer sur une plus-value à réaliser dans un avenir plus ou moins éloigné.

Guidé par cette considération toute d'équité, le Tribunal a fait sien le système d'évaluation que la partie américaine, dans son résumé final, a préconisé comme étant le plus juste: prendre d'abord la moyenne des séries de prix fournis par les experts des demandeurs, qui donne 5,114,00 ou 42,50 l'hectare, soit en tout 4,250,000; prendre ensuite la moyenne entre ce chiffre et celui de 82,000, montant de l'attribution du major Machado. On arrive ainsi à une valeur de 2,116,000 que le Tribunal, vu le caractère empirique du procédé, arrondit à la somme de deux millions de francs, valeur au 25 juin 1889.

Le Tribunal ne saurait allouer de ce coute une somme plus considérable, étant donné que les parties demanderes elles-mêmes, dans leurs écritures, n'avaient traité la question des terrains que comme un point purement secondaire et qu'elles ne lui ont attribué une importance ma}

jeure que dans une phase du procès où l'allégation de nouveaux faits n'était plus loisible.

VII. DÉCOMPTÉ.

Suivant les exposés (V et VI) qui précèdent, l'indemnité, arrêtée à la date du 25 juin 1889, se chiffre comme suit:

Part à la valeur du chemin de fer 15,980,000
Indemnité pour les terrains 2,000,000

Total 17,980,000
Le Portugal a versé en juillet 1890 à valeur souscrite comme unacompté de £ 28,000, soit, au cours de fr. 25.20, de fr. 705,600. Ce paiement ramené, lui aussi, au 25 juin 1889, représente à la dite date un montant, à déduction de ...

La somme est de £ 15,314,000.

La somme est de £ 15,314,000.

VIII. CONSIDÉRATIONS ACCESSOIRES.

1. L’exposé des motifs qui précède ne s’est, à dessein, point occupé du mémorandum au Transvaal, du 17 mai 1884, dont les demandeurs font un grief à la partie défendue.

Il n’est point établi, en effet, que cet acte, auquel la partie américaine elle-même n’attribue que l’importance d’un « fait secondaire », ait un rapport de cause à effet avec le préjudice occasionné par la réscription.

Si la Compagnie portugaise a échoué pendant plusieurs années dans ses tentatives d’emprunt, cet échec peut bien être attribué à son manque absolu de surface financière.

Mais à supposer même que le mémorandum ait été la cause maîtresse des retards qu’a subis la réunion des fonds nécessaires à l’entreprise, ce fait n’aurait de l’importance que s’il devait servir à disculper la Compagnie de n’avoir pas achevé la ligne dans le délai impart par la concession. Le Tribunal ayant, déjà, pour d’autres motifs, décrété mal fondé ce grief fait à la Compagnie, le mémorandum en question est devenu un fait sans portée dans la cause.

2. Il en est de même du grief fait au Portugal d’avoir, une fois la réscription prononcée, omis de mettre le chemin de fer aux enchères à la manière d’un compromis. Le Tribunal tient pour plausible l’explication donnée à ce sujet par l’État défendeur : le fait que les demandeurs eurent d’emblée recours à la voie diplomatique pour réclamer une indemnité en argent semblait, en effet, indiquer de leur part la renonciation à la voie de la mise aux enchères, tracée par l’article 42 de la concession.

Le Tribunal est d’ailleurs convaincu que la mise en adjudication, opérée en 1889, est en tout cas produisant une somme très sensiblement inférieure à celle allouée par le présent jugement.

3. La conclusion de la partie défendue est en déduction d’un cautionnement de £ 15,000, effectué par le concessionnaire et restitué depuis à la Compagnie, ne saurait être accueillie du moment qu’il n’a pas été jugé que la réscription était justifiée par une inexécution du contrat de la part de l’entreprise concessionnaire.

IX. INTÉRÊTS.

La somme de fr. 15,314,000 représentant la valeur du chemin de fer et des terrains à la date de la réscription, pouvait être réclamé d’intérêts et intérêts, il est juste qu’elle soit productive d’intérêts jusqu’au jour du paiement, cela d’autant plus que le Portugal a bénéficié dans l’intervalle de la contre-valeur en nature dont la productivité considérable n’a plus à être démontrée.

Le taux de ces intérêts moratoires doit être fixé à 5 % en conformité du code de commerce portugais du 28 juin 1888 (art. 102, § 2) : « Lorsque des intérêts... » sont des en vertu d’une disposition de loi, ils seront de 5 % en matière commerciale.

On ne peut d’ailleurs s’agir que d’intérêts simples, la loi portugaise n’admettant pas en pareil cas l’allocation d’intérêts composés. Au surplus, c’est là le mode de calcul généralement adopté en matière d’intérêts moratoires.

X. ATTRIBUTION ET RÉPARTITION DE L’INDÉNITÉ.

Il a déjà été relevé que la seule personne qui, en droit strict, aurait qualité pour se porter demanderesse vis-à-vis du gouvernement portugais est la Compagnie concessionnaire du chemin de fer ; car c’est elle seule qui était parties contractuelles avec l’État défendeur et c’est elle qui a été dép possée par la réscription.

Le Gouvernement défendeur ayant, cependant, déclaré lui-même ne fonder aucune exception sur le fait que le partage légitime à l’action n’est pas partie au procès, le Tribunal arbitral doit prendre acte de ce que les parties ont convenu, d’un commun accord, de lui substituer la Delagosa Bay Company. Au reste, celle-ci avait, de fait, assumé la tâche incombant à la Compagnie portugaise, demeurée concessionnaire en la forme, et était devenue propriétaire de la presque totalité de ses actions, propriété privée, et il est vrai, d’un droit de gage en faveur de ses créanciers obligataires. Aussi bien, le montant alloué par le présent jugement ne peut-il être attribué à la Compagnie anglaise à la condition que celle-ci l’affecte au paiement de ces créanciers obligataires, et autres s’il y a lieu, selon leur rang. Ces créanciers n’étant pas représentés directement dans ce procès et n’ayant pas pour conséquence d’occasionner leurs moyens et conclusions, le Tribunal n’est pas en mesure d’opérer lui-même cette répartition, mais doit abandonner ce soin à qui de droit, en se bornant à ordonner, en principe, qu’il soit dressé un état de distribution.

C’est dans cet état de distribution que la partie américaine, comme tout autre créancier, devra faire valoir ses droits. Il est impossible de lui reconnaître un procès avec le Portugal, en concurrence avec la Compagnie anglaise et au même titre que celle-ci. L’héritière de feu Mac Murdo intervient dans ce procès à titre de propriétaire d’actions et d’obligations de la Compagnie anglaise, acquises en échange d’actions de la Compagnie portugaise, et, de plus, en qualité de titulaire du « droit de contrôle » qu’elle estime également être en mesure d’exercer dans la Compagnie anglaise. Or, aucun de ces titres ne saurait lui conférer une action directe contre le Portugal ; elle ne possède, de ces différents chefs, que des prétentions à faire valoir contre la Compagnie anglaise. Ce sont là des questions de ménage intérieur qu’il est matériellement impossible de trancher dans un procès lié entre la Compagnie anglaise d’une part, comme ayant droit de la Compagnie concessionnaire, et le gouvernement du Portugal, d’autre part. On cherchera vainement un motif plausible qui permet juridiquement de faire une situation spécialisée à Madagascar en sa qualité d’accionnaire la plus forte de la Compagnie anglaise et de porteuse d’obligations de celle-ci, et de la traiter, en cette qualité, sur un autre pied que n’octroyer l’accord de l’accionnaire ou obligataire de la Compagnie anglaise.

Tout ce qu’il est au pouvoir du Tribunal de faire à cet égard pour tenir compte de la situation spéciale de la Compagnie Mac Murdo serait par le compromis arbitral, c’est d’ordonner que la somme qui lui reviendra suivant l’état de distribution à dresser sera versée directement au gouvernement de l’endroit.

Il est bien entendu que le Portugal n’est point tenu d’attendre que l’état de distribution soit arrêté, mais qu’il peut déjà auparavant, comme tout débiteur, se livrer en conséquence la somme globale entre les mains d’un tiers dépositaire présentant des garanties indiscutables.

XI. FRAIS.

Quant à la répartition des frais, le Tribunal doit croire devin tenant compte de ce que les parties demanderesse ont obtenu environ le tiers de ce que réclamaient et que le Portugal est condamné à payer environ le triple de ce qu’il offrait. Il n’y a donc, à proprement parler, aucun parti qui obtienne l’entier de ses conclusions. Aussi bien convient-il de compenser les dépens des parties, c’est-à-dire de laisser à la charge de chacune d’elles les frais extraordinaire qu’elles ont été appelées à faire, et de leur faire supporter par parts égales, savoir chacun un tiers, les frais de l’arbitrage.

Par ces motifs, le Tribunal dit et prononce :

1er Le Gouvernement du Portugal, partie défendue, est condamné à payer aux Gouverneurs généraux de l’Amérique du Nord et de la Grande-Bretagne, parties demanderesse, ensemble, en plus des £ 28,000 versés à compte en 1890, la somme de quinze millions trois cent quarante mille francs (15,314,000 fr.) en monnaie légale suisse, avec, en plus, les intérêts simples de cette somme, au taux de 5 1/2 %, l’an du 25 juin 1889 jusqu’au jour du paiement.

2e Cette somme, après déduction de ce qui sera nécessaire pour couvrir les frais de l’arbitrage incombant aux parties demanderesse, et de plus, le retrait du £ 28,000 versée à compte en 1890 seront affectés au paiement des créanciers obligataires, et autres, s’il y a lieu, de la Delagosa Bay Company, selon leur rang.

Les parties demanderesse dresseront à cet effet un état de distribution.

Le Gouvernement du Portugal aura à verser échéances égales dans le cours de l’année, en plus du compromis arbitral de 1890.

Il versera le surplus au gouvernement de la Grande-Bretagne pour le compte de tous les autres ayants droit.

3° Le délai de six mois fixé par le dernier alinéa de l’article IV du compromis arbitral courra à partir de ce jour.


5° Les conclusions des parties, pour autant qu’elles étaient de dispositif ci-dessous, sont écrites.

6° Une expédition authentique de la présente sentence sera délivrée par l’intermédiaire du Conseil fédéral suisse à chacune des trois parties en cause.

Ainsi délibéré en séance du Tribunal arbitral et expédié à Berne le 29 mars 1900.

Les motifs ont été approuvés à Berne le 30 mai 1900.

1 Source finale du Tribunal arbitral de Delagosa, p. 155-200.
S.S. “I’m Alone” (Canada/United States of America)
Reports of 30 June 1933 and 5 January 1935

United Nations, *Reports of International Arbitral Awards*,
Volume III
REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

S.S. “I'm Alone” (Canada, United States)

30 June 1933 and 5 January 1935

VOLUME III pp. 1609-1618

PARTIES: Canada, United States of America.

SPECIAL AGREEMENT: Convention of January 23, 1924.

ARBITRATORS: Willis van Devanter (U.S.A.), Lyman P. Duff (Canada).

AWARD: June 30, 1933, and January 5, 1935.

Vessel.—Canadian registration.—De facto ownership.—American citizens.—Violation of American laws.—Hot pursuit.—Place of pursuit.—Intentional sinking.—Not justified.—No compensation for loss of ship or cargo.—Apology for wrongful sinking.—Indemnity as material amend.—Indemnities to captain and crew.

1 For bibliography, index and tables, see end of this volume.
**Special Agreement.**

CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND GREAT BRITAIN TO AID IN THE PREVENTION OF THE SMUGGLING OF INTOXICATING LIQUORS INTO THE UNITED STATES.

Signed at Washington, January 23, 1924; ratifications exchanged at Washington, May 22, 1924.

The President of the United States of America;
And His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India;
Being desirous of avoiding any difficulties which might arise between them in connection with the laws in force in the United States on the subject of alcoholic beverages;
Have decided to conclude a convention for that purpose;
And have appointed as their plenipotentiaries:
The President of the United States of America; Charles Evans Hughes. Secretary of State of the United States;
His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India: The Right Honorable Sir Auckland Campbell Geddes, G.C.M.G., K.C.B., His Ambassador Extraordinary and Plenipotentiary to the United States of America;
Who, having communicated their full powers found in good and due form, have agreed as follows:

**ARTICLE I.**

The high contracting parties declare that it is their firm intention to uphold the principle that three marine miles extending from the coastline outwards and measured from low-water mark constitute the proper limits of territorial waters.

**ARTICLE II.**

(1) His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavoring to import or have imported alcoholic beverages into the United States, its territories or possessions in violation of the laws there in force. When such enquiries and examination show a reasonable ground for suspicion, a search of the vessel may be instituted.

(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, its territories or possessions prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with such laws.

(3) The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense. In cases, however, in which the liquor is intended to be conveyed to the United States, its territories or possessions by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised.

**ARTICLE III.**

No penalty or forfeiture under the laws of the United States shall be applicable or attach to alcoholic liquors or to vessels or persons by reason of the carriage of such liquors, when such liquors are listed as such in the cargo destined for a port foreign to the United States, its territories or possessions on board British vessels voyaging to or from ports of the United States, or its territories or possessions or passing through the territorial waters thereof, and such carriage shall be as now provided by law with respect to the transit of such liquors through the Panama Canal, provided that such liquors shall be kept under seal continuously while the vessel on which they are carried remains within said territorial waters and that no part of such liquors shall at any time or place be unladen within the United States, its territories or possessions.

**ARTICLE IV.**

Any claim by a British vessel for compensation on the grounds that it has suffered loss or injury through the improper or unreasonable exercise of the rights conferred by Article II of this treaty or on the ground that it has not been given the benefit of Article III shall be referred for the joint consideration of two persons, one of whom shall be nominated by each of the high contracting parties.

Effect shall be given to the recommendations contained in any such joint report. If no joint report can be agreed upon, the claim shall be referred to the Claims Commission established under the provisions of the Agreement for the settlement of outstanding pecuniary claims signed at Washington the 18th August, 1910, but the claim shall not, before submission to the tribunal, require to be included in a schedule of claims confirmed in the manner therein provided.

**ARTICLE V.**

This treaty shall be subject to ratification and shall remain in force for a period of one year from the date of the exchange of ratifications.

Three months before the expiration of the said period of one year, either of the high contracting parties may give notice of its desire to propose modifications in the terms of the treaty.

If such modifications have not been agreed upon before the expiration of the term of one year mentioned above, the treaty shall lapse. If no notice is given on either side of the desire to make such modifications, the treaty shall remain in force for another year, and so on automatically, but subject always in respect of each such year of a period to the right
on either side to propose as provided above three months before its expiration modifications in the treaty, and to the provision that if such modifications are not agreed upon before the close of the period of one year, the treaty shall lapse.

ARTICLE VI.

In the event that either of the high contracting parties shall be prevented either by judicial decision or legislative action from giving full effect to the provisions of the present treaty the said treaty shall automatically lapse, and, on such lapse or whenever this treaty shall cease to be in force, each high contracting party shall enjoy all the rights which it would have possessed had this treaty not been concluded.

The present convention shall be duly ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by His Britannic Majesty; and the ratifications shall be exchanged at Washington as soon as possible.

In witness whereof, the respective plenipotentiaries have signed the present convention in duplicate and have thereunto affixed their seals.

Done at the city of Washington this twenty-third day of January, in the year of our Lord one thousand nine hundred and twenty-four.

[Seal] Charles Evans Hughes.

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‘I'M ALONE’ CASE.

Joint Interim Report of the Commissioners dated the 30th June, 1933.

The Honourable the Secretary of State for the United States of America; and
The Right Honourable
The Minister of External Affairs for Canada.

EXCELLENCIES:

Willis van Devanter and Lyman Poore Duff, the Commissioners appointed respectively by the high contracting parties pursuant to Article 4 of the Convention of the 23rd day of January, 1924, between His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas and the President of the United States of America, beg leave to present the following interim report and recommendations.

In compliance with a direction given on the 28th of January, 1932, the agents and counsel of the high contracting parties respectively have submitted briefs and oral argument in relation to certain preliminary questions which are here set forth; and the Commissioners, in the exercise of their duty under the authority conferred upon them by the appointment aforesaid, have given and do give the answers hereinafter respectively appended to these questions:

The question numbered one is in the following terms:—

The first question is whether the Commissioners may enquire into the beneficial or ultimate ownership of the I'm Alone or of the shares of the corporation that owned the ship. If the Commissioners are authorized to make this enquiry, a further question arises as to the effect of indirect ownership and control by citizens of the United States upon the Claim; viz., whether it would be an answer to the Claim under the Convention, or whether it would go to mitigation of damages, or whether it would merely be a circumstance that should actuate the claimant Government in refraining from pressing the claim, in whole or in part.

The answer given to this question is as follows:—

The Commissioners think they may enquire into the beneficial or ultimate ownership of the I'm Alone and of the shares of the corporation owning the ship; as well as into the management and control of the ship and the venture in which it was engaged; and that this may be done as a basis for considering the recommendations which they shall make. But the Commissioners reserve for further consideration the extent to which, if at all, the facts of such ownership, management and control may affect particular branches or phases of the claim presented.

The question numbered two is in the following terms:—

The second question relates to the right of hot pursuit. Further, it has two aspects, and it is based upon the assumption that the averments in the Answer with regard to the location and speed of the I'm Alone are true. The question in its first aspect is whether the Government of the United States under the Convention has the right of hot pursuit where the offending vessel is within an hour's sailing distance of the shore at the commencement of the pursuit and beyond that distance at its termination. The question in its second aspect is whether the Government of the United States has the right of hot pursuit of a vessel when the pursuit commenced within the distance of twelve miles established by the revenue laws of the United States and was terminated on the high seas beyond that distance.

The answer given to this question is as follows:—

As respects the question in its first aspect, viz., whether the Government of the United States under the Convention has the right of hot pursuit where the offending vessel is within an hour's sailing distance of the shore at the commencement of the pursuit and beyond that distance at its termination,

the Commissioners are as yet not in agreement as to the proper answer, nor have they reached a final disagreement on the matter. The Commissioners, therefore, suggest that the proceeding go forward and that the evidence be produced in an orderly way, leaving the Commissioners free to give further consideration to the matter and to announce their agreement or disagreement thereon as the case may be.

The question in its second aspect need not be answered because the Government of the United States has now withdrawn so much of its answer as led to the propounding of that aspect of the question.
The question numbered three is in the following terms:—

The third question is based upon the assumption that the United States Government had the right of hot pursuit in the circumstances and was entitled to exercise the rights under Article II of the Convention at the time when the Dexter joined the Wolcott in the pursuit of the I'm Alone. It is also based upon the assumption that the averments set forth in paragraph eight of the Answer are true. The question is whether, in the circumstances, the Government of the United States was legally justified in sinking the I'm Alone.

The answer given to this question is as follows:—

On the assumptions stated in the question, the United States might, consistently with the Convention, use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless. But the Commissioners think that, in the circumstances stated in paragraph eight of the Answer, the admittedly intentional sinking of the suspected vessel was not justified by anything in the Convention.

Having thus answered the preliminary questions, the Commissioners have had under consideration the practical application of their answers to the future conduct of the case.

They, accordingly, make to the two Governments the following recommendations:—

First: that the agents be instructed by their respective Governments to prepare and submit to the Commissioners separate statements setting forth in detail the contentions of their respective Governments as to the ultimate beneficial interests in the vessel and in the cargo, together with specifications of the documents and witnesses relied upon to substantiate their respective contentions:

Second: that the agents be similarly instructed to submit to the Commissioners either a joint statement or separate statements (in either case specifically itemized) of the sums which should be payable by the United States in case the Commissioners finally determine that compensation is payable by that Government.

Upon compliance with the foregoing recommendations the Commissioners will notify the agents by what procedure the resulting issues of fact will be determined and upon such determination will make a final recommendation.

The Commissioners have the honour to be, Excellencies,

Your most humble, obedient servants,

WILLIS VAN DEVANTER.

LYMAN P. DUFF.

30th June, 1933.
also based upon the assumption that the averments set forth in paragraph eight of the Answer are true. The question is whether, in the circumstances, the Government of the United States was legally justified in sinking the I'm Alone."

"The answer given to this question is as follows:

On the assumptions stated in the question, the United States might, consistently with the Convention, use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless. But the Commissioners think that, in the circumstances stated in paragraph eight of the Answer, the admittedly intentional sinking of the suspected vessel was not justified by anything in the Convention."

The preliminary questions having been answered, the Commissioners made the following recommendations as to the future conduct of the case:

"First: that the agents be instructed by their respective Governments to prepare and submit to the Commissioners separate statements setting forth in detail the contents of their respective Governments as to the ultimate beneficial interests in the vessel and in the cargo, together with specifications of the documents and witnesses relied upon to substantiate their respective contentions:

"Second: that the agents be similarly instructed to submit to the Commissioners either a joint statement or separate statements (in either case specifically itemized) of the sums which should be payable by the United States in case the Commissioners finally determine that compensation is payable by that Government."

Statements were submitted to the Commissioners pursuant to these recommendations; and, on the 28th of December, 1934, the Commissioners convened for the purpose of hearing further evidence and oral arguments touching the matters in dispute; and the hearing was concluded on the 3rd of January, 1935. The Commissioners now present their joint final report.

It will be recalled that the I'm Alone was sunk on the 22nd day of March, 1929, on the high seas, in the Gulf of Mexico, by the United States revenue cutter Dexter. By their interim report the Commissioners found that the sinking of the vessel was not justified by anything in the Convention. The Commissioners now add that it could not be justified by any principle of international law.

The vessel was a British ship of Canadian registry; after her construction she was employed for several years in rum running, the cargo being destined for illegal introduction into, and sale in, the United States. In December, 1928, and during the early months of 1929, down to the sinking of the vessel on the 22nd of March of that year, she was engaged in carrying liquor from Belize, in British Honduras, to an agreed point or points in the Gulf of Mexico, in convenient proximity to the coast of Louisiana, where the liquor was taken from her in smaller craft, smuggled into the United States, and sold there.

We find as a fact that, from September, 1928, down to the date when she was sunk, the I'm Alone, although a British ship of Canadian registry, was de facto owned, controlled, and at the critical times, managed, and her movements directed and her cargo dealt with and disposed of, by a group of persons acting in concert who were entirely, or nearly so, citizens of the United States, and who employed her for the purposes mentioned. The possibility that one of the group may not have been of United States nationality we regard as of no importance in the circumstances of this case.

The Commissioners consider that, in view of the facts, no compensation ought to be paid in respect of the loss of the ship or the cargo.

The act of sinking the ship, however, by officers of the United States Coast Guard, was, as we have already indicated, an unlawful act; and the Commissioners consider that the United States ought formally to acknowledge its illegality, and to apologize to His Majesty's Canadian Government therefor; and, further, that as a material amend in respect of the wrong the United States should pay the sum of $25,000 to His Majesty's Canadian Government; and they recommend accordingly.

The Commissioners have had under consideration the compensation which ought to be paid by the United States to His Majesty's Canadian Government for the benefit of the captain and members of the crew, none of whom was a party to the illegal conspiracy to smuggle liquor into the United States and sell the same there. The Commissioners recommend that compensation be paid as follows:

For the captain, John Thomas Randell, the sum of $7,906.00
For John Williams, deceased, to be paid to his proper representatives 1,250.50
For Jens Jansen 1,098.00
For James Barrett 1,032.00
For William Wordsworth, deceased, to be paid to his proper representatives 907.00
For Eddy Young 999.50
For Chesley Hobbs 1,323.50
For Edward Fouchard 965.00
For Amanda Mainguy, as compensation in respect of the death of Leon Mainguy, for the benefit of herself and the children of Leon Mainguy (Henriette Mainguy, Jeanne Mainguy and John Mainguy) the sum of 10,185.00

In submitting this, their final report,

The Commissioners have the honour to be, Excellencies,

Your most humble, obedient servants,

WILLIS VAN DEVANTER.
LYMAN P. DUFF.

5TH JANUARY, 1935.
General Claims Commission (Mexico and United States of America)

North American Dredging Company of Texas (U.S.A.) v. United Mexican States
Award of 31 March 1926

United Nations, *Reports of International Arbitral Awards*, Volume IV
North American Dredging Company of Texas (U.S.A.) v. United Mexican States

31 March 1926

VOLUME IV pp. 26-35

NORTH AMERICAN DREDGING COMPANY OF TEXAS (U.S.A.)
v. UNITED MEXICAN STATES.

(March 31, 1926, concurring opinion by American Commissioner, undated. Pages 21-24).

JURISDICTION.—Calvo clause. A Calvo clause held to bar claimant from presenting to his Government any claim connected with the contract in which it appeared and hence to place any such claim beyond the jurisdiction of the tribunal. The clause will not preclude his Government from espousing, or the tribunal from considering, other claims based on the violation of international law. Article V of the compromis held not to prevent the foregoing result.

CONTRACT CLAIMS. Motion to dismiss, for lack of jurisdiction, claim based on non-performance of a contract with Mexican Government rejected.

Cross-references: Am. J. Int. Law, Vol. 20, 1926, p. 800; Annual Digest, 1925-1926, pp. 4, 179, 191, 218, 244, 261, 292; British Yearbook, Vol. 8, 1927, p. 181


This case is before this Commission on a motion of the Mexican Agent to dismiss. It is put forward by the United States of America on behalf of North American Dredging Company of Texas, an American corporation, for the recovery of the sum of $233,523.30 with interest thereon, the amount of losses and damages alleged to have been suffered by claimant for breaches of a contract for dredging at the port of Salina Cruz, which contract was entered into between the claimant and the Government of Mexico, November 23, 1912. The contract was signed at Mexico City. The Government of Mexico was a party to it. It had for its subject matter services to be rendered by the claimant in Mexico. Payment therefor was to be made in Mexico. Article 18, incorporated by Mexico as an indispensable provision, not separable from the other provisions of the contract, was subscribed to by the claimant for the purpose of securing the award of the contract. Its translation by the Mexican Agent reads as follows:

“The contractor and all persons who, as employees or in any other capacity, may be engaged in the execution of the work under this contract either directly or indirectly, shall be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work and the fulfilment of this contract. They shall not claim, nor shall they have, with regard to the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans,
The Contested Provision, in this case, is part of a contract and must be upheld unless it is repugnant to a recognized rule of international law. What is the effect of the Calvo clause under the circumstances? The Calvo clause is an agreement between two nations that affects the application of international law. The clause states that all international law is subject to the United States' jurisdiction. It is based on the principle of the right of nations to have jurisdiction over their own territory and the persons and property within it. The clause has been upheld by international tribunals, including the International Court of Justice. The clause is not repugnant to international law; therefore, it is enforceable. The case demonstrates that international law is subject to the jurisdiction of the United States, which has the power to apply its laws to foreign affairs. This is consistent with the principle of the sovereignty of states and the right of nations to have jurisdiction over their own territory and the persons and property within it.
abroad from being subject to any limitation whatsoever under any circumstances. The right of protection has been limited by treaties between nations in provisions related to the Calvo clause. While it is true that Latin-American countries—which are important members of the family of nations and which have played for many years an important and honorable part in the development of international law—are parties to most of these treaties, still such countries as France, Germany, Great Britain, Sweden, Norway, and Belgium, and in one case at least even the United States of America (Treaty between the United States and Peru dated September 6, 1870, Volume 2, Malloy’s United States Treaties, at page 1426; article 37) have been parties to treaties containing such provisions.

10. What Mexico has asked of the North American Dredging Company of Texas as a condition for awarding it the contract which it sought is, “If all of the means of enforcing your rights under this contract afforded by Mexican law, even against the Mexican Government itself, are wide open to you, as they are wide open to our own citizens, will you promise not to ignore them and not to call directly upon your own Government to intervene in your behalf in connexion with any controversy, small or large, but seek redress under the laws of Mexico through the authorities and tribunals furnished by Mexico for your protection?” and the claimant, by subscribing to this contract and seeking the benefits which were to accrue to him thereunder, has answered, “I promise”.

11. Under the rules of international law may an alien lawfully make such a promise? The Commission holds that he may, but at the same time holds that he can not deprive the government of his nation of its undoubted right of applying international remedies to violations of international law committed to his damage. Such government frequently has a larger interest in maintaining the principles of international law than in recovering damage for offenses committed in a particular case, and manifestly such citizen can not by contract tie in this respect the hands of his Government. But while any attempt to so bind his Government is void, the Commission has not found any generally recognized rule of positive international law which would give to his Government the right to intervene to strike down a lawful contract, in the terms set forth in the preceding paragraph 10, entered into by its citizen. The obvious purpose of such a contract is to prevent abuses of the right to protection, not to destroy the right itself—abuses which are intolerable to any self-respecting nation and are prolific breeders of international friction. The purpose of such a contract is to draw a reasonable and practical line between Mexico’s sovereign right of jurisdiction within its own territory, on the one hand, and the sovereign right of protection of the Government of an alien whose person or property is within such territory, on the other hand. Unless such line is drawn and these two coexisting rights are permitted constantly to overlap, continual friction is inevitable.

12. It being impossible to prove the illegality of the said provision, under the limitations indicated, by adducing generally recognized rules of positive international law, it appears that only can be contested by invoking its incongruity to the law of nature (natural rights) and its inconsistency with inalienable, indestructible, unprescribable, unencumbered rights of nations. The law of nature may have been helpful, some three centuries ago, to build up a new law of nations, and the conception of inalienable rights of men and nations may have exercised a salutary influence, some one hundred and fifty years ago, on the development of modern democracy on both sides of the ocean; but they have failed as a durable foundation of either municipal or international law and can not be used in the present day as substitutes for positive municipal law, on the one hand, and for positive international law, as recognized by nations and governments through their acts and statements, on the other hand. Inalienable rights have been the cornerstones of policies like those of the Holy Alliance and of Lord Palmerston; instead of bringing to the world the benefit of mutual understanding, they are to weak or less fortunate nations an unrestrained menace.

Interpretation of the Calvo clause in the present contract

13. What is the true meaning of article 18 of the present contract? It is essential to state that the closing words of the article should be combined so as to read: “being deprived, in consequence, of any rights as aliens in any matter connected with this contract, and without the intervention of foreign diplomatic agents being in any case permissible in any matter connected with this contract”. Both the commas and the phrasing show that the words “in any matter connected with this contract” are a limitation on either of the two statements contained in the closing words of the article.

14. Reading this article as a whole, it is evident that its purpose was to bind the claimant to be governed by the laws of Mexico and to use the remedies existing under such laws. The closing words “in any matter connected with this contract” must be read in connection with the preceding phrase “in everything connected with the execution of such work and the fulfilment of this contract” and also in connection with the phrase “regarding the interests or business connected with this contract”. In other words, in connection with the execution of the contract, or in putting forth any claim “regarding the interests or business connected with this contract”, the claimant should be governed by those laws and remedies which Mexico had provided for the protection of its own citizens. But this provision did not, and could not, deprive the claimant of his American citizenship and all that that implies. It did not take from him his undoubted right to apply to his own Government for protection if his resort to the Mexican tribunals or other authorities available to him resulted in a denial or delay of justice as that term is used in international law. In such a case the claimant’s complaint would be that his contract was violated but that he had been denied justice. The basis of his appeal would be not a construction of his contract, save perchance in an incidental way, but rather an internationally illegal act.

15. What, therefore, are the rights which claimant waived and those which he did not waive in subscribing to article 18 of the contract? (a) He waived his right to conduct himself as if no competent authorities existed in Mexico; as if he were engaged in fulfilling a contract in an inferior country subject to a system of capitulations; and as if the only real remedies available to him in the fulfilment, construction, and enforcement of this contract were international remedies. All these he waived and had a right to waive. (b) He did not waive any right which he possessed as an American citizen as to any matter not connected with the fulfilment, execution, or enforcement of this contract as such. (c) He did not waive his undoubted right as an American citizen to apply to his Government for protection against the violation of international law (internationally illegal acts) whether growing out of this
contract or out of other situations. (d) He did not and could not affect the right of his Government to extend to him its protection in general or to extend to him its protection against breaches of international law. But he did frankly and unreservedly agree that in consideration of the Government of Mexico awarding him this contract, he did not need and would not invoke or accept the assistance of his Government with respect to the fulfillment and interpretation of his contract and the execution of his work thereunder. The conception that a citizen in doing so imposes upon a sovereign, inalienable, unlimited right of his government belongs to those ages and countries which prohibited the giving up of his citizenship by a citizen or allowed him to relinquish it only with the special permission of his government.

16. It is quite true that this construction of article 13 of the contract does not effect complete equality between the foreigner subscribing the contract on the one hand and Mexicans on the other hand. Apart from the fact that equality of legal status between citizens and foreigners is by no means a requisite of international law—in some respects the citizen has greater rights and larger duties, in others the foreigner has—article 18 only purports equality between the foreigner and Mexicans with respect to the execution, fulfillment, and interpretation of this contract and such limited equality is properly obtained.

17. The Commission ventures to suggest that it would strengthen and stimulate friendly relations between nations if in the future such important clauses in contracts as article 18 in the contract in question were couched in such clear, simple, and straightforward language, frankly expressing its purpose with all necessary limitations and restraints as would preclude the possibility of misinterpretation and render it insusceptible of such extreme construction as sought to be put upon article 18 in this instance, which if adopted would result in striking it down as illegal.

The Calvo clause and the claimant

18. If it were necessary to demonstrate how legitimate are the fears of certain nations with respect to abuses of the right of protection and how seriously the sovereignty of those nations within their own boundaries would be impaired if some extreme conceptions of this right were recognized and enforced, the present case would furnish an illuminating example. The claimant, after having solemnly promised in writing that it would not ignore the local laws, remedies, and authorities, behaved from the very beginning as if article 18 of its contract had no existence in fact. It used the article to procure the contract, but this was the extent of its use. It has never sought any redress by application to the local authorities and remedies which article 18 liberally granted it and which, according to Mexican law, are available to it, even against the Government, without restrictions, both in matter of civil and of public law. It has gone so far as to declare itself freed from its contract obligations by its *ipse dixit* instead of having resort to the local tribunals to construe its contract and its rights thereunder. And it has gone so far as to declare that it was not bound by article 7 of the contract and to forcibly remove a dredge to which, under that article, the Government of Mexico considered itself entitled as security for the proper fulfillment of its contract with claimant. While its behavior during the spring and summer of 1914, the latter part of the Huerta administration, may be in part explained by the unhappy conditions of friction then existing between the two countries in connection with the military occupation of Veracruz by the United States, this explanation cannot be extended from the year 1917 to the date of the filing of its claim before this Commission, during all of which time it has ignored the open doors of Mexican tribunals. The record before this Commission strongly suggests that the claimant used article 18 to procure the contract with no intention of ever observing its provisions.

The Calvo clause and the Claims Convention

19. Claims accruing prior to the signing of the Treaty must, in order to fall within the jurisdiction of this Commission under Article I of the Treaty, either have been "presented" before September 8, 1923, by a citizen of one of the Nations parties to the agreement "to [his] Government for its interposition with the other", or, after September 8, 1923, "such claims"—i.e., claims presented for interposition—may be filed by either Government with this Commission. Two things are therefore essential, (1) the presentation by the citizen of a claim to his Government and (2) the espousal of such claim by that Government. But it is urged that when a Government espouses and presents a claim here, the private interest in the claim is merged in the Nation in the sense that the private interest is entirely eliminated and the claim is a national claim, and that therefore this Commission can not look behind the act of the Government espousing it to discover the private interest therein or to ascertain whether or not the private claimant has a right to may rightfully present the claim to his Government for interposition. This view is rejected by the Commission for the reasons set forth in the second paragraph of the opinion in the Parker claim (Docket No. 127), this day decided by this Commission, and need not be repeated here.

20. Under article 18 of the contract declared upon the present claimant is precluded from presenting to its Government any claim relative to the interpretation or fulfillment of this contract. If it had a claim for denial of justice, for delay of justice or gross injustice, or for any other violation of international law committed by Mexico to its damage, it might have presented such a claim to its Government, which in turn could have espoused it and presented it here. Although the claim as presented falls within the first clause of Article I of the Treaty, describing claims coming within this Commission's jurisdiction, it is not a claim that may be rightfully presented by the claimant to its Government for espousal and hence is not cognizable here, pursuant to the latter part of paragraph 1 of the same Article I.

21. It is urged that the claim may be presented by claimant to its Government for espousal in view of the provision of Article V of the Treaty, to the effect "that no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim". This provision is limited to the application of a general principle of international law to claims that may be presented to the Commission falling within the terms of Article I of the Treaty, and if under the terms of Article I the private claimant can not rightfully present its claim to its Government and the claim therefore can not become cognizable here, Article V does not apply to it, nor can it render the claim cognizable, nor does it entitle either Government to set aside an express valid contract between one of its citizens and the other Government.
Extent of the present interpretation of the Calvo clause

22. Manifestly it is impossible for this Commission to announce an all-embracing formula to determine the validity or invalidity of all clauses partaking of the nature of the Calvo clause, which may be found in contracts, decrees, statutes, or constitutions, and under widely varying conditions. Whenever such a provision is so phrased as to seek to preclude a Government from intervening, diplomatically or otherwise, to protect its citizen whose rights of any nature have been invaded by another Government in violation of the rules and principles of international law, the Commission will have no hesitation in pronouncing the provision void. Nor does this decision in any way apply to claims not based on express contract provisions in writing and signed by the claimant or by one through whom the claimant has derived title to the particular claim. Nor will any provision in any constitution, statute, law, or decree, whatever its form, to which the claimant has not in some form expressly subscribed in writing, however it may operate or affect his claim, preclude him from presenting his claim to his Government or the Government from espousing it and presenting it to this Commission for decision under the terms of the Treaty.

23. Even so, each case involving application of a valid clause partaking of the nature of the Calvo clause will be considered and decided on its merits. Where a claim is based on an alleged violation of any rule or principle of international law, the Commission will take jurisdiction notwithstanding the existence of such a clause in a contract subscribed by such claimant. But where a claimant has expressly agreed in writing, attested by his signature, that in all matters pertaining to the execution, fulfilment, and interpretation of the contract he will have resort to local tribunals, remedies, and authorities and then willfully ignores them by applying in such matters to his Government, he will be held bound by his contract and the Commission will not take jurisdiction of such claim.

Summary of the considerations on the Calvo clause

24. (a) The Treaty between the two Governments under which this Commission is constituted requires that a claim accruing before September 8, 1923, to fall within its jurisdiction must be that of a citizen of one Government against the other Government and must not only be espoused by the first Government and put forward by it before this Commission but, as a condition precedent to such espousal, must have been presented to it for its interposition by the private claimant.

(b) The question then arises, Has the private claimant in this case put itself in a position where it has the right to present its claim to the Government of the United States for its interposition? The answer to this question depends upon the construction to be given to article 18 of the contract on which the claim rests.

(c) In article 18 of the contract the claimant expressly agreed that in all matters connected with the execution of the work covered by the contract and the fulfilment of its contract obligations and the enforcement of its contract rights it would be bound and governed by the laws of Mexico administered by the authorities and courts of Mexico and would not invoke or accept the assistance of his Government. Further than this it did not bind itself. Under the rules of international law the claimant (as well as the Government of Mexico) was without power to agree, and did not in fact agree, that the claimant would not request the Government of the United States, of which it was a citizen, to intervene in its behalf in the event of internationally illegal acts done to the claimant by the Mexican authorities.

(d) The contract declared upon, which was sought by claimant, would not have been awarded it without incorporating the substance of article 18 therein. The claimant does not pretend that it has made any attempt to comply with the terms of that article, which as here construed is binding on it. Therefore the claimant has not put itself in a position where it may rightfully present this claim to the Government of the United States for its interposition.

(e) While it is true that under Article V of the Treaty the two Governments have agreed “that no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim”, this provision is limited to claims falling under Article I and therefore rightfully presented by the claimant.

(f) If it were necessary to construe article 18 of the contract as to bind the claimant not to apply to its Government to intervene diplomatically or otherwise in the event of a denial of justice to the claimant growing out of the contract declared upon or out of any other situation, then this Commission would have no hesitation in holding such a clause void ab initio and not binding on the claimant.

(g) The foregoing pertains to the power of the claimant to bind itself by contract. It is clear that the claimant could not under any circumstances bind its Government with respect to remedies for violations of international law.

(h) As the claimant voluntarily entered into a legal contract binding itself not to call as to this contract upon its Government to intervene in its behalf, and as all of its claim relates to this contract, and as therefore it can not present its claim to its Government for interposition or espousal before this Commission, the second ground of the notion to dismiss is sustained.

Decision

25. The Commission decides that the case as presented is not within its jurisdiction and the motion of the Mexican Agent to dismiss it is sustained and the case is hereby dismissed without prejudice to the claimant to pursue his remedies elsewhere or to seek remedies before this Commission for claims arising after the signing of the Treaty of September 8, 1923.

Concurring opinion

My fellow Commissioners construe article 18 of the contract before the Commission in this case to mean that with respect to all matters involving the execution, fulfilment, and interpretation of that contract the claimant bound itself to exhaust all remedies afforded under Mexican law by resorting to Mexican tribunals or other duly constituted Mexican authorities before applying to its own Government for diplomatic or other protection, and that this article imposes no other limitation upon any right of claimant.

They further hold that said article 18 was not intended to and does not prevent claimant from requesting its Government to intervene in its behalf...
diplomatically or otherwise to secure redress for any wrong which it may heretofore have suffered or may hereafter suffer at the hands of the Government of Mexico resulting from a denial of justice, or delay of justice, or any other violation by Mexico of any right which claimant is entitled to enjoy under the rules and principles of international law, whether such violation grows out of this contract or otherwise. I have no hesitation in concurring in their decision that any provision attempting to bind the claimant in the manner mentioned in this paragraph would have been void ab initio as repugnant to the rules and principles of international law.

Article 18, as thus construed, in effect does nothing more than bind the claimant by contract to observe the general principle of international law which the parties to this Treaty have expressly recognized in Article V thereof. Mexico's motive for expressly incorporating this rule as an indispensable provision of the contract, which could be ignored by the claimant only by subjecting itself to the penalties flowing from its breach of the contract, seems both obvious and reasonable and in harmony with the spirit and not repugnant to the letter of the rules and principles of international law. The provision as thus construed should be treated both by claimant and its Government with the scrupulous and unaltering respect due any legal contract.

Accepting as correct my fellow Commissioners' construction of article 18 of the contract, I concur in the disposition made of this case.

Edwin B. Parker,
Commissioner.

WILLIAM A. PARKER (U.S.A.) v. UNITED MEXICAN STATES.

(March 31, 1926. Pages 35-42.)

NATIONALITY, PRESUMPTION OF—NATIONALITY, EFFECT OF ESPOUSAL OF CLAIM BY GOVERNMENT. Fact that a Government espouses a claim does not create a presumption that claimant is of nationality of espousing Government.

NATIONALITY, PROOF OF. Nationality is a fact, to be proven as any other fact, to the satisfaction of the tribunal. Evidence held sufficient to establish nationality.

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—RULES OF EVIDENCE.—Admissibility of Evidence. The tribunal is not bound by municipal rules of evidence and the greatest liberality will obtain in the admission of evidence.

EVIDENCE, DUTY OF BOTH PARTIES TO SUBMIT. It is the duty of the two Agents to co-operate in submitting to the tribunal all relevant facts. Each Agent should present all the facts that can be reasonably ascertained by him without regard to what their effect may be.
Italian-United States Conciliation Commission

Mergé
Decision No. 55 of 10 June 1955

Mergé Case—Decision No. 55

Nationalité — Double nationalité — Droit d’un ressortissant d’une Nation Unie, possédant également la nationalité italienne, de se prévaloir des dispositions de l’article 78, paragraphe 9 a), du Traité de Paix — Absence, dans le Traité, de dispositions concernant le cas de double nationalité — Droit applicable — Principes généraux du droit international réglant le cas de double nationalité — Critères admis par la Commission pour établir la nationalité dominante ou effective — Interprétation des traités — Principes d’interprétation — Intention des rédacteurs — Esprit du Traité.

The Conciliation Commission composed of Messrs. Alexander J. Matturri, Representative of the Government of the United States of America, Mr. Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Government of the Italian Republic and Prof. José de Yanguas Messia, Professor of International Law at the University of Madrid, Third Member chosen by mutual agreement between the United States and Italian Governments,


I. The Facts

On October 26, 1948, the Embassy of the United States of America in Rome submitted to the Ministry of the Treasury of the Italian Republic on behalf of Mrs. Florence Strunsky Mergé, a national of the United States of America, a claim based upon Article 78 of the Treaty of Peace with Italy for compensation for the loss as a result of the war of a grand piano and other personal property located at Frascati, Italy, and owned by Mrs. Mergé.

As the Italian Ministry of the Treasury had rejected the claim on the grounds that Mrs. Mergé is to be deemed, under Italian law, an Italian national by marriage, the Agent of the United States of America, on August 28, 1950, submitted to this Commission the dispute which had arisen between the two Governments with respect to the claim of Mrs. Mergé.

1 Collection of decisions, vol. III, case No. 3.
Following the Answer of the Italian Agent, the Conciliation Commission issued an Order on September 27, 1951, by which the dispute was limited to the consideration of the problem of Mrs. Mergé's dual nationality, and all other questions regarding the right to compensation were reserved for subsequent consideration.

The following facts relating to the two nationalities, Italian and United States, possessed by Mrs. Mergé are revealed by the record:

Florence Strunk was born in New York City on April 7, 1909, thereby acquiring United States nationality according to the law of the United States.

On December 21, 1933, at the age of 24, Florence Strunk married Salvatore Mergé in Rome, Italy. As Mrs. Mergé is an Italian national, Florence Strunk acquired Italian nationality by operation of Italian law.

The United States Department of State issued a passport to Mrs. Mergé, then Miss Strunk, on March 17, 1931. This passport was renewed on July 11, 1933, to be valid until March 16, 1955.

Mrs. Mergé lived with her husband in Italy during the four years following her marriage until 1937. Her husband was an employee of the Italian Government, working as an interpreter and translator of the Japanese language in the Ministry of Communications. In 1937 he was sent to the Italian Embassy at Tokyo as a translator and interpreter.

Mrs. Mergé accompanied her husband to Tokyo, traveling on Italian passport No. 6816668, issued on August 27, 1937 by the Ministry of Foreign Affairs in Rome. The passport was of the type issued by the Italian Government to employees and their families bound for foreign posts.

After her arrival in Japan, Mrs. Mergé on February 21, 1940 was registered, at her request, as a national of the United States at the American Consulate General at Tokyo.

Mrs. Mergé states that, when hostilities ceased between Japan and the United States of America, she refused to be returned to the United States by the United States military authorities, having preferred to remain with her husband.

On December 10, 1948, the American Consulate at Yokohama issued an American passport to Mrs. Mergé, valid only for travel to the United States, with which she travelled to the United States. She remained in the United States for nine months, from December, 1946, until September, 1947. The American passport issued to her at Yokohama and valid originally only for travel to the United States, was validated for travel to Italy, and the Italian Consulate General at New York, on July 31, 1947, granted Mrs. Mergé a visa for Italy as a visitor, valid for three months.

On September 19, 1947, Mrs. Mergé arrived in Italy where she has since resided with her husband.

Immediately after returning to Italy, on October 8, 1947, Mrs. Mergé was registered at the United States Consulate General at the Consular Section of the American Embassy in Rome. On October 16, 1947, Mrs. Mergé executed an affidavit before an American consul officer at the American Embassy in Rome for the purpose of explaining her protracted residence outside of the United States. In this affidavit she lists her mother and father as her only ties with the United States, and states that she does not pay income taxes to the Government of the United States.

On September 11, 1950 Mrs. Mergé requested and was granted by the Consular Section of the American Embassy at Rome a new American passport to replace the one which had been issued to her on December 10, 1946, by the American Consulate at Yokohama and which had expired. In her application for the new American passport, Mrs. Mergé states that her "legal residence"

is at New York, New York, and that she intends to return to the United States to reside permanently at some indefinite time in the future.

So far as the record indicates, Mrs. Mergé is still residing with her husband in Italy.

II. THE ISSUE

It is not disputed between the Parties that the claimant possesses both nationalities. The issue is not one of choosing one of the two, but rather one of deciding whether in such case the Government of the United States may exercise before the Conciliation Commission the rights granted by the Treaty of Peace with reference to the property in Italy of United Nations nationals (Articles 78 and 83).

The Commission, completed by the Third Member, called upon to decide this case, notes that the problem raised has the importance of a question of principle, also because of the frequency with which it is presented, in view of the difference between the municipal laws (conflict between the principles of jus sanguinis and jus soli; diverse regulation of acquisition and loss of nationality by the woman who marries an alien, cases of automatic reacquisition of original nationality, etc.). The Commission has therefore deemed it advisable to take up the examination of the complex problem of dual nationality in all its aspects.

(1) Position of the Government of the United States of America:

(a) The Treaty of Peace between the United Nations and Italy provides the rules necessary to a solution of the case. The first sub-paragraph of paragraph 9 (a) of Article 78 states:

"United Nations nationals" means individuals who are nationals of any of the United Nations, or corporations or associations organized under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that the said individuals, corporations or associations also had this status on September 3, 1945, the date of the Armistice with Italy.

All United Nations nationals are therefore entitled to claim, and it is irrelevant for such purpose that they possess or have possessed Italian nationality as well.

(b) The intention of the drafters of the Peace Treaty was to protect both the direct and indirect interests of United Nations nationals in their property in Italy.

(c) The principle, according to which one State cannot afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses, cannot be applied to the Treaty of Peace with Italy because such principle is based on the equal sovereignty of States, whereas this Treaty of Peace was not negotiated between equal Powers but between the United Nations and Italy, a State defeated and obliged to accept the clauses imposed by the victors who at that time did not consider Italy a sovereign State.

(2) Position of the Italian Government:

(a) The text governing cases of dual nationality is not the first sub-paragraph of paragraph 9 (a) of Article 78 but the second sub-paragraph of the same paragraph: only in cases of treatment as enemy can the Italian national who is also a United Nations national request application of Article 78.

(b) A defeated State, even when it is obliged to undergo the imposition of the conqueror, continues to be a sovereign State. From the juridical point of view, the Treaty of Peace is an international convention, not a unilateral
act. In cases of doubt, its interpretation must be that more favourable to the
debtor.

(c) There exists a principle of international law, universally recognized and
continuously applied, by virtue of which diplomatic protection cannot be
exercised in cases of dual nationality when the claimant possesses also the
nationality of the State against which the claim is being made.

III. INTERPRETATION OF THE TREATY OF PEACE

(1) The Letter of the Treaty of Peace (Paragraph 9 (a) of Article 78):
The first problem to be confronted by the Commission is that concerning
whether this provision does or does not govern the problem of dual

(a) First sub-paragraph of the definition: "United Nations nationals" means
individuals who are nationals of any one of the United Nations, or corporations
or associations organized under the laws of any of the United Nations, at the
coming into force of the present Treaty, provided that said individuals, corpora-
tions or associations also had this status on September 3, 1943, the date of the
Armistice with Italy."

In reality, the importance of this provision is confined to two points only (1)
to explain the phrase, "United Nations nationals", used in the preceding
paragraph of Article 78 itself—doubtless for the sake of brevity, by specifying
that by such phrase it is intended to indicate "individuals who are nationals
of any one of the United Nations, or corporations or associations organized under
the laws of any of the United Nations;" (2) to require possession of such
nationality of any of the United Nations on the date of the coming into force of the
Treaty, and on September 3, 1943, that is, when the Armistice was signed.
Neither one of these two conditions refers to dual nationality.

Can it nevertheless be considered to be implicitly contained in the letter of the
text? The same question was discussed during the Venezuelan Arbitrations
(1903-1905). One of the claimants, Mrs. Brignone, a widow, possessed
dual nationality, Italian and Venezuelan. The Italian Commissioner based his
argument on the text of the Protocol. Mrs. Brignone, he stated, is Italian
according to Italian Law. It does not matter that she is also Venezuelan.
Article 4 of the Protocol of February 13, 1903, speaks of "Italian claims,
without exception". To exclude claims of Italian nationals because they
simultaneously possess another nationality is to introduce an exception not
contemplated by the text and is an infraction of the provisions of the Protocol.
The Umpire did not accept this argument, nor did he follow a literal inter-
pretation. He faced openly the problem of dual nationality.

The fact that there exists in the Treaty of Peace which we are discussing
an apposite definition of persons who can invoke the benefits of Article 78
obligated its drafters even more to insert explicitly cited is applicable in all the cases
which it was desired to include within its contents. Therefore, it is clear that,
in the first sub-paragraph, no reference, direct or indirect, is made to dual
nationality. This is the surest indication that the problem did not enter the
minds of the drafters of the Treaty. If it had, it seems most probable that it
would have been included in the definition, even more so inasmuch as this
legal situation has previously given rise to numerous controversies and arbitra-
tions on the international level.

(b) Second sub-paragraph of the definition: If dual nationality is not governed
by the first sub-paragraph, is it perhaps governed by the second?

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1 Volume X of these Reports, p. 542.

Let us recall that in this second sub-paragraph, the term "United Nations
nationals" includes all individuals, corporations or associations which, "under
the laws in force in Italy during the war have been treated as enemy".

Notwithstanding every effort of interpretation, one cannot arrive at the
conclusion that such paragraph was drawn up with the intention of regulating
specifically the dual nationality which interests us. Not only: from referring
concretely to such cases, the paragraph cited is applicable to other, different
cases, such as those, above all, concerning corporations owned by United
Nationals organized in Italy and those of stateless persons, but not to
cases in which the Italian nationality of individuals comes into play.

In fact: by the Italian War Law of July 8, 1938, it was established that,
for the purpose of such law, he who, being a national of an enemy State, at
the same time possessed Italian nationality or that of another State, must be
considered to be an enemy national. However, by the new Law of December
6, 1940, which was in force from January 30, 1941, until the end of the war;
consideration as enemy nationals was limited to those cases only in which
the individual possessed at the same time the nationality of an enemy State
and that of another foreign State.

The possibility of application of the provision contained in the law of 1938
lasted only the short time from the beginning of hostilities on June 10, 1940,
to January 30, 1941, date on which the new law took effect, but the provision
was never applicable to United States nationals as the United States did not
enter the war until December 1941. Logically, it is not possible to deduce
from this text a general rule to resolve the problem of dual nationality.

(c) Conclusion from Paragraph 9 (a): The conclusion to be reached from
what has been said is that neither the first nor the second sub-paragraph of
paragraph 9 (a) of Article 78 contains a definition specifically referring to dual
nationality and therefore capable of being a governing rule for those cases.

(2) The spirit of the Treaty of Peace:

If cases of dual nationality do not appear to be specifically settled by the
letter of the Treaty of Peace, is it perhaps possible to infer from the spirit of
the Treaty that its drafters intended to protect United Nations nationals
even though they possess Italian nationality?

The United Nations nationals expressly protected by the Treaty of Peace
certainly are entitled to compensation for property damaged or lost in Italy.
The Commission considers that the provision can not extended to cases not
contemplated in the Treaty.

The clauses of the Treaty must be strictly followed, even when they constitute
a derogation from the general rules of international law. Article 78, in fact,
constitutes a derogation when it declares the Italian Government responsible,
in every case, and without reference to the cause, for the restitution to United
Nationals nationals in good order of their property and, in the event that that
is not possible, for the payment of compensation, free of any type of tax, in
the amount of two-thirds of the sum necessary, as of the date of payment,
for the purchase of similar property or to make good the loss suffered. And
this provision, in all the cases contemplated by the Treaty, is indisputably
and undisputedly applicable.

The United Nations obviously could have inserted in the Treaty, in the
same manner, a specific rule to govern cases of dual nationality, apart from
or even in conflict with the generally recognized rules of international law,
and such an obligation would have been legally binding on the Italian
Government. However, they did not do so; and it is a universally admitted principle,
in international law as in domestic law, that any contractual obligation—
and the Treaty, by its nature, is such—must be performed only within the limits of what has been agreed.

(3). Principle of equality:

Finally, let us see if the Treaty of Peace between the United Nations and Italy lacks the principle of legal equality and hence can applied to it no principle of international law which is based on the equality between sovereign States.

To admit this argument it would be necessary that the Treaty of Peace not be a treaty. Prof. Rousseau writes and underlines: “Those between contracting parties at least one of which is not a direct subject of the Jus Gentium cannot be classified as treaties” (translated from Spanish) (Rousseau, Droit International Public, Paris, 1953, p. 17). Liszt says: “The capacity to conclude treaties derive from sovereignty. Nevertheless, the custom exists of conceding to semi-sovereign States the right to conclude treaties, on condition that they do not have a political character (especially, commercial treaties)” (Liszt, Derecho Internacional Publico (traduccion espanola) Barcelona 1929, p. 225). A treaty of peace, essentially political by nature, is subject to this rule.

The defeated State can, in the peace treaty itself, accept limitations, more or less temporary, on the exercise of its sovereignty. Such acceptance, however, as a manifestation of intention, presupposes possession of a personality on the international level as a subject of the Jus Gentium. The armistice is only an agreement of a military nature which recognises a situation of fact, leaving the juridical settlement for the subsequent treaty of peace.

Without the consent and the signature of the defeated State a treaty of peace does not exist. It may be a unilateral regulation on the part of the victor, but it is not a treaty of peace, Dupuis says:

Whether one looks at it from the point of view of natural law or from the point of view of positive law, the fact that force intervened to dictate a treaty or a law is an act, of itself, to invalidate the treaty or the law. The State which accepts a treaty under the pressure of force is bound by the contract given. If it agrees reluctantly, it agrees, with full knowledge, in order to avoid the force, in order to avoid a worse evil or in order to obtain some advantage of which a refusal would deprive it. If force has a weight in its decision, it is not the only fact in that decision. If it did not agree, it would remain under a regime of force and of force only . . . The object of treaties is to replace the instability of force with the stability of conventions. (translated from French) (Dupuis, Recueil des Cours de l’Académie des Droit International de la Haye, 1924, vol. 2, pp. 346-7).

The inequality of every treaty of peace following a victory exists and is manifested, not in the capacity of the international subjects which conclude it, but rather in the very contents of the treaty. This inequality, consequence of the victory, has been translated into numerous clauses of the Treaty which we are discusing, and likewise could have been manifested—but it was not—by the express regulation of dual nationality within paragraph 9 (a).

IV. Principles of international law

As the Treaty contains no provisions governing the case of dual nationality, the Commission must turn to the general principles of international law.

In this connexion two solutions are possible: (a) the principle according to which a State may not afford diplomatic protection to one of its nationals against the State whose nationality such person also possesses; (b) the principle of effective or dominant nationality.
appear to be no obstacle to the regulation of this question by international agreement, and we consider that the domicile of the interested party should be taken into consideration in order to determine his nationality. (translated from Spanish) (op. cit., p. 32)

The Italian Government, in its Reply, declared itself in favour of the nationality which is accompanied by habitual residence (op. cit., p. 33)

The Hague Convention, although not ratified by all the Nations, expresses a communis opinio juris, by reason of the near-unanimity with which the principles referring to dual nationality were accepted.

(2). Pecedents:

Uniformity of precedents in this field does not exist, but it can be stated that the ratio of nearly all the arbitral and judicial decisions on the international level is either one or the other of the two afore-mentioned principles. We shall cite a few by way of example.

(a) The principle which bars diplomatic protection of the individual who is a national of the State against which the claim is made was applied by the United States-British Claims Commission established under the Treaty of Washington of May 8, 1871, in the Alexander Case between Great Britain and the United States (Moore, International Arbitrations, 1898, vol. III, p. 2529).

Instead, the same Commission decided the Halley Case, between the same Powers, in another way (Moore, op. cit., p. 2239).

(b) In the Venezuelan Arbitrations, the British Agent himself, in the Mathison Case, maintained the view that, if a claimant were both a British subject and a Venezuelan national, his claim could not be heard by the Commission (Ralston, Venezuelan Arbitrations of 1903, 1904, p. 429 et seq.). The principle of effective nationality was instead applied in the following cases: Milliani, Italy vs. Venezuela (Ralston, op. cit., pp. 754-756); Scovens, Great Britain vs. Venezuela (Ralston, op. cit., p. 436 et seq.); Massiani, France vs. Venezuela (Ralston’s Report of 1902, Washington, 1906, p. 211, 224).

(c) The case of Baron Canevera, Italian jure sanguinis and Peruvian jure soli, is typical of those decided in favour of the effective nationality. The case having been submitted to the Permanent Court of Arbitration at the Hague, the motive which—according to the decision of May 3, 1912—caused the Peruvian nationality to prevail for the purposes of the disputed claim was the previous conduct of Canevera, who was a candidate for election to the Senate where only Peruvian nationals are admitted and who had requested the Government of Peru, as its national, to grant authorization to perform the functions of Consul General of the Netherlands (Revue générale de droit international public, 1913, pp. 328-333).

(d) The Franco-German Mixed Arbitral Tribunal applied the principle of effective nationality in the case of Mrs. Barthez de Monfort vs. Trenkander (Decision of July 10, 1926).

(e) The Franco-Mexican Claims Commission (1924-1932) examined the problem of dual nationality in 1928 in the George Pinson Case. The decision

is based on the fact that the French nationality of Pinson was proved, but not the Mexican nationality, so that, in reality, contrary to Mexico’s claim, there did not exist a case of dual nationality.

Nevertheless, it is important to examine the reasoning of the President of the Commission, Mr. Verzijl, who states that the Mexican argument was based on the theory, generally enough admitted in the jus gentium, according to which a State is not permitted to take advantage of its right to provide diplomatic protection in the event that the nationals to be protected simultaneously possess the status of nationals of the State against which the right of protection is to be exercised. Mr. Verzijl continues:

While recognizing the well-foundedness of that theory for the cases in which the person in question is effectively considered and treated as a national by each of the two States in the case, and this by virtue of legal rules which do not overstep the bounds set out for them by public or customary international law, I nevertheless believe I must make certain reservations with regard to its admissibility in the case in which one or the other of these two conditions might not be fulfilled. (translated from French) (La réparation de dommages causés aux étrangers par des mouvements révolutionnaires. Jurisprudence de la Commission franco-mexicaine des réclamations. 1924-1932, Paris, A. Pedone.)

Although the word “effectively” seems to refer to the principle of effective, in the sense of dominant, nationality, this is not so, because the case which Prof. Verzijl is considering is not that of choosing one of two nationalities but that of ascertaining that each one of the two contesting States effectively considers and treats the person in question as its national.

(f) The International Court of Justice, in its Advisory Opinion of April 11, 1949, refers to “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” (International Court of Justice, Reports of Judgments, Advisory Opinions and Orders, 1949, p. 186).

The same International Court, in the interval between the meeting of this Commission in Paris and the meeting in Rome, issued a decision in the Nottebohm Case (Lichtenstein vs. Guatemala) which is not a case of dual nationality; but it is interesting for our purposes to note what is set forth in the reasoning of the decision in regard to the problem of dual nationality when such problem arises because of the simultaneous possession of the nationality of two States involved in the dispute:

International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc. (Reports of Judgments, Advisory Opinions and Orders, 1955, p. 22, Nottebohm Case).

(3). Legal literature:

(a) The institute of International Law, during its meeting at Cambridge in 1931, discussed an excellent report of Professor Borchard. It was entitled “Diplomatic Protection of Citizens Abroad”. Its purpose was explained by
Borchard himself: "This report shall be confined to a study of the conditions of the Hague Convention of 1907 and the Sykes-Picot Agreement, in which statesmen, after having failed to obtain a diplomatic solution, preferred to turn to the Court of International Justice for a final decision."

The Committee of the Hague Convention of 1907 was set up to study the conditions of the Sykes-Picot Agreement, in which statesmen, after having failed to obtain a diplomatic solution, preferred to turn to the Court of International Justice for a final decision. The committee was composed of representatives of all the states involved in the agreement, and it was charged with the task of drafting a report on the conditions under which the states would be bound by the agreement.

The committee's report was adopted by the conference on January 22, 1907, and it was submitted to the states for ratification. The report contained a number of provisions, including the following:

1. The states would be bound by the agreement as soon as it was ratified by all the states involved.
2. The agreement would be subject to the International Court of Justice for interpretation and application.
3. The states would be free to withdraw from the agreement at any time, with twelve months' notice.
4. The states would be free to modify the agreement at any time, with the consent of all the states involved.

The committee's report was submitted to the states for ratification, and it was eventually adopted by all the states involved in the agreement. The agreement was then submitted to the International Court of Justice for interpretation and application, and it has been in force ever since.

The Hague Convention of 1907 and the Sykes-Picot Agreement are both examples of international law, and they illustrate the extent to which the states have been able to reach a consensus on the conditions under which they would be bound by international agreements.
to the problem of dual nationality which concerns the two contesting States, in view of the fact that in such case effective nationality does not mean only the existence of a real bond, but means also the prevalence of that nationality over the other, by virtue of facts which exist in the case.

(5). The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such predominance is not proved because the first of these two principles is generally recognised and may constitute a criterion of practical application for the elimination of any possible uncertainty.

(6). The question of dual nationality obviously arises only in cases where the claimant was in possession of both nationalities at the time the damage occurred and during the whole of the period comprised between the date of the Armistice (September 3, 1943) and the date of the coming into force of the Treaty of Peace (September 15, 1947). In view of the principles accepted, it is considered that the Government of the United States of America shall be entitled to protect its nationals before this Commission in cases of dual nationality, United States and Italian, whenever the United States nationality is the effective nationality.

In order to establish the prevalence of the United States nationality in individual cases, habitual residence can be one of the criteria of evaluation, but not the only one. The conduct of the individual in his economic, social, political, civic and family life, as well as the closer and more effective bond with one of the two States must also be considered.

(7). It is considered that in this connexion the following principles may serve as guides:

(a) The United States nationality shall be prevalent in cases of children born in the United States of an Italian father and who have habitually lived there.

(b) The United States nationality shall also be prevalent in cases involving Italians who, after having acquired United States nationality by naturalization and having thus lost Italian nationality, have reacquired their nationality of origin as a matter of law as a result of having sojourned in Italy for more than two years, without the intention of retransferring their residence permanently to Italy.

(c) With respect to cases of dual nationality involving American women married to Italian nationals, the United States nationality shall be prevalent in cases in which the family has had habitual residence in the United States and the interests and the permanent professional life of the head of the family were established in the United States.

(d) In case of dissolution of marriage, if the family was established in Italy and the widow transfers her residence to the United States of America, whether or not the new residence is of an habitual nature must be evaluated, case by case, bearing in mind also the widow’s conduct, especially with regard to the raising of her children, for the purpose of deciding which is the prevalent nationality.

(8). United States nationals who did not possess Italian nationality but the nationality of a third State can be considered “United Nations nationals” under the Treaty, even if their prevalent nationality was the nationality of the third State.

(9). In all other cases of dual nationality, Italian and United States, when, that is, the United States nationality is not prevalent in accordance with the above, the principle of international law, according to which a claim is not admissible against a State, Italy in our case, when this State also considers the claimant as its national and such bestowal of nationality is, as in the case of Italian law, in harmony (Article 1 of the Hague Convention of 1930) with international custom and generally recognized principles of law in the matter of nationality, will reacquire its force.

VI. DECISION

Examining the facts of the case in bar, in the light of the aforementioned criteria, especially paragraph 6, in relation to paragraph 7 (c), the Commission holds that Mrs. Mergé can in no way be considered to be dominantly a United States national within the meaning of Article 78 of the Treaty of Peace, because the family did not have its habitual residence in the United States and the interests and the permanent professional life of the head of the family were not established there. In fact, Mrs. Mergé has not lived in the United States since her marriage, she used an Italian passport in travelling to Japan from Italy in 1937, she stayed in Japan from 1937 until 1946 with her husband, an official of the Italian Embassy in Tokyo, and it does not appear that she was ever interned as a national of a country enemy to Japan.

Inasmuch as Mrs. Mergé, for the foregoing reasons, cannot be considered to be dominantly a United States national within the meaning of Article 78 of the Treaty of Peace, the Commission is of the opinion that the Government of the United States of America is not entitled to present a claim against the Italian Government in her behalf.

The Italian-United States Conciliation Commission, having noted the statement made during the deliberations by the Italian Representative in the name of his Government, according to which Mrs. Mergé, as an Italian national, will be able to submit a suitable claim to the competent Italian authorities, under domestic law, for the damages in question, even though the time-limit for such claims has expired, unanimously,

RESOLVES:

1. The Petition of the Agent of the United States of America is rejected.

2. This Decision is final and binding.


The Third Member
José de Yanguas Marea

The Representative of the
United States of America
J. Matturri

The Representative of the
Italian Republic
Antonio Sorrentino
Iran-United States Claims Tribunal

Sedco Inc. v. National Iranian Oil Company and the Islamic Republic of Iran (Case No. 129)
Award of 24 October 1985
SEDCO, Inc., for itself and on behalf of SEDCO
INTERNATIONAL, S.A., and SEDIRAN DRILLING COMPANY,
Claimant,
v.
NATIONAL IRANIAN OIL COMPANY and THE ISLAMIC REPUBLIC OF
IRAN, Respondents.

CASE NO. 129
CHAMBER THREE
AWARD NO. ITL 55-129-3
Iran - United States Claims Tribunal
Filed October 28, 1985

INTERLOCUTORY AWARD

Appearances:

For the Claimant: Mr. Robert B. Davidson, Attorney for Claimant; Mr. Carl F. Thorne, President
SEDCO International, S.A.; Mr. Paul Franzetti, Associate Counsel; Mr. Walter W. Cardwell, Special
Counsel; Mr. Herman E. Malone, Representative of Claimant.

For the Respondents: Mr. Alahyar Mouri, Attorney for and Representative of the National
Iranian Oil Company; Mr. Nozar Dabiran, Legal Adviser to the Agent; Mr. Khosrow Arya,
Financial Expert; Mr. Abdolhamid Bigdeli, Financial Representative; Mr. Mehdi Sadri,
Technical Representative; Mr. Mohsen Shahrestani, Financial Representative; Mr. Mostafa
Zaynoldin, Representative of the National Iranian Oil Company; Mr. Hossein Piran, Assistant to
the Agent; Mr. Salimi Mr. Shenyan, Representatives of Social Insurance Organization.

Also present: Mr. John R. Crook, Agent of the United States of America; Mr. Jose Alvarez
Assistant to the Agent.

I. PROCEDURAL HISTORY

Claimant, SEDCO, INC. ("SEDCO"), filed its Statement of Claim on 19 November 1981. SEDCO
brought claims for itself and on behalf of SEDCO INTERNATIONAL, S.A. ("SISA") and
SEDIRAN DRILLING COMPANY ("SEDIRAN") against the NATIONAL IRANIAN OIL
COMPANY ("NIOC") and the ISLAMIC REPUBLIC OF IRAN ("Iran"). These claims were
based on contract, some of which were concluded with the Oil Service Company of Iran
("OSCO"), the expropriation of drilling rigs, the expropriation of warehouse stocks, and
additionally, in the case of SEDIRAN, the expropriation of fixed assets. SEDCO also brings
contractual claims against NIOC allegedly assigned to it by IRAN MARINE INDUSTRIAL
COMPANY ("IMICO").

On 30 April 1984 Claimant submitted its memorial concerning the valuation of expropriated
warehouse stock and SEDIRAN fixed assets. NIOC submitted its counter-memorial concerning
the valuation of warehouse stock and fixed assets on 23 July 1984.

Respondents submitted their memorial and evidence concerning the allegedly expropriated
drilling rigs on 5 March 1985. Claimant submitted an additional expert opinion by Mr. William
Whitney on the valuation of the expropriated rigs on 10 May 1985. Likewise on 10 June 1985
Respondents filed an additional expert opinion by Mr. Harvey A. Davis relating to the valuation
of SISA and SEDIRAN drilling rigs.

On 31 July 1984 Claimant filed its memorial addressing its invoice claims and the counterclaims
of Respondents. Respondent NIOC submitted a memorandum concerning its tax counterclaim
on 25 May 1984. Respondent NIOC filed its counter-memorial concerning Claimsants’ invoice
claims and its counterclaims in part on 15 May 1985, with further filings on 10 June 1985.
Claimant filed its rebuttal memorial and conclusion on 12 June 1985.

On 3 May 1984 Claimant submitted its memorial concerning the valuation of expropriated
warehouse stock and SEDIRAN fixed assets. NIOC submitted its counter-memorial concerning
the valuation of warehouse stock and fixed assets on 23 July 1984.

Respondents submitted their memorial and evidence concerning the allegedly expropriated
drilling rigs on 5 March 1985. Claimant submitted an additional expert opinion by Mr. William
Whitney on the valuation of the expropriated rigs on 10 May 1985. Likewise on 10 June 1985
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Claimant filed its rebuttal memorial and conclusion on 12 June 1985.

Under the scheduling proposal agreed to by the parties and set forth in the Tribunal’s Order of 11
April 1984 two further Hearings were to be held in this case on 25 and 26 July 1984 and on 11
and 12 March 1985. Because of a death in the family of the United States-appointed Member of
Chamber Three, the Hearing set for 25 and 26 July 1984 was cancelled and rescheduled for 11 and 12
September 1984. “In implementation of the Presidential Order No. 27 of 5 September 1984,” the
Tribunal by its order of 6 September 1984 cancelled the Hearing scheduled for 11 and 12
September 1984. By its Order dated 31 December 1984 the Tribunal rescheduled the Hearing
originally set for 25 and 26 July 1984 for 11 and 12 March 1985; the final Hearing was
rescheduled to be held on 15 and 16 April 1985. On 10 March 1985 the Iran-appointed member
of Chamber Three informed the Chamber that for personal reasons he would not be available
until 15 March 1985. With the agreement of the Parties the hearing to be held on 11 and 12
March 1985 was rescheduled for 14 and 15 May 1985 and the Final Hearing was set for 18 and
19 June 1985. On 14 and 15 May 1985 Respondents Iran and NIOC did not appear for the

NIOC is not liable for the obligations of OSCO. Following the Full Tribunal’s decision on this
issue in Oil Fields of Texas and The Islamic Republic of Iran, Interlocutory Award No. 10-43-FT
(9 December 1982), reprinted in 1 Iran-U.S. C.T.R. 347, the Tribunal ordered full Statements of
Defense to be filed by the Respondents. Respondents filed their Statements of Defense and
Counterclaim on 1 August 1983.

Claimant filed its submission in support of its claim relating to expropriation of drilling rigs
on 31 August 1983. Respondent NIOC submitted a counter-memorial relating to “appropriation
of properties” on 20 February 1984. The Parties were ordered to file any rebuttal submission
relating to the issue of the expropriation of drilling rigs by 15 March 1984. Claimant filed its
rebuttal submission on 19 March 1984. A Hearing to address the claims for expropriation of
drilling rigs was held on 29 and 30 March 1984. In the course of the Hearing, the Parties agreed
that that Hearing should be limited to the presentation of a claim relating to expropriation of
SISA drilling rigs, and jointly proposed a schedule for further proceedings in the Case. The
proposal included filing dates for further memorials and envisaged two further hearings. The
proposal was adopted by the Tribunal in its Order of 11 April 1984.

On 3 May 1984 Claimant submitted its memorial concerning the valuation of expropriated
warehouse stock and SEDIRAN fixed assets. NIOC submitted its counter-memorial concerning
the valuation of warehouse stock and fixed assets on 23 July 1984.
scheduled Hearing. Moreover, the Iran-appointed Member of Chamber Three was not present. The Tribunal proceeded on 15 May 1985 for the limited purpose of hearing Claimant’s expert witness Mr. Whitney. The testimony and the simultaneous translation of such testimony, including all questions and answers, was tape recorded for use by the Tribunal and the Parties in this Case. At that Hearing Claimant requested that it receive in an Interlocutory Award its unnecessary costs of attending the 14 and 15 May 1985 Hearing. All remaining issues in the Case were scheduled for a Final Hearing to be held on 18 and 19 June 1985 with a possible continuation on 21 June 1985. The Final Hearing actually was held on 21, 22 and 23 June 1985 in the presence of all members of Chamber Three. All Parties appeared and presented oral argument.

Following the Final Hearing limited post-hearing submissions were authorized. On 30 July 1985 Respondent NIOC filed the final portion of its counter-memorial relating to invoices and counterclaims. On 31 July 1985 Claimant filed the “Rebuttal Affidavit of Lee A. Drake and Secretary’s Supplemental Certificate of Robert S. Browning.” A final rebuttal to the other Party’s post-hearing submission was filed by the Claimant on 17 October 1985 and by the Respondents on 21 October 1985.

II. JURISDICTION

A. Nationality of Claimant

Claimant asserts that it is a national of the United States within the meaning of Articles II(1) and VIII(1) of the Claims Settlement Declaration, a position consistently contested by Respondent. Claimant has submitted to the Tribunal evidence in support of its contention that it is a corporation duly established and existing at all relevant times under the law of the State of Texas and owned more than 50% by United States citizens.

In particular, Claimant submits a Certificate of the Secretary of State of the State of Texas dated 13 September 1982 which indicates that Claimant was incorporated on 21 July 1950 and was still so incorporated as of the date of the Certificate. Respondents do not contest the Texas incorporation of Claimant.

As to the requirement that 50% or more of the capital stock of Claimant be owned by U.S. citizens, Claimant submits the proxy statements issued by the company for the annual meetings held in the years 1978, 1979, 1980 and 1981. Each of these proxy statements indicates that holders of 5% or more of the stock of SEDCO did not collectively hold 40% or more of the shares entitled to vote at any of the annual meetings mentioned. As stated in the Tribunal’s Order of 15 December 1982 in Flexi-Van Leasing and The Islamic Republic of Iran, reprinted in 1 Iran-U.S. C.T.R. 455, the Tribunal on the basis of the above described proxy statements may draw the inference that more than 50% of the stockholders of SEDCO are citizens of the United States “because even if as much as 40% of all voting stock were owned by large shareholders [i.e., holding 5% or more of such stock] who are not citizens, the remaining shares held as ‘portfolio investments’ by small [non-U.S.] shareholders could not reasonably be expected to exceed 10%.” In addition, the Tribunal notes that Claimant SEDCO has filed an affidavit of Walter W. Cardwell, III, Secretary of SEDCO, dated 6 June 1985 in which it is stated that as of 12 January 1981 “98% of SEDCO’s voting stock was held by stockholders of record with addresses in the United States who were not registered aliens” and that as of 2 October 1978 97% of SEDCO’s voting stock was so held. The Tribunal therefore concludes that Claimant SEDCO is a national of the United States within the meaning of Article VII(1) of the Claims Settlement Declaration.

Following 19 January 1981 Claimant SEDCO merged into Schlumberger Technology Corporation (“Schlumberger”). At the Final Hearing in this Case Respondent NIOC’s representative objected to the jurisdiction of the Tribunal on the basis that Claimant had not established the U.S. nationality of SEDCO following its merger with Schlumberger. Claimant has filed evidence allegedly establishing that SEDCO, following its merger into Schlumberger, continues to be owned more than 50% or more by U.S. nationals. The Tribunal need not examine this evidence. Article VII(2) of the Claims Settlement Declaration requires only that a claim be owned by the relevant nationals “from the date on which the claim arose to the date on which this Agreement [the Claims Settlement Declaration] enters into force.” As stated in Gruen Associates and The Islamic Republic of Iran, Award No. 61-188-2 at 12 (27 July 1983), reprinted in 3 Iran-U.S. C.T.R. 97 at 103, the only relevant period for the purpose of jurisdiction is the period from the time the claim arose until 19 January 1981.”

Respondent NIOC also requests that the Tribunal stay proceedings involving material proof of corporate nationality pending the Full Tribunal’s decision in Case No. A20, a case specifically addressing the issue of proof of corporate nationality.

The argument that the determinations of nationality should not be made (and necessarily no awards made) pending the decision of the Full Tribunal in Case No. A20 is analogous to the request discussed in R. J. Reynolds and The Islamic Republic of Iran, Award No. 145-35-3 at 21 (6 August 1984) in which this Chamber held:

Finally, the argument that interest must not be allowed pending the Full Tribunal decision in Case No. A19 should not affect the above conclusions... When the issue of interest was previously raised informally in the Full Tribunal, the prevailing opinion was that pending an eventual decision on the subject by the Full Tribunal, each Chamber shall resolve issues of interest in cases before it according to its own best judgment. The three chambers have consistently done so. To act otherwise would have meant blocking the work of the Tribunal for an unforeseeable length of time, as interest is claimed in practically every case.

The same considerations apply even more in the instant case. Withholding decisions on interest would not prevent the rendering of awards on the merits (exclusive of interest at that time) but suspension of jurisdictional determinations would for an indeterminate time bring the work of the Tribunal to a halt as such determinations are necessary in every case. For these reasons, the three Chambers have consistently made determinations of corporate nationality notwithstanding the pendency of Case A20. Respondent’s request is therefore denied.
Claimant SEDCO has filed indirect claims relating to SISA under Article VII(2) of the Claims Settlement Declaration. Article VII(2) provides that claims of nationals include claims which are "owned indirectly by such nationals through ownership of capital stock or other proprietary interests in judicial persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity is not entitled to bring a claim under the terms of this agreement."

Claimant submits a certificate dated 22 February 1983 from the General Director of the Public Registry of Panama certifying that SISA is a Panamanian corporation which was organized under the laws of Panama on 9 August 1948. Claimant argues that under the Articles of Incorporation of SISA, the United States government has no right to intervene on behalf of SISA, and that SISA is therefore "owned indirectly" by nationals of the United States through ownership of capital stock. Moreover, as has repeatedly been held, the ownership of the United States does not constitute the ownership of SISA. Therefore, the Tribunal must conclude that SISA is a Panamanian corporation and therefore not entitled to bring a claim under Article VII(2) because SISA, a Panamanian corporation, is not entitled to bring a claim in its own behalf.

Respondents argue fundamentally, however, that Article VII(2) of the Claims Settlement Declaration may not be used in a case such as this in order to allow a U.S. corporation to bring as its indirect claim a claim owned by nationals of the United States. Instead, Respondents contend that Article VII(2) merely serves to define what are "claims of nationals." The Tribunal does not accept Respondents' interpretation of Article VII(2). Preliminarily, the Tribunal notes that it can conceive of no situation such as Respondents' argument supposes, e.g., a U.S. parent corporation not jurisdictionally banned from pursuing a claim which its U.S. subsidiary is precluded from bringing before the Tribunal. The Tribunal notes that it can also conceive of no situation in which the United States, through its ownership of a U.S. corporation, would be indirectly able to participate in a claim brought by that corporation.

Respondents' arguments regarding the interpretation of Article VII(2) are therefore not persuasive. In the Tribunal's view, the work of the Tribunal is to interpret the terms of the Claims Settlement Declaration in the light of its object and purpose. See, e.g., The United States of America and The Islamic Republic of Iran, Decision No. 12-A1-FT at 19 (31 January 1985). The Tribunal's interpretation of Article VII(2) is therefore consistent with the Tribunal's interpretation of Article VII(1) of the Claims Settlement Declaration. The Tribunal does not find suspension of its proceedings in this Case appropriate. The present decision is taken, however, without prejudice to any decision of the Full Tribunal in Case No. A22.
C. Jurisdiction Over the Claims Relating to SEDIRAN

Claimant SEDCO has also filed indirect claims relating to SEDIRAN under Article VII(2) of the Claims Settlement Declaration. Respondents present additional objections to these indirect claims. Alternatively, Claimant presents a direct claim for its shareholder interest in SEDIRAN.

1. Indirect Claims Relating to Corporations Organized under the Laws of Iran

Respondents argue that even if Article VII(2) may be used in a case such as this to file as indirect claims the claims of foreign corporations, its use cannot be extended to authorize indirect claims for corporations established under Iranian law (as is SEDIRAN):

Article VII of the Algiers Claims Settlement Declaration in no circumstances whatsoever permits bringing of claim by an Iranian firm or company against the Government of Iran or Iranian Governmental Agencies or instrumentalities.

The Tribunal first of all reiterates that the indirect claim involved in this case is the claim of a U.S. national, SEDCO. That claim arises from the indirect ownership interest of that U.S. national in a foreign corporation, which in this case was established under the law of Iran. It is true that in effect the direct owner of the claim being adjudicated is an entity established under Iranian law. However, as this Tribunal has held, the place of incorporation is not, in itself, determinative of corporate nationality. Indeed the test for indirect claims set forth in Article VII(2) requires the ownership interest of U.S. nationals in the Iranian corporation to be very significant.

2. SEDCO’s Ownership Interest in and Control of SEDIRAN

The Parties agree that SEDIRAN is an Iranian joint stock company and is not itself entitled to bring a claim before this Tribunal. Therefore in order to take jurisdiction over SEDCO’s indirect claim relating to SEDIRAN the Tribunal must satisfy itself that, in accordance with Article VII (2) of the Claims Settlement Declaration, SEDCO’s “ownership interest” in SEDIRAN was “sufficient at the time the claim arose to control” the latter corporation. The Parties disagree as to the extent of the ownership interest of SEDCO in SEDIRAN and as to whether such interest was sufficient at the time the claim arose to control the corporation.

Respondents argue that “control should be a financial one exercised through ownership of shares and stock or similar proprietary interests but not administrative control.” The Tribunal, however, has taken a slightly broader view of interests sufficient to control and indicated that such a right of control may be demonstrated in various ways. In The Management of Alcan Aluminium Limited, on Behalf of its Shareholders who are United States Nationals and Ircable Corporation, Award No. 41-91-3 at 6 (3 May 1983), reprinted in 2 Iran-U.S. C.T.R. 294 at 297, it was stated, inter alia, that

It may be shown that, at the appropriate time, such shareholders controlled the corporation in fact, regardless of the total proportion of their shares. Also it may be shown that such shareholders had sufficient voting strength or other rights to assert control; this would generally require ownership of 50 per cent or more of the shares.

The requirements necessary to establish “control” depend upon the context in which the examination is made. As stated in Anaconda Company v. OPIC:

In general, “control” as applied to corporate operations is an elusive term, dealing as it sometimes does with the degree of influence in fact or potentially exerted by some persons within a complex structure over a multitude of actions taken by many others. In differing legal contexts different aspects of that influence can assume greater or lesser importance; sometimes actually exercised present control is more important than potential but dormant control and sometimes the reverse is true.

59 Int’l L. Rep. 406, 420 (Field, Sommers and Vagts, arbs., Award of 17 July 1975). Article VII(2) seeks to determine when the ownership or other proprietary interests of a national are great enough to characterize a claim owned indirectly as a claim of a national. Therefore it is not de facto control as such which is important but rather the existence of ownership interests sufficient to control. Actual control may be evidence of such ownership interests, but care must be taken in evaluating factual control to distinguish between whether such control exists as a matter of right or as a result of the sufferance of another party which itself has sufficient interests to control. Claimant in the present case has based its control contention on a combination of alleged 50 per cent ownership and alleged managerial control by SEDCO over SEDIRAN.

As to the shareholding, the evidence before the Tribunal shows that following SEDIRAN’s founding in 1973 SEDCO directly owned 48 out of SEDIRAN’s 100 shares of equal value, two further shares being owned by Messrs. Amos L. Carter, the first Managing Director of SEDIRAN and a member of its Board of Directors designated by SEDCO, and Carl F. Thorne, likewise a SEDCO-designated member of the Board of Directors of SEDIRAN and later the successor to Mr. Carter as Managing Director. In Article 4 of SEDIRAN’s Articles of Association this 50 per cent of the shares subscribed by non-Iranian parties are referred to as Class A shares. Article 3 of the Protocol of Agreement signed 19 May 1973 by SEDCO, the Pahlavi Foundation and Bank Bazargani, which defined their respective rights in regard to the SEDIRAN joint venture, states that the Class A shares are to be “subscribed [to] by SEDCO”, Class B, comprised of the other 50 per cent, was subscribed to by the Iranian parties: 20 per cent by the Pahlavi Foundation and 30 per cent by Bank Bazargani.

There is further evidence that in 1975 SEDIRAN was recapitalized to reflect 1000 instead of 100 shares, whereby SEDCO came to own 498 shares or 49.8 per cent of the whole stock. This fact has been confirmed indirectly also by Respondent NIOC, which submitted as evidence a Letter No. 621/32 dated 3 December 1981 from the Ministry of Finance and Economic Affairs to Discussing Committee of the Algerian Declaration in which SEDCO is referred to as the owner of 498 out of the total of 1000 shares in SEDIRAN.

SEDCO claims further that at the relevant jurisdictional times it had also become the legal owner of 50 per cent of the shares, as Messrs. Carter and Thorne allegedly assigned their two shares to
SEDCO on 12 April 1977. Claimant submits a certification from Deloitte, Haskins and Sells stating that for the five year period ending 30 June 1982 SEDCO owned 50% of SEDIRAN stock. NIOC disputes the existence of a valid assignment, inter alia, on the ground that there is no evidence that the permission of the Board of Directors was sought for the assignment, as required by Article 11 of the Articles of Association.

The Tribunal finds particularly noteworthy the fact that the Iranian Class B shareholders likewise granted one share to each of their two members of the Board of Directors and that Article 107 of the Iranian Commercial Code requires that the members of the Board of Directors be shareholders. In this sense, it can be seen that discounting from both the Class A and Class B shareholders two shares, each category of shareholder owned fifty percent of the remaining shares.

The Tribunal does not believe, however, that in this Case it makes any difference whether SEDCO’s ownership interest amounted to 49.8 or 50 percent. Even the latter degree of shareholding by Class A owners, without proof of further indicia of control, would not in itself be enough to fulfill the requirements of Article VII (2) of the Claims Settlement Declaration, as also the Class B owners had the same 50 percent amount of the shares. Although the Class B shares were divided between the Iranian entities - thereby making SEDCO by far the largest single shareholder - there is no indication of such a division of interest between the two Iranian groups as to make it possible for SEDCO to exercise control solely by virtue of its voting power.

On the other hand, the Tribunal is of the view that even a 49.8 percent of shareholding may be sufficient for the purposes of Article VII (2), provided SEDCO can show that it had the right to control SEDIRAN. Therefore attention has to be turned to SEDCO’s allegation concerning its managerial control over SEDIRAN’s affairs.

SEDCO argues that all of its business activity depends upon the maintenance of its reputation and that consequently SEDCO demanded and received the contractual right to control the operations of SEDIRAN. Therefore attention has to be turned to SEDCO’s allegation concerning its managerial control over SEDIRAN’s affairs.

The relevant portions of Articles 36 and 39 of the Articles of Association, which evidently were agreed to contemporaneously with execution of the Protocol of Agreement, provide:

Article 36

The Board of Directors of the Company shall be composed of four members, two of whom shall be nominated by the Iran Group [Class B shareholders], and two of whom shall be nominated by SEDCO [Class A shareholders]. The Directors nominated by the Iran Group shall nominate a Chairman of the Board of Directors, and the Directors nominated by SEDCO shall nominate a Deputy Chairman.

The Managing Director of the Company shall be nominated by SEDCO, and the Deputy Managing Director shall be nominated by the Iran Group. In accord with Article 36 of the Articles of Association, the Board of Directors shall delegate to the Managing Director all of the powers of the Board of Directors as more specifically defined in Article 39 of the said Articles of Association. The Managing Director shall not, however, take any decision involving, or resulting in, a capital expenditure of in excess of U.S. $250,000 without first securing the approval of the Board of Directors. (Emphasis added.)

Article 9 of that same Protocol provides:

BANKING ARRANGEMENTS

The Company shall initially open banking accounts with two banks, namely the Bank Bazargani Iran, Teheran, Iran, and the First National Bank in Dallas, Texas, U.S.A. The Company’s initial authorized capital shall be deposited into the Company’s account with the Bank Bazargani Iran. It is the expressed intent of the Iran Group and Sedco that, whenever possible, payments for work undertaken by the Company shall be made by the oil company in U.S. Dollars into the account of the Company with the First National Bank in Dallas. The Managing Director shall delegate signatory power to two senior officials of Sedco in Dallas, Texas. The purpose of this delegation will be to allow the said officials to operate the Company’s banking account with the First National Bank in Dallas on behalf of the Managing Director ....

The Iranian Ministry of Justice Notice of the Foundation of SEDIRAN Drilling Company on 30 May 1973 states in paragraph 10:

The President [i.e., Managing Director] has, under supervision of the Board of Directors all the authority of the Board of Directors, as mentioned in the Company Foundation Issue.

The relevant portions of Articles 36 and 39 of the Articles of Association, which evidently were agreed to contemporaneously with execution of the Protocol of Agreement, provide:

Article 36

The Board of Directors is authorized to delegate, partly or wholly, its powers to one or several Directors, or to one or several representatives, shareholders or not; but they shall...
fix in this event the term and the limits of each one’s powers.

Article 39

The Company’s Board of Directors shall be vested with fullest powers authorizing it to handle the Company’s affairs, such as: ....

The powers specified above are not limited and the Company’s Board of Directors or the Managing Director within his powers, shall have unlimited authority to act on the Company’s behalf in all matters relating thereto, ....

The Board of Directors of SEDIRAN, as mandated by Article 5 of the Protocol of Agreement and consistent with the Ministry of Justice Notice, resolved at a meeting held 22 May 1973 that

The company’s Managing Director, under the supervision of the Board of Directors, shall have all the powers of the Board of Directors stipulated in the Articles of Association.

The Board at the same meeting also decided that,

All contracts, deeds and documents committing the company shall be signed jointly by Mr. Amos L. Carter, company’s Managing Director, and Mr. Dijavad Sadr, Chairman of the Board of Directors or Mr. Modjtaba Mahmoud Dehghan, Deputy Managing Director.

Mr. Amos L. Carter was named as Managing Director at the Board meeting held 22 May 1973, and Carl F. Thorne was named his successor as Managing Director at a Board meeting held 28 April 1975.

According to Claimant, the documents described clearly indicate that the Managing Director of SEDIRAN, an individual nominated by SEDCO, was delegated as required by Article 5 of the Protocol of Agreement “all the powers of the Board of Directors stipulated in the Articles of Association.” Although it might appear theoretically possible that the Board of Directors could revoke the delegation of powers, it is argued that such an act would contradict the mandatory delegation language of Article 5 of the Protocol Agreement. Moreover, as a practical matter SEDCO, holding two of the four seats on the Board, had the power to block any such attempt. Respondents argue, however, that the documents nonetheless indicate two limitations on SEDCO’s power to control SEDIRAN.

Respondent NIOC notes that Article 5 of the Protocol of Agreement states that the Managing Director shall not take any decision involving, or resulting in; a capital expenditure of in excess of US$250,000 without first securing the approval of the Board of Directors.

NIOC also argues that the Board of Directors at its meeting on 22 May 1973 specifically limited its grant of powers to the Managing Director by requiring that all “contracts, deeds and documents committing the company” be signed jointly by the Managing Director and either Mr. Sadr, Chairman of the Board of Directors, or Mr. Dehghan, Deputy Managing Director. The Minutes of the Board Meeting dated 28 April 1975, which among other things record the election of Mr. Thorne as the Managing Director, also provide for similar joint signing of contracts and other commitments by the Managing Director and one of the two Iranian Board Members as was the case earlier. Mr. Thorne testified at the March 1984 Hearing that this joint signature requirement was later dispensed with by the Board of Directors. This position, however, is disputed by Respondents.

It may be true, in the light of the evidence submitted to the Tribunal, that SEDCO through the Managing Director in fact controlled SEDIRAN at the time the claim arose. Moreover, it is arguable that the Protocol of Agreement and the Articles of Association can be interpreted as enrolling SEDCO to such control. Given, however, the Tribunal’s holding infra as to the continuous ownership of these indirect claims, the Tribunal need not decide whether SEDCO possessed sufficient interests to control SEDIRAN at the time the claim arose in accordance with Article VII(2) of the Claims Settlement Declaration.

3. Continuous Ownership of the Indirect Claim

Respondent also objects to Claimant’s right to bring an indirect claim in view of the fact that “as the shares [of SEDIRAN] were taken over by the Government, SEDIRAN’s claim on behalf of SEDIRAN...was not owned continuously by SEDCO.”

Article VII(2) of the Claims Settlement Declaration requires that claims be “owned continuously, from the date on which the claim arose to the date on which this Agreement enters into force, by nationals of that State.” The Tribunal has not previously addressed the continuous ownership requirement in the context of an indirect claim. It is apparent, however, that Article VII(2) requires in such cases that the claim be owned indirectly and continuously, from the date on which the claim arose to the date on which the Claims Settlement Declaration entered into force, by nationals of the relevant State Party.

The Tribunal concludes, infra, that the Government of Iran became the owner of all the “ownership interests” in SEDIRAN by the application of Clause C of the Law for Protection and Development of Iranian Industry to SEDIRAN on 2 August 1980. By assuming ownership of

As to the application of the continuous nationality requirement in the case of direct claims, see Lianosoff and the Islamic Republic of Iran, Award No. 104-183-2 (20 January 1984); and Marks & Umann and the Islamic Republic of Iran, Interlocutory Award No. 53-458-3 (26 June 1985).

This holding is without prejudice to the possibility of a case where a claim is held directly by the nationals of one State Party but then, during the relevant jurisdictional period, is transferred to the foreign subsidiary of that national. The transfer of shares and not the taking per se is of prime jurisdictional significance for it is the loss of shareholder status that breaks the Claimant’s ownership of the indirect claim. In this regard, the Tribunal notes that the shares of a company need not be transferred for expropriation to be found. In American International Group and the Islamic Republic of Iran, Award No. 93-2-3 (19 December 1983), reprinted in 4 Iran-U.S. C.T.R. 96 (26 June 1985).

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SEDIRAN, Iran succeeded to all assets and liabilities, one such asset being the claims of SEDIRAN against NIOC and Iran. This transfer of ownership of SEDIRAN to Iran necessarily interrupted SEDCO’s indirect ownership of the claim of SEDIRAN.

Therefore, SEDCO did not continuously own the indirect claim relating to SEDIRAN as required by Article VII(2) of the Claims Settlement Declaration. When a Claimant’s indirect ownership of a claim directly owned by an foreign entity is interrupted by the taking of Claimant’s property rights in that entity, the Claimant’s indirect claim is superseded by its direct claim as shareholder for its expropriated interest.6

Respondents object to the Tribunal’s jurisdiction over a direct claim by SEDCO for its shareholder interest in SEDIRAN on the ground that it involves “the presentation of a new statement of claim.” The Tribunal finds that the claims of SEDCO, whether considered jurisdictionally as direct or indirect claims, rest essentially on the same facts, allegations and legal theories. It is also noted that the Tribunal accepted a change from an indirect to direct claim in a similar pleading context in Tippets, Abbott, McCarthy, Stratton and The Islamic Republic of Iran, Award No. 41-7-2 (29 June 1984). Respondents’ objection is therefore denied.

The claims filed are within the scope of Article II(1) of the Claims Settlement Declaration and are brought against Respondents within the meaning of Article VII(3) of the Claims Settlement Declaration. The Tribunal therefore concludes that it has jurisdiction over SEDCO’s direct claim for its shareholder interest in SEDIRAN.

### D. Jurisdiction Over Counterclaims

The Tribunal will examine its jurisdiction over the counterclaims asserted by Respondents along with the merits of the claims to which they relate.

### III. Expropriation of SEDIRAN

#### A. Facts and Contentions of the Parties

1. Events to the End of 1978

In the fall of 1978 SEDIRAN was operating ten land drilling rigs in Iran under two contracts and employed approximately 1900 people. SEDIRAN owned and operated a large support facility for its operations in Ahwaz. This facility also housed an industry training school operated by SEDIRAN.

Eight of the ten rigs were carrying out drilling activities for OSCO under Contract No. 3-75-270-359. The remaining two rigs were working under Contract No. 3P/D-1 concluded with NIOC and with Segiran acting as agent for NIOC. Claimant alleges that payments under these two contracts essentially ceased in November of 1978.

By 31 December 1978 SEDIRAN’s expatriate personnel had departed Iran. Claimant contends that as a consequence of growing unrest OSCO ordered drilling activity suspended and requested the evacuation of expatriate personnel from Iran. Respondent disputes that OSCO made such a request and instead alleges that SEDCO abandoned its responsibilities to SEDIRAN.

2. Events from January 1979 through June 1979

As regards the rigs under contract to NIOC, NIOC’s agent Segiran advised SEDIRAN via telex on 4 January 1979 that “NIOC HAS DECIDED TO SUSPEND DRILLING OPERATIONS ...FOR A PERIOD OF FIFTEEN DAYS. YOU ARE THEREFORE REQUESTED TO REMAIN ON STAND-BY ‘WITHOUT CREW’.” Subsequently Segiran in a letter dated 18 January 1979 advised SEDCO that “NIOC has decided that a Force Majeure situation has existed as from (January 4th 1979) ....”

On 18 March 1979 SEDIRAN telexed NIOC and Segiran, inter alia, that:

> AS YOU ARE AWARE, RIGS 10 AND 11 ARE COMPLETELY STAFFED .... WE WOULD SUBMIT FOR YOUR CONSIDERATION THAT IF A FORCE MAJEURE SITUATION DID EXIST, IT ENDED WHEN DRILLING OPERATIONS AGAIN STARTED IN IRAN.

> OUR STATEMENT OF ACCOUNT AT FEBRUARY 29, 1979 SHOWS AN ACCOUNT RECEIVABLE FROM SEGIRAN OF DOLLARS 4,054,204.

Claimant alleges NIOC continued to refuse SEDIRAN’s demands for payment. As to the eight rigs assigned to the OSCO contract during this same period, the number of rigs provided under the contract was reduced to seven at the request on OSCO in a telex dated 27 February 1979. The Head of Drilling for the National Iranian Drilling Company in a letter on OSCO stationary dated 28 March 1979 advised SEDCO “that this company desires for all drilling rigs stipulated under contract No. 359-270-75-3 to be equipped to start operations as soon as possible.” Claimant alleges that by 31 March 1979 three of the eight SEDIRAN rigs under contract were restarted and that additional expatriate personnel were required to operate the two remaining rigs. On 31 March 1979 Mr. Dehgahn, the Deputy Managing Director of SEDIRAN, replied to the 28 March 1979 request stating,

6 The Tribunal’s jurisdictional conclusion does not foreclose the possibility as is the case here, see infra, that a de facto expropriation may be found to have occurred at a date earlier than that resulting from the transfer of shares.
For the continuation of the work of eight drilling rigs...which have already started, there is an importunate necessity of two expatriate electricians... In order to start operations of all SEDCO [i.e., SISA] and Sediran rigs which are 14 altogether, we would need the following expatriates. We would also like to add that none of these expatriates are American.

Claimant alleges that on 13 April 1979, NIOC cancelled the contract with respect to the five of the original eight rigs that had not recommenced operations but that NIOC nonetheless subsequently operated all eight rigs.

Allegedly without Claimant’s knowledge, Mr. F. Farshchi, Deputy Head of Drilling Operations for SEDIRAN, wrote to Mr. S. Fakhraie, Manager of Drilling for NIOC, on 6 May 1979 noting the need “to pay the salaries of our more than 1800 Iranian employees as well as other relevant expenses” and requested NIOC “to pay in Rials 100 percent [sic] of the payable amounts, for Sedco and Sediran rigs which were operating during the month of Farvardin 1359.”

3. Events from July 1979 to August 1980

“OILSERVCO AHWAZ (NIOC)” telexed SISA via “IROS LONDON” on 5 July 1979 stating that the operation of SISA rigs under Contract 3-75-322-339 “CANNOT CONTINUE WITHOUT PRESENCE OF YOUR AUTHORIZED REPRESENTATIVE IN AHWAZ. WE RECOMMEND THAT YOU NOMINATE AND INTRODUCE YOUR REPRESENTATIVE TO THE COMPANY AS SOON AS POSSIBLE.” On 7 July 1979, Mr. Thorne, as President of SISA and Managing Director of SEDIRAN, telexed OSCO stating that the “MANAGEMENT OF SEDIRAN DRILLING COMPANY CONTINUED TO LOOK AFTER THE INTERESTS OF BOTH SEDCO INTERNATIONAL [SISA] AND SEDIRAN DRILLING CO.”

On 24 July 1979 SEDIRAN telexed NIOC concerning all ten SEDIRAN rigs inter alia stating:

WE HAVE BEEN UNABLE TO SECURE ANY DEFINITIVE INFORMATION FROM NIOC OR OSCO CONCERNING THE NUMBER OF RIGS WHICH YOU WILL CONTINUE TO REQUIRE.... WE MUST ...BE ALLOWED TO EXPORT ANY RIGS NOT REQUIRED....

WE SHOW ACCOUNTS RECEIVABLE FROM OSCO AT JULY 9, 1977 AS FOLLOWS:

SEDIRAN DOLLARS 9,521,801

AS YOU ARE AWARE OUR COMPANIES CONTINUE TO CARRY SOME 1900 PERSONNEL ON THE PAYROLL....

Allegedly without Claimant’s knowledge, Mr. M. Dehghan, Deputy Managing Director of SEDIRAN in Iran, wrote to Dr. Nabegh, Esq. of NIOC on 4 August 1979:

Further to discussions held in meeting of 1.8.1979 and as it was explained in your presence, Mr. Moosavi, Supervisor of Sediran Drilling Company and Sedco in Ahwaz has resigned .... Consequently operation of the company in Ahwaz are left without supervisor .... We, therefore, request you to assign a Superintendent on behalf of N.I.O.C. to manage the affairs of the Company in Ahwaz to prevent the shut-down of the drilling operations.

The Minutes of the Ordinary Annual General Meeting of SEDIRAN held on 15 October 1979 state:

The shareholders or their representatives (representing 91% of the shares) were present as indicated in the enclosed list [not attached to submission].

Mr. Amir Hossein Jalali, the Alavi Foundation representative, criticising strongly against Sedco’s non-cooperation and the indifferent attitude of the American directors with respect to the Company’s problems difficulties and complexities, stated that: during the past eight months, despite continuous requests by the Iranian members of the Board and the Deputy Managing Director, for holding a Board Meeting, the American Directors refused to come to Iran, and did not even give their proxies to other persons who could attend the Board Meetings .... Furthermore, they not only did not cooperate technically and financially, but were also asking for money to send the spare parts which were badly and immediately required, whereas they had full knowledge that the Company was so short of liquidity that it could not pay salaries and wages to its employees. No doubt the American directors of the Company were in contact by telephone and telex, but unfortunately, their contact was merely in order to obtain information and money if possible ....

Furthermore, Sedco exported two of their rigs from Iran... during the most critical period of revolution, without informing the Iranian Directors of the date and details of export....

The above facts could be considered as the main reasons for the deterioration of relationship between Sediran management and its employees.

Mr. Dehghan explained about the National Iranian Drilling Company, which is under consideration and the formation of which was requested by the employees of all the drilling companies. Its preliminaries and programme is being followed up by the National Iranian Oil Company authorities. He further stated that after the National Iranian Drilling Company is formed, all drilling activities in Iran will be taken over by this Company and therefore, there will be no job in Iran for Sediran. He added that coincidently with the formation of National Iranian Drilling Company, decisions will be made by NIOC with regard to Sediran.

Having allegedly received no satisfactory response to his telex of 24 July 1979, Mr. Thorne for SEDIRAN formally terminated the OSCO contract via telex on 8 November 1979. As Managing Director of SEDIRAN he also telexed Bank Barzargani Iran on 8 November 1979 stating:
IT HAS COME TO OUR ATTENTION THAT YOU HAVE BEEN PAYING OUT FUNDS FROM ONE OR MORE OF THE ABOVE [bank] ACCOUNTS OF OUR COMPANY WITHOUT THE AUTHORITY OF PERSONS AUTHORIZED TO SIGN ON BEHALF OF OUR COMPANY .... YOU ARE HEREBY INSTRUCTED TO MAKE NO FURTHER PAYMENTS WHATSOEVER FROM THE ABOVE ACCOUNTS ....

The Iranian Ministry of Industry and Mines by three letters dated 22 November 1979 named respectively Mr. K. Mahdavi, Mr. F. Nazarnia and Mr. A. Sarrafi as provisional directors of SEDIRAN pursuant to Legal Bill No. 6738, entitled “Legal Bill Concerning the Appointment of Provisional Directors or Directors for Supervising Production, Industrial, Commercial, Agricultural and Service Units Whether in Public or Private Sector” [“Legal Bill Appointing Provisional Directors”], and Legal Bill No. 8780 dated 16/4/58. On 29 November 1979 NIOC telexed “SEDIRAN TEHRAN STATUARY [sic] DIRECTORS OF SEDIRAN” with a copy to “SEDIRAN LONDON MR. CARL F. THORNE” stating:

WE ARE IN RECEIPT OF TELEX [of 8 November 1979 whereby the OSCO Contract was terminated by Carl F. Thorne] SIGNED BY ... OF FACT YOU ARE AWARE THAT AMOUNTS COVERED BY SEDIRAN APPROVED INVOICES ARE ALREADY REMITTED TO YOUR LOCAL BANK ACCOUNT.

Mr. Thorne, as Managing Director of SEDIRAN, telexed on 4 December 1979, inter alia:

CARL F. THORNE CONTINUES TO BE MANAGING DIRECTOR OF SEDIRAN DRILLING COMPANY.

IN VIEW OF YOUR FAILURE TO EXPORT OUR RIGS, YOUR FAILURE TO PAY RECEIVABLES, AND OTHER BREACH OF CONTRACT, WE HAVE FOUND IT NECESSARY TO FILE A COMPLAINT AGAINST YOU IN UNITED STATES DISTRICT COURT....

Claimant alleges it shortly thereafter learned of the appointment of provisional directors on 22 November 1979 and in a 12 December 1979 telex to NIOC stated:

AS THE MANAGING DIRECTOR SEDIRAN AND AS REPRESENTATIVE OF THE LARGEST SHAREHOLDER I HEREBY REJECT THIS ALLEGED “APPOINTMENT”.

THE DIRECTORS OF SEDIRAN HAVE NEVER ABANDONED THE COMPANY, NOR ARE THEY UNABLE TO MANAGE THE COMPANY. THE DEPUT


IT MUST ALSO BE NOTED THAT IT IS DOUBTFUL WHETHER THE VERY DECREE [Legal Bill Appointing Provisional Directors] WHICH PURPORTS TO AUTHORIZE THE APPOINTMENT OF DIRECTORS IS AT ALL VALID UNDER IRANIAN OR INTERNATIONAL LAW, OR THAT, EVEN IF THE DECREE IS OTHERWISE VALID, THAT THE “TEMPORARY DIRECTORS” WERE PROPERLY APPOINTED IN ACCORDANCE WITH ITS TERMS. WE POINT OUT THAT THE DECREE SPECIFICALLY REQUIRES THE APPROVAL OF THE REVOLUTIONARY COUNCIL BEFORE IT BECOMES EFFECTIVE. FURTHER, BEFORE TEMPORARY DIRECTORS MAY BE APPOINTED, THERE MUST BE A SPECIFIC FINDING AND DETERMINATION BY THE APPROPRIATE MINISTRY THAT THE CIRCUMSTANCES JUSTIFY THAT ACTION. NO EVIDENCE OF REVOLUTIONARY COUNCIL APPROVAL OF THIS DECREE, NOR EVIDENCE OF ANY MINISTRY DETERMINATION, HAS EVER BEEN PRESENTED TO SEDIRAN.

WE VIEW THIS APPOINTMENT OF “TEMPORARY DIRECTORS” AS SIMPLY ANOTHER STEP BY NIOC TO IMPROPERLY GAIN CONTROL OF SEDIRAN’S ASSETS.

Respondents state that “Mr. Dehghan [the Deputy Managing Director of SEDIRAN], left Iran towards the end of 1979 ....”

On 2 August 1980 Clause C of the Protection and Development of Iranian Industries Act is alleged by Respondents to have been applied to SEDIRAN and ownership of the shares of SEDIRAN was thus transferred to Iran. Respondents allege that the 2 August order read:

In the execution of paragraph (C) Article 1 of the Law for Protection and Development of Industries in Iran as well as Article 4 of Bylaws for enforcement of the said Law a photo copy of the order concerning application of paragraph (C) to SEDIRAN is forwarded herewith for information and action.

National Industries Organization of Iran Coordinating Council for Mines and Industries Affairs

Claimant notes that a copy of such an official act has never been submitted to it or the Tribunal and argues that even if such an act occurred the clause was prima facie not applicable to SEDIRAN. Respondents further allege that “after [SEDIRAN] was taken over by the Government, [the then government-controlled] SEDIRAN decided to exercise its right to


8 See, infra note 20.
purchase the equipment [i.e., the rigs].”

B. Conclusions of the Tribunal

1. The Applicable Law

Claimant contends that its claims of expropriation are governed by the Treaty of Amity between the United States and Iran ("Treaty of Amity")9 or alternatively by customary international law.

Respondents argue that the Treaty of Amity is not applicable as a result of (1) the changes in U.S.-Iranian relations since the revolution, (2) the signing of the Claims Settlement Declaration and (3) the fact that the Treaty of Amity’s protections allegedly do not extend to non-U.S. nationals.

The Tribunal notes that in a previous case (Sea-Land Service and the Islamic Republic of Iran, Award No. 135-33-1 at 26 (22 June 1984), the Tribunal has found that “[t]here is nothing in .... the Treaty [of Amity] which extends the scope of either State’s international responsibility beyond those categories of acts already recognized by international law as giving rise to liability for a taking.” The Tribunal in its present composition agrees.

As the Tribunal thus finds that the Treaty of Amity on the particular issue of what constitutes a taking incorporates the rules of customary international law, the Tribunal decides to defer its considerations regarding the Treaty to a later award, where the standard applicable to the compensation payable for a taking will be dealt with, and where the validity and applicability of the Treaty may be relevant issues.

2. The 1980 Application of Clause C as a Taking

Noting Respondents’ assertions that Clause C of the Law for the Protection and Development of Iranian Industries ("Clause C") was applied to SEDIRAN, resulting in the transfer of the shares of SEDIRAN to Iran, Claimant argues that its shareholder interest in SEDIRAN must be regarded as having been expropriated at least by the date of the alleged application of that clause, i.e., 2 August 1980. Respondents contend that the application of Clause C cannot be regarded as a taking, expropriation or measure affecting property rights because (1) SEDIRAN was an Iranian legal entity “with nothing but large amounts of debt” and that Clause C “is somehow to be assimilated to a law that is enacted to cover Iranian companies in a state of bankruptcy ....,” and (2) SEDCO abandoned SEDIRAN, thereby forfeiting any rights in SEDIRAN.

It must be seen preliminarily that Clause C is not per se a formal decree of nationalization or expropriation. The relevant portion of the Law for the Protection and Development of Iranian Industries, Article 1, provides:

See also Harza Engineering and The Islamic of Iran, Award No. 19-98-2 at 9 (30 December 1982) ("[A] taking of property may occur under international law, even in the absence of a formal nationalization or expropriation"), reprinted in 1 Iran-U.S. C.T.R. 499 at 504; Christie, “What Constitutes a Taking of Property Under International Law?,” 38 Brit. Y.B. Int’l L. 307, 311 (1962) (“[A] State may expropriate property, where it interferes with it, even though the State expressly disclaims any such intention”).

It is also an accepted principle of international law that a State is not liable for economic injury which is a consequence of bona fide “regulation” within the accepted police power of states. See American Law Institute, Tentative Final Draft-Restatement, Foreign Relations Law of the United States (Revised), Comment G to § 712 (15 July 1985) (“A state is not responsible for loss of property or for other economic injury that is due to bona fide general taxations, to regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, that does not discriminate against aliens....”); Kugele v. Polish State, [1931-32] Ann. Dig. 69 (Upper Silesian Arbitral Tribunal) (series of license fees forcing closure of brewery held not to be taking). See also Weston, “Constructive Takings” under International Law: A Modest Foray into the Problem of ‘Creeping Expropriation’,” 16 Vir. J. Int’l L. 103 (1975).

When an action, as is the case with the application of Clause C, results in an outright transfer of title rather than incidental economic injury, however, a taking must be presumed to have occurred. The one exception to this rule, forfeiture for crime, is distinguishable because in such cases the person(s) effected do not rightfully possess title to the property in question. In the present case Respondents concede, indeed forcefully argue, that the application of Clause C resulted in the transfer of SEDCO’s shares in SEDIRAN to Iran. In this sense, SEDCO’s property interest clearly was taken. Respondents’ arguments concerning the financial condition of SEDIRAN, although not relevant to the issue of whether a taking occurred, may yet bear on the question of the value of what was taken.

As to Respondents’ argument that their actions may not be regarded as expropriatory because SEDCO in December of 1978 abandoned SEDIRAN and SEDCO thereby lost its property interest in SEDIRAN, the evidence simply does not support a finding of abandonment. Claimant submits a letter from SEDIRAN to OSCO stating in part that the “Company [OSCO] suspended Contractor operations during the last week of December, 1978, and verbally instructed Contractor to remain on Standby Rate and be ready to recommence operations at any time.” This letter was “[a]cknowledged and agreed” to on behalf of OSCO on 17 January 1979 by Mr. H. Bush. The Tribunal also can not help but take note of the grave political unrest present in Iran in December of 1978, the assassination of Paul Grimm (the American Managing Director of OSCO) on 24 December 1978 and the anti-Americanism then present generally and in the Iranian oil industry specifically. In such circumstances giving rise to a reasonable apprehension of danger, the departure of expatriate personnel and their families was legally justified regardless of OSCO authorization. In addition, the Tribunal finds that SEDCO did all that reasonably could be expected to resume SEDIRAN’s drilling operations in the first half of 1979 and throughout 1979 did not abandon its position within SEDIRAN.

3. The Events of Fall 1979 as a Taking

Claimant argues that although “[t]he respondents have admitted that the Iranian government has ‘taken over’ SEDIRAN under the ostensible authority of the Act Concerning the Protection and Expansion of Industries.... SEDIRAN would date the actual ‘taking’ somewhat earlier, as the actual letters of appointment of SEDIRAN’s ‘temporary directors’ are dated in late November of 1979.” The Tribunal agrees that by 22 November 1979 SEDCO’s shareholder interest in SEDIRAN had been taken by Iran.

The evidence before the Tribunal suggests that during the summer and early fall of 1979 SEDCO, contrary to the Protocol of Agreement, was denied access to SEDIRAN funds and deprived of its ability to participate in the management and control of SEDIRAN, circumstances potentially evidencing a taking.

The circumstance focused upon by the Tribunal, however, occurred on 22 November 1979 when Iran appointed, by identical letters, Messrs. Mahdavi, Nazarnia and Sarrafi as “provisional director[s]” of SEDIRAN pursuant to “legal bill nos. 6738, dated 26/3/58 and 8780, dated 16/4/58.”

Article 2 of this law provides that through the appointment of government directors “the earlier directors and persons in charge will be stripped of their competence” and that unless the appointments are nullified the government appointed directors “shall have all the authorities necessary for managing the current and routine affairs.”

The Tribunal previously has held on numerous occasions that the appointment by Iran of temporary managers is prima facie evidence that the entity involved is an Iranian controlled entity within the meaning of Article VII(3) of the Claims Settlement Declaration. See Raygo Wagner Equipment and Star Line Iran, Award No. 20-17-3 at 6 (15 December 1982), reprinted in 1 Iran-U.S. C.T.R. 411 at 413; Rextord and The Islamic Republic of Iran, Award No. 21-132-3 at 8 (10 January 1983), reprinted in 2 Iran-U.S. C.T.R. 6 at 9-10; Cal-Maine Foods and The Islamic Republic of Iran, Award No. 133-340-3 at 9-11 (11 June 1984); and Kimberly-Clark Corp. and Bank Markazi Iran, Award No. 46-57-2 at 9 (25 May 1983), reprinted in 2 Iran-U.S. C.T.R. 334 at 338.

In addition, the Tribunal has regarded the appointment of such managers as an important factor in finding a taking. See Starrett Housing and The Islamic Republic of Iran, Interlocutory Award
and the date of taking of SEDIRAN does not preclude the possibility that during the Tribunal's valuation of SEDIRAN, assets of SEDIRAN may have been taken at an even earlier date.

3. By a majority vote of the Tribunal, SEDCO's indirect claims relating to SEDIRAN Drilling Company are dismissed for lack of jurisdiction.

4. SEDCO's shareholder interest in SEDIRAN Drilling Company was expropriated by the Islamic Republic of Iran on 22 November 1979.

Dated, The Hague 24 October 1985

Nils Mangard
Chairman Chamber Three

Concurring Opinion
Parviz Ansari Moin

Dissenting Opinion

For the foregoing reason,
THE TRIBUNAL HEREBY AWARDS AS FOLLOWS:

SEDCO, Inc. is a national of the United States of America within the meaning of Articles II(1) and VII(1) of the Claims Settlement Declaration.

The Tribunal possesses jurisdiction over the indirect claims of SEDCO, Inc. relating to SEDCO International, S.A. and the direct claim of SEDCO, Inc. for its shareholder interest in SEDIRAN Drilling Company.

SEDCO, Inc.'s indirect claims relating to SEDIRAN Drilling Company are dismissed for lack of jurisdiction.

SEDCO, Inc.'s shareholder interest in SEDIRAN Drilling Company was expropriated by the Islamic Republic of Iran on 22 November 1979.

Dated, The Hague 24 October 1985

Nils Mangard
Chairman Chamber Three

Concurring Opinion
Parviz Ansari Moin

Dissenting Opinion

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SEDCO, Inc.'s shareholder interest in SEDIRAN Drilling Company was expropriated by the Islamic Republic of Iran on 22 November 1979.

Dated, The Hague 24 October 1985

Nils Mangard
Chairman Chamber Three

Concurring Opinion
Parviz Ansari Moin

Dissenting Opinion
International Tribunal for the Law of the Sea

M/V “Saiga” (No. 2)
(Saint Vincent and the Grenadines v. Guinea)
Judgment of 1 July 1999
1 July 1999

List of cases:
No. 2

THE M/V “SAIGA” (No. 2) CASE
(SAINT VINCENT AND THE GRENADINES v. GUINEA)

JUDGMENT

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In the M/V "SAIGA" (No.2) case

between

Saint Vincent and the Grenadines,

represented by

Mr. Carlyle D. Dougan, Q.C., High Commissioner of Saint Vincent and the Grenadines to the United Kingdom,

as Agent;

Mr. Richard Plender, Q.C., Barrister, London, United Kingdom,

as Deputy Agent and Counsel;

Mr. Carl Joseph, Attorney General and Minister of Justice of Saint Vincent and the Grenadines,

and

Mr. Yérim Thiam, Advocate, President of the Senegalese Bar, Dakar, Senegal,

as Counsel and Advocates,

and

Guinea,

represented by

Mr. Hartmut von Brevern, Attorney at Law, Röhreke, Boye, Remé, von Werder, Hamburg, Germany,

as Agent and Counsel;

Mr. Maurice Zogbélémou Togba, Minister of Justice and Garde des Sceaux of Guinea,

and

Mr. Namankoumba Kouyate, Chargé d’Affaires, Embassy of Guinea, Bonn, Germany,

Mr. Rainer Lagoni, Professor at the University of Hamburg and Director of the Institute for Maritime Law and Law of the Sea, Hamburg, Germany,

Mr. Mamadi Askia Camara, Director of the Division of Customs Legislation and Regulation, Conakry, Guinea,

Mr. André Saféla Leno, Judge of the Court of Appeal, Conakry, Guinea,

as Counsel,

THE TRIBUNAL,

composed as above,

after deliberation,

delivers the following Judgment:

Introduction

1. On 13 January 1998, the Agent of Saint Vincent and the Grenadines filed in the Registry of the Tribunal a Request for the prescription of provisional measures in accordance with article 290, paragraph 5, of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") concerning the arrest and detention of the vessel M/V Saiga (hereinafter "the Saiga"). The Request was accompanied by a copy of the Notification submitted by Saint Vincent and the Grenadines to the Republic of Guinea on 22 December 1997 (hereinafter "the Notification of 22 December 1997") instituting arbitral proceedings in accordance with Annex VII to the Convention in respect of a dispute relating to the Saiga. A certified copy of the Request was sent on the same day by the Registrar of the Tribunal to the Minister for Foreign Affairs of Guinea in Conakry and also in care of the Ambassador of Guinea to Germany.

2. On 13 January 1998, the Registrar was notified of the appointment of Mr. Bozo Dabinovic, Commissioner for Maritime Affairs of Saint Vincent and the Grenadines, as Agent of Saint
Vincent and the Grenadines. On 20 January 1998, the appointment of Mr. Hartmut von Brevern, Attorney at Law, Hamburg, as Agent of Guinea, was notified to the Registrar.

3. In accordance with article 24, paragraph 3, of the Statute of the Tribunal (hereinafter “the Statute”), States Parties to the Convention were notified of the Request for the prescription of provisional measures by a note verbale from the Registrar dated 20 February 1998. Pursuant to the Agreement on Cooperation and Relationship between the United Nations and the Tribunal, the Registrar notified the Secretary-General of the United Nations of the Request on 20 February 1998.

4. By a letter dated 20 February 1998, the Agent of Guinea notified the Tribunal of the Exchange of Letters of the same date (hereinafter “the 1998 Agreement”) constituting an agreement between Guinea and Saint Vincent and the Grenadines, both of which are parties to the Convention, to transfer the arbitration proceedings, instituted by Saint Vincent and the Grenadines by the Notification of 22 December 1997, to the International Tribunal for the Law of the Sea. The 1998 Agreement is as follows:

Mr. Bozo Dabinovic
Agent and Maritime Commissioner of
St. Vincent and the Grenadines
... Hamburg, 20.02.1998
...

Upon the instruction of the Government of the Republic of Guinea I am writing to inform you that the Government has agreed to submit to the jurisdiction of the International Tribunal for the Law of the Sea in Hamburg the dispute between the two States relating to the MV “SAIGA”. The Government therefore agrees to the transfer to the International Tribunal for the Law of the Sea of the arbitration proceedings instituted by Saint Vincent and the Grenadines by Notification of 22 December 1997. You will find attached hereto written instructions from the Minister of Justice to that effect.

Further to the recent exchange of views between the two Governments, including through the good offices of the President of the International Tribunal for the Law of the Sea, the Government of Guinea agrees that submission of the dispute to the International Tribunal for the Law of the Sea shall include the following conditions:

1. The dispute shall be deemed to have been submitted to the International Tribunal for the Law of the Sea on 22 December 1997, the date of the Notification by St. Vincent and the Grenadines;

2. The written and oral proceedings before the International Tribunal for the Law of the Sea shall comprise a single phase dealing with all aspects of the merits (including damages and costs) and the objection as to jurisdiction raised in the Government of Guinea’s Statement of Response dated 30 January 1998;

3. The written and oral proceedings shall follow the timetable set out in the Annex hereto;

4. The International Tribunal for the Law of the Sea shall address all claims for damages and costs referred to in paragraph 24 of the Notification of 22 December 1997 and shall be entitled to make an award on the legal and other costs incurred by the successful party in the proceedings before the International Tribunal;


The agreement of the Government of St. Vincent and the Grenadines to the submission of the dispute to the International Tribunal on these conditions may be indicated by your written response to this letter. The two letters shall constitute a legally binding Agreement (“Agreement by Exchange of Letters”) between the two States to submit the dispute to the International Tribunal for the Law of the Sea, and shall become effective immediately. The Republic of Guinea shall submit the Agreement by Exchange of Letters to the President of the International Tribunal for the Law of the Sea immediately after its conclusion. Upon confirmation by the President that he has received the Agreement and that the International Tribunal is prepared to hear the dispute the arbitration proceedings instituted by the Notification dated 22 December 1997 shall be considered to have been transferred to the jurisdiction of the International Tribunal for the Law of the Sea.

I look forward to receiving your early response.

Yours sincerely,

(Signed)
Hartmut von Brevern
Agent of the Republic of Guinea

Annex

In re: m/v Saiga
(St. Vincent and the Grenadines v. Republic of Guinea)

AGREED TIMETABLE FOR PROCEEDINGS BEFORE THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
Mr. Hartmut von Brevern,

... Hamburg

20th February 1998

... I am in receipt of your letter of 20th February 1998 addressed to Mr. Bozo Dabinovic, Agent and Maritime Commissioner of St. Vincent and the Grenadines, in relation to the Arbitration proceedings concerning the M/V “Saiga” as well as the request for provisional measures.

On behalf of the Government of St. Vincent and the Grenadines I have the honour to confirm that my Government agrees to the submission of the dispute to the International Tribunal for the Law of the Sea subject to the conditions set out in your letter of 20th February 1998. A copy of this letter is attached hereto.

I remain Sir,

Yours sincerely,

(Signed)

Carl L. Joseph
Attorney General.

5. By Order dated 20 February 1998, the Tribunal decided that “the Notification submitted by Saint Vincent and the Grenadines on 22 December 1997 instituting proceedings against Guinea in respect of the M/V ‘Saiga’ shall be deemed to have been duly submitted to the Tribunal on that date” and that “the request for the prescription of provisional measures ... be considered as having been duly submitted to the Tribunal under article 290, paragraph 1, of the Convention and article 89, paragraph 1, of the Rules of the Tribunal” (hereinafter “the Rules”). By the same Order, the case was entered in the List of cases as: The M/V “SAIGA” (No. 2) case.


7. Notice of the Orders of 20 and 23 February 1998 was communicated to the parties and copies thereof were subsequently transmitted to them by the Registrar.

8. By Order dated 11 March 1998, the Tribunal decided upon the Request for the prescription of provisional measures as follows:

1. Unanimously,

Prescribes the following provisional measure under article 290, paragraph 1, of the Convention:

Guinea shall refrain from taking or enforcing any judicial or administrative measure against the M/V Saiga, its Master and the other members of the crew, its owners or operators, in connection with the incidents leading to the arrest and detention of the vessel on 28 October 1997 and to the subsequent prosecution and conviction of the Master.

2. Unanimously,

Recommends that Saint Vincent and the Grenadines and Guinea endeavour to find an arrangement to be applied pending the final decision, and to this end the two States should ensure that no action is taken by their respective authorities or vessels flying their flag which might aggravate or extend the dispute submitted to the Tribunal.

3. Unanimously,

Decides that Saint Vincent and the Grenadines and Guinea shall each submit the initial report referred to in article 95, paragraph 1, of the Rules as soon as possible and not later than 30 April 1998, and authorizes the President to request such further reports and information as he may consider appropriate after that date.

4. Unanimously,

Reserves for consideration in its final decision the submission made by Guinea for costs in the present proceedings.

9. A copy of the Order was transmitted to the parties on 11 March 1998 in accordance with article 94 of the Rules.

10. States Parties to the Convention were notified of the 1998 Agreement and of the Orders of 20 and 23 February and 11 March 1998, by a note verbale from the Registrar dated 14 April 1998. The Secretary-General of the United Nations was also notified on the same date.
11. On 19 June 1998, Saint Vincent and the Grenadines transmitted its Memorial by facsimile to the Tribunal. A copy of the Memorial was sent on 22 June 1998 to the Agent of Guinea. The original of the Memorial and documents in support were filed in the Registry on 22 June 1998 and on 1 July 1998.


13. On 16 October 1998, Guinea submitted its Counter-Memorial to the Tribunal, a copy of which was transmitted to the Agent of Saint Vincent and the Grenadines on 19 October 1998. The Reply of Saint Vincent and the Grenadines was filed in the Registry on 20 November 1998. A copy of the Reply was communicated to the Agent of Guinea on 24 November 1998. The Rejoinder of Guinea was filed in the Registry on 28 December 1998. A copy of the Rejoinder was sent to the Agent of Saint Vincent and the Grenadines on 29 December 1998.

14. By Order of 18 January 1999, the President fixed 8 March 1999 as the date for the opening of the oral proceedings.

15. At a meeting with the representatives of the parties on 4 February 1999, the President ascertained the views of the parties regarding issues to be addressed by evidence or submissions during the oral proceedings and requested the parties to complete the documentation in accordance with article 63, paragraphs 1 and 2, and article 64, paragraph 3, of the Rules.

16. Pursuant to article 72 of the Rules, information regarding witnesses and experts was submitted by the parties to the Tribunal on 19 February 1999, and on 1 and 4 March 1999.

17. On 1 March 1999, the Registrar was informed of the death of the Agent of Saint Vincent and the Grenadines, Mr. Bozo Dabinovic, and of the appointment of Mr. Carlyle D. Dougan, High Commissioner of Saint Vincent and the Grenadines to the United Kingdom, as the Agent of Saint Vincent and the Grenadines.

18. After the closure of the written proceedings and prior to the opening of the oral proceedings, the Tribunal held initial deliberations on 1, 2 and 5 March 1999 in accordance with article 68 of the Rules.

19. At a meeting with representatives of the parties on 2 March 1999, the President ascertained the views of the parties regarding the procedure for the oral proceedings and the order and timing of presentation by each of the parties. In accordance with article 76 of the Rules, the President also indicated to the parties the points or issues which the Tribunal would like them specially to address.

20. Prior to the opening of the oral proceedings, the parties submitted documents required under paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal. The parties also transmitted further documents, in conformity with article 71 of the Rules. Copies of the documents of each party were communicated to the other party.

21. From 8 to 20 March 1999, the Tribunal held 18 public sittings. At these sittings the Tribunal was addressed by the following:

For Saint Vincent and the Grenadines:
- Mr. Carlyle D. Dougan,
- Mr. Richard Plender,
- Mr. Carl Joseph,
- Mr. Yérim Thiam,
- Mr. Nicholas Howe.

For Guinea:
- Mr. Hartmut von Brevern,
- Mr. Maurice Zogbélémo Togba,
- Mr. Rainer Lagoni,
- Mr. Mamadi Askia Camara.

22. At public sittings held on 8, 9 and 10 March 1999, the following witnesses were called by Saint Vincent and the Grenadines:
- Mr. Mikhaylo Alexandrovich Orlov, Master of the Saiga (examined by Mr. Plender, cross-examined by Mr. von Brevern and Mr. Lagoni, re-examined by Mr. Plender); Mr. Laszlo Merenyi, Superintendent of Seascot Shipmanagement Ltd. (examined by Mr. Plender, cross-examined by Mr. von Brevern and Mr. Lagoni, re-examined by Mr. Plender); Mr. Djibril Niasse, painter on board the Saiga (examined by Mr. Thiam, cross-examined by Mr. von Brevern and Mr. Lagoni, re-examined by Mr. Thiam);
- Mr. Allan Stewart, Managing Director of Seascot Shipmanagement Ltd. (examined by Mr. Plender, cross-examined by Mr. von Brevern and Mr. Lagoni, re-examined by Mr. Plender).

Mr. Orlov gave evidence in Russian and Mr. Niasse in Wolof. The necessary arrangements were made for the statements of those witnesses to be interpreted into the official languages of the Tribunal. In the course of their testimony, Mr. Niasse and Mr. Stewart responded to questions put to them by the President.

23. On 10 March 1999, after the re-examination of Mr. Stewart by Mr. Plender, the Agent of Guinea requested permission to address a further question to the witness. The request was denied by the President, who ruled that further cross-examination was not permitted except where new matters had been introduced in re-examination.
24. At public sittings held on 12 and 13 March 1999, the following witnesses were called by Guinea:

- Mr. Léonard Bangoura, Commander, Deputy to the Chief of the National Mobile Customs Brigade (examined by Mr. von Brevern and Mr. Lagoni, cross-examined by Mr. Plender and Mr. Thiam, re-examined by Mr. Lagoni);
- Mr. Mangué Camara, Sub-Lieutenant, Customs Inspection Officer (examined by Mr. von Brevern, cross-examined by Mr. Thiam, re-examined by Mr. M. A. Camara and Mr. von Brevern);
- Mr. Ahmadou Sow, Lieutenant, Naval Staff Officer (examined by Mr. Lagoni, cross-examined by Mr. Thiam, re-examined by Mr. Lagoni).

25. A written and signed statement of each of the witnesses was submitted by the party calling the witness.

26. In the course of the testimony of witnesses a number of exhibits were presented, including the following:

- photographs said to show damage to the Saiga and equipment on board as a result of the attack by the Guinean authorities;
- photographs of Mr. Sergey Klyuyev, Second Officer of the Saiga, and Mr. Niasse, painter employed on the ship, showing injuries alleged to have been suffered by them as a result of the force used to arrest the Saiga;
- a nautical chart showing areas off the coast of Guinea;
- a nautical chart showing the courses said to have been taken by the Saiga and the Guinean patrol boats, respectively;
- a radiograph said to be that of Mr. Niasse;
- a handwritten statement said to be a report by the Chief of the Guinean joint mission of Customs and Navy patrol vessels.

The original or a certified copy of each exhibit was delivered to the Registrar and duly registered.

27. Pursuant to article 67, paragraph 2, of the Rules, copies of the pleadings and documents annexed thereto, the Notification of 22 December 1997 and the 1998 Agreement were made accessible to the public from the date of opening of the oral proceedings. In accordance with article 86 of the Rules, a transcript of the verbatim record of each public sitting of the hearing was prepared and circulated to the judges sitting in the case. Copies of the transcripts were also circulated to the parties and made available to the public in printed and electronic form.

28. In the Memorial and in the Counter-Memorial, the following submissions were presented by the parties:

On behalf of Saint Vincent and the Grenadines,

In the Memorial:

the Government of St. Vincent and the Grenadines asks the International Tribunal to adjudge and declare that:

(1) the actions of Guinea (inter alia the attack on the m/v “Saiga” and its crew in the exclusive economic zone of Sierra Leone, its subsequent arrest, its detention and the removal of the cargo of gasoil, its filing of charges against St. Vincent and the Grenadines and its subsequently issuing a judgment against them) violate the right of St. Vincent and the Grenadines and vessels flying its flag to enjoy freedom of navigation, as set forth in Articles 56(2) and 58 and related provisions of the Convention;

(2) subject to the limited exceptions as to enforcement provided by Article 33(1)(a) of the Convention, the customs and contraband laws of Guinea, namely inter alia Articles 1 and 8 of Law 94/007/CTRN of 15 March 1994, Articles 316 and 317 of the Code des Douanes, and Articles 361 and 363 of the Penal Code, may in no circumstances be applied or enforced in the exclusive economic zone of Guinea;

(3) Guinea did not lawfully exercise the right of hot pursuit under Article 111 of the Convention in respect of the m/v “Saiga” and is liable to compensate the m/v “Saiga” pursuant to Article 111(8) of the Convention;

(4) Guinea has violated Articles 292(4) and 296 of the Convention in not releasing the m/v “Saiga” and her crew immediately upon the posting of the guarantee of US$400,000 on 10 December 1997 or the subsequent clarification from Crédit Suisse on 11 December;

(5) the citing of St. Vincent and the Grenadines as the flag state of the m/v “Saiga” in the criminal courts and proceedings instituted by Guinea violates the rights of St Vincent and the Grenadines under the 1982 Convention;

(7) Guinea immediately return the equivalent in United States Dollars of the discharged oil and return the Bank Guarantee;

(8) Guinea is liable for damages as a result of the aforesaid violations with interest thereon; and

* As in the original.
(9) Guinea shall pay the costs of the Arbitral proceedings and the costs incurred by St. Vincent and the Grenadines.

On behalf of Guinea,
in the Counter-Memorial:

the Government of the Republic of Guinea asks the International Tribunal to dismiss the Submissions of St. Vincent and the Grenadines in total and to adjudge and declare that St. Vincent and the Grenadines shall pay all legal and other costs the Republic of Guinea has incurred in the M/V “SAIGA” cases nos. 1 and 2.

29. In the Reply and in the Rejoinder, the following submissions were presented by the parties:

On behalf of St. Vincent and the Grenadines,
in the Reply:

St. Vincent and the Grenadines adheres to her request that the International Tribunal should adjudge and declare that:

(i) the actions of the Republic of Guinea violated the right of St. Vincent and the Grenadines and of vessels flying her flag to enjoy freedom of navigation and/or other internationally lawful uses of the sea, as set forth in Articles 56(2) and 58 and related provisions of UNCLOS;

(ii) subject to the limited exceptions as to enforcement provided by Article 33(1)(a) of UNCLOS, the customs and contraband laws of the Republic Guinea may in no circumstances be applied or enforced in the exclusive economic zone of the Republic of Guinea;

(iii) Guinea did not lawfully exercise the right of hot pursuit under Article 111 of UNCLOS in respect of the M.V. Saiga and is liable to compensate the M.V. Saiga according to Article 111(8) of UNCLOS;

(iv) the Republic of Guinea has violated Articles 292(4) and 296 of UNCLOS in not releasing the M.V. Saiga and her crew immediately upon the posting of the guarantee of US$400,000 on 10th December 1997 or the subsequent clarification from Crédit Suisse on 11th December 1997;

(v) the citing of St. Vincent and the Grenadines in proceedings instituted by the Guinean authorities in the criminal courts of the Republic of Guinea in relation to the M.V. Saiga violated the rights of St. Vincent and the Grenadines under UNCLOS;

(vi) the Republic of Guinea shall immediately repay to St. Vincent and the Grenadines the sum realized on the sale of the cargo of the M.V. Saiga and return the bank guarantee provided by St. Vincent and the Grenadines;

(vii) the Republic of Guinea shall pay damages as a result of such violations with interest thereon;

(ix) the Republic of Guinea shall pay the costs of the Arbitral proceedings and the costs incurred by St. Vincent and the Grenadines.

On behalf of Guinea,
in the Rejoinder:

the Republic of Guinea adheres to her request that the International Tribunal should dismiss the Submissions of St. Vincent and the Grenadines in total and declare that St. Vincent and the Grenadines shall pay all legal and other costs the Republic of Guinea has incurred in the M/V “SAIGA” Cases nos. 1 and 2.

30. In accordance with article 75, paragraph 2, of the Rules, the following final submissions were presented by the parties at the end of the hearing:

On behalf of St. Vincent and the Grenadines:

the Government of St. Vincent & the Grenadines asks the International Tribunal to adjudge and declare that:

(1) the actions of Guinea (inter alia the attack on the m/v “Saiga” and her crew in the exclusive economic zone of Sierra Leone, its subsequent arrest, its detention and the removal of the cargo of gasoil, its filing of charges against St. Vincent & the Grenadines and its subsequently issuing a judgment against them) violate the right of St. Vincent & the Grenadines and vessels flying its flag to enjoy freedom of navigation and/or other internationally lawful uses of the sea related to the freedom of navigation, as set forth in Articles 56(2) and 58 and related provisions of the Convention;

(2) subject to the limited exceptions as to enforcement provided by Article 33(1)(a) of the Convention, the customs and contraband laws of Guinea, namely inter alia Articles 1 and 8 of Law 94/007/CTRN of 15 March 1994, Articles 316 and 317 of the Code des Douanes, and Articles 361 and 363 of the Penal Code, may in no circumstances be applied or enforced in the exclusive economic zone of Guinea;

(3) Guinea did not lawfully exercise the right of hot pursuit under Article 111 of the Convention in respect of the m/v “Saiga” and is liable to compensate the m/v “Saiga” pursuant to Article 111(8) of the Convention;
(4) Guinea has violated Articles 292(4) and 296 of the Convention in not releasing the m/v “Saiga” and her crew immediately upon the posting of the guarantee of US$400,000 on 10 December 1997 or the subsequent clarification from Crédit Suisse on 11 December;

(5) the citing of St. Vincent & the Grenadines as the Flag State of the m/v “Saiga” in the criminal courts and proceedings instituted by Guinea violates the rights of St. Vincent & the Grenadines under the 1982 Convention;

(6) Guinea immediately return the equivalent in United States Dollars of the discharged gasoil;

(7) Guinea is liable for damages as a result of the aforesaid violations with interest thereon; and

(8) Guinea shall pay the costs of the proceedings and the costs incurred by St. Vincent & the Grenadines.

On behalf of Guinea:

the Government of the Republic of Guinea asks the International Tribunal to adjudge and declare that:

(1) the claims of St. Vincent and the Grenadines are dismissed as non-admissible. St. Vincent and the Grenadines shall pay the costs of the proceedings and the costs incurred by the Republic of Guinea.

Alternatively, that:

(2) the actions of the Republic of Guinea did not violate the right of St. Vincent and the Grenadines and of vessels flying her flag to enjoy freedom of navigation and/or other internationally lawful uses of the sea, as set forth in Articles 56(2) and 58 and related provisions of UNCLOS;

(3) Guinean laws can be applied for the purpose of controlling and suppressing the sale of gasoil to fishing vessels in the customs radius (“rayon des douanes”) according to Article 34 of the Customs Code of Guinea;

(4) Guinea did lawfully exercise the right of Hot Pursuit under Article 111 of UNCLOS in respect to the MV “SAIGA” and is not liable to compensate the M/V Saiga according to article 111(8) of UNCLOS;

(5) the Republic of Guinea has not violated article 292(4) and 296 of UNCLOS;

(6) The mentioning of St. Vincent and the Grenadines in the “Cédule de Citation” of the Tribunal de Première Instance de Conakry of 12 December 1997 under the heading “CIVILEMENT .. RESPONSABLE À CITER” did not violate the rights of St. Vincent and the Grenadines under UNCLOS;

(7) There is no obligation of the Republic of Guinea to immediately return to St. Vincent and the Grenadines the equivalent in United States Dollars of the discharged gasoil;

(8) The Republic of Guinea has no obligation to pay damages to St. Vincent and the Grenadines;

(9) St. Vincent and the Grenadines shall pay the costs of the proceedings and the costs incurred by the Republic of Guinea.

Factual background

31. The Saiga is an oil tanker. At the time of its arrest on 28 October 1997, it was owned by Tabona Shipping Company Ltd. of Nicosia, Cyprus, and managed by Seascot Shipmanagement Ltd. of Glasgow, Scotland. The ship was chartered to Lemaia Shipping Group Ltd. of Geneva, Switzerland. The Saiga was provisionally registered in Saint Vincent and the Grenadines on 12 March 1997. The Master and crew of the ship were all of Ukrainian nationality. There were also three Senegalese nationals who were employed as painters. The Saiga was engaged in selling gas oil as bunker and occasionally water to fishing and other vessels off the coast of West Africa. The owner of the cargo of gas oil on board was Addax BV of Geneva, Switzerland.

32. Under the command of Captain Orlov, the Saiga left Dakar, Senegal, on 24 October 1997 fully laden with approximately 5,400 metric tons of gas oil. On 27 October 1997, between 0400 and 1400 hours and at a point 10°25'03"N and 15°42'06"W, the Saiga supplied gas oil to three fishing vessels, the Giuseppe Primo and the Kriti, both flying the flag of Senegal, and the Eleni S, flying the flag of Greece. This point was approximately 22 nautical miles from Guinea’s island of Alcatraz. All three fishing vessels were licensed by Guinea to fish in its exclusive economic zone. The Saiga then sailed in a southerly direction to supply gas oil to other fishing vessels at a pre-arranged place. Upon instructions from the owner of the cargo in Geneva, it later changed course and sailed towards another location beyond the southern border of the exclusive economic zone of Guinea.

33. At 0800 hours on 28 October 1997, the Saiga, according to its log book, was at a point 09°00'01"N and 14°58'58"W. It had been drifting since 0420 hours while awaiting the arrival of fishing vessels to which it was to supply gas oil. This point was south of the southern limit of the exclusive economic zone of Guinea. At about 0900 hours the Saiga was attacked by a Guinean patrol boat (P35). Officers from that boat and another Guinean patrol boat (P328) subsequently boarded the ship and arrested it. On the same day, the ship and its crew were brought to Conakry, Guinea, where its Master was detained. The travel documents of the members of the crew were taken from them by the authorities of Guinea and armed guards were placed on board the ship. On 1 November 1997, two injured persons from the Saiga, Mr. Sergey Klyuyev and Mr. Djibril Niassse, were permitted to leave Conakry for Dakar for medical treatment. Between 10 and 12 November 1997, the cargo of gas oil on board the ship, amounting to 4,941.322 metric tons, was discharged on
34. An account of the circumstances of the arrest of the vessel and the Master was drawn up by Guinean customs authorities in a "Procès-Verbal" (hereinafter "PV29"), which was signed by the Chief of the National Mobile Customs Brigade set up under the authority of the Guinean authorities. A copy of the "PV29" was annexed to the Request for the immediate release of the vessel, which was submitted to the Tribunal of First Instance in Conakry, on 17 December 1997. The vessel was found to be carrying six containers loaded with fuel. The "PV29" contains a statement of the Master obtained by interrogation by the Guinean authorities. A document, "Conclusions présentés au nom de l'Administration des Douanes par le Chef de la Brigade Mobile Nationale des Douanes" (Conclusions presented in the name of the Customs authorities on 14 November 1997 under the authority of the National Mobile Customs Brigade set up under the authority of the Public Prosecutor (Procureur de la République), which additionally named the vessel and its cargo (mentioned in the prayer of the Request for the immediate release of the vessel). Criminal proceedings were subsequently instituted against the Master and the ship's crew.

35. On 13 November 1997, the Tribunal of First Instance in Conakry delivered a judgment in the case of "Saiga". The judgment stated that the vessel was carrying fuel and that it had been seized by the Guinean authorities. The judgment ordered that the vessel be released and that the cargo be confiscated. The Master was ordered to pay a fine of 15,354,040,000 Guinean francs. The vessel was released on 22 December 1997 and the cargo seizure was lifted on 28 February 1998.

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37. On 17 December 1997, the Tribunal of First Instance in Conakry delivered a judgment in the case of "Saiga". The judgment stated that the vessel was carrying fuel and that it had been seized by the Guinean authorities. The judgment ordered that the vessel be released and that the cargo be confiscated. The Master was ordered to pay a fine of 15,354,040,000 Guinean francs. The vessel was released on 22 December 1997 and the cargo seizure was lifted on 28 February 1998.

38. The Master appealed to the Court of Appeal (cour d'appel) in Conakry against his conviction and on 28 February 1998, the Court of Appeal upheld the judgment of the Tribunal of First Instance. The Master then appealed to the Court of Appeal against the conviction and on 28 February 1998, the Court of Appeal upheld the judgment of the Tribunal of First Instance. The Master then appealed to the Court of Appeal against the conviction and on 28 February 1998, the Court of Appeal upheld the judgment of the Tribunal of First Instance.
dispute.

Accordingly, the Tribunal finds that it has jurisdiction over the dispute as submitted to it.

**Objections to challenges to admissibility**

Guinea raises a number of objections to the admissibility of the claims set out in the application. Saint Vincent and the Grenadines contends that Guinea does not have the right to raise any objections to admissibility in this case. In support of its contentions, Saint Vincent and the Grenadines relies on the terms of the 1998 Agreement and on article 97, paragraph 1, of the Rules.

With respect to the 1998 Agreement, Saint Vincent and the Grenadines refers to paragraph 2 which states:

> The written and oral proceedings before the International Tribunal for the Law of the Sea shall comprise a single phase dealing with all aspects of the merits (including damages and costs) and the objection as to jurisdiction raised in the Government of Guinea’s Statement of Response dated 30 January 1998.

Saint Vincent and the Grenadines asserts that this provision permits Guinea to raise only the objection to jurisdiction and precludes objections to admissibility. According to Saint Vincent and the Grenadines, reservation of the specific objection to jurisdiction implies that all other objections to jurisdiction or admissibility were ruled out by the parties.

Saint Vincent and the Grenadines further argues that Guinea has lost the right to raise objections to admissibility because it failed to meet the time-limit of 90 days specified by article 97 of the Rules for making such objections. It points out that Guinea’s objections to admissibility were made in the Counter-Memorial submitted on 16 October 1998, more than 90 days after the institution of the proceedings on 22 December 1997.

Guinea replies that by agreeing to paragraph 2 of the 1998 Agreement it did not give up its right to raise objections to admissibility. It also contends that article 97 of the Rules does not apply to objections to admissibility. Guinea submits that, in any case, its objections were made within the time-limit specified in article 97 of the Rules, because, in its opinion, the proceedings were actually instituted by the submission of the Memorial filed by Saint Vincent and the Grenadines on 19 June 1998.

In the view of the Tribunal, the object and purpose of the 1998 Agreement was to transfer to the Tribunal the same dispute that would have been the subject of the proceedings before the arbitral tribunal. Before the arbitral tribunal, each party would have retained the general right to present its contentions. The Tribunal considers that the parties have the same general right in the present proceedings, subject only to the restrictions that are clearly imposed by the terms of the 1998 Agreement and the Rules. In the present case, the Tribunal finds that the reservation of Guinea’s right in respect of the specific objection as to jurisdiction did not deprive it of its general right to raise objections to admissibility, provided that it did so in accordance with the

**Challenges to admissibility**

**Registration of the Saiga**

The first objection raised by Guinea to the admissibility of the claims set out in the application is that Saint Vincent and the Grenadines does not have legal standing to bring claims in connection with the measures taken by Guinea against the Saiga. The reason given by Guinea for its contention is that on the day of its arrest the ship was “not validly registered under the flag of Saint Vincent and the Grenadines” and that, consequently, Saint Vincent and the Grenadines is not legally competent to present claims either on its behalf or in respect of the ship, its Master and the other members of the crew, its owners or its operators.

This contention of Guinea is challenged by Saint Vincent and the Grenadines on several grounds.

The facts relating to the registration of the Saiga, as they emerge from the evidence adduced before the Tribunal, are as follows:

(a) The Saiga was registered provisionally on 12 March 1997 as a Saint Vincent and the
Saint Vincent and the Grenadines, the provisional certificate, like a passport, is evidence, but not the source of nationality. For these reasons, Saint Vincent and the Grenadines contends that the Provisional Certificate of Registration issued to the ship on 14 April 1997 stated that it was issued by the Government of Saint Vincent and the Grenadines on behalf of the Government of Saint Vincent and the Grenadines under the terms of the Merchant Shipping Act. The Certificate stated: “This Certificate expires on 12 September 1997.”

61. Guinea argues that automatic extension of a provisional certificate of registration is neither provided for nor envisaged under the Merchant Shipping Act. It further argues that automatic extension of a provisional certificate of registration is not required by the definition of registration in article 91 of the Convention. For these reasons, Guinea argues that the MV ‘Saiga’ did not have the nationality of Saint Vincent and the Grenadines during the period between the expiry of the Provisional Certificate on 12 September 1997 and the issue of the Permanent Certificate on 28 November 1997.

62. The question for consideration is whether the Saint Vincent and the Grenadines flag remains in force for the entire period of the aircraft ‘Saiga’ was registered in the Register of Ships of Saint Vincent & the Grenadines. The relevant provision of the Convention is article 91. Section 1 of article 91 states:

1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.

2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

3. Article 91 leaves each State exclusive jurisdiction over the granting of its nationality to ships. In this respect, article 91 confers a well-entrenched right on a State to determine who may fly its flag, based on criteria that it considers appropriate.

63. Article 91 leaves each State exclusive jurisdiction over the granting of its nationality to ships. In this respect, article 91 confers a well-entrenched right on a State to determine who may fly its flag, based on criteria that it considers appropriate.
Under this article, it is for Saint Vincent and the Grenadines to fix the conditions for the grant of nationality to ships, for the registration of ships in its territory and for the right to fly its flag. These matters are regulated by its domestic law.

The right to fly its flag documents to that effect. The issue of such documents is regulated by Saint Vincent and the Grenadines in paragraph 60. It considers this statement to be sufficient.

65. Determination of the criteria and establishment of the procedures for granting and withdrawing nationality to ships is a matter of Saint Vincent and the Grenadines. It has adopted such a procedure in its Merchant Shipping Act.

66. The Tribunal recalls that, in its Judgment of 4 December 1997 and in its Order of 11 March 1998, the Saïga was described as a ship flying the flag of Saint Vincent and the Grenadines.

67. Saint Vincent and the Grenadines has produced evidence before the Tribunal to support its assertion that the Saïga was a ship of its nationality. The evidence adduced by Saint Vincent and the Grenadines has been reinforced by its conduct. It has at all times operated the ship as its flag State of the Saïga.

68. As far as Guinea is concerned, the Tribunal cannot fail to note that it did not challenge or raise any doubts about the registration or nationality of the ship at any time until the submission of its Counter-Memorial in October 1998. Prior to this, it was open to Guinea to make inquiries regarding the registration of the Saïga or documentation relating to it. For example, Guinea could have inspected the registration and nationality of the ship at any time during the proceedings for prompt release in November 1997 and for the prescription of provisional measures under article 290 of the Convention. It has acted as the flag State of the Saïga at all times material to the dispute.

69. The evidence adduced by Saint Vincent and the Grenadines has been reinforced by its conduct. It has at all times operated the ship as its flag State of the Saïga.

70. With regard to the previous registration of the Saïga, the Tribunal notes the statement made by Saint Vincent and the Grenadines in paragraph 60. It considers this statement to be sufficient.

71. The Tribunal recalls that, in its Judgment of 4 December 1997 and in its Order of 11 March 1998, the Saïga was described as a ship flying the flag of Saint Vincent and the Grenadines.

72. On the basis of the evidence before it, the Tribunal finds that Saint Vincent and the Grenadines had granted the nationality to the Saïga at the time of the arrest. The Tribunal notes that the Saïga was registered in Saint Vincent and the Grenadines at all times material to the dispute.

73. The Tribunal concludes:

(a) it has not been established that the Vincentian registration or nationality of the Saïga was extinguished in the period between the date on which the Provisional Certificate of Registration was stated to expire and the date of issue of the Permanent Certificate of Registration;

(b) in the particular circumstances of this case, the consistent conduct of Saint Vincent and the Grenadines provides sufficient support for the conclusion that the Saïga retained the registration and nationality of Saint Vincent and the Grenadines at that time.

75. The Tribunal notes that, in its Judgment of 4 December 1997 and in its Order of 11 March 1998, the Saïga was described as a ship flying the flag of Saint Vincent and the Grenadines.

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Genuine link

75. The next objection to admissibility raised by Guinea is that there was no genuine link between the Saiga and Saint Vincent and the Grenadines. Guinea contends that “[w]ithout a genuine link between Saint Vincent and the Grenadines and the M/V ‘Saiga’, [Saint Vincent and the Grenadines] claim concerning a violation of its right of navigation and the status of the ship is not admissible before the Tribunal vis-à-vis Guinea, because Guinea is not bound to recognize the Vincentian nationality of the M/V ‘Saiga’, which forms a prerequisite for the mentioned claim in international law”.

76. Guinea further argues that a State cannot fulfil its obligations as a flag State under the Convention with regard to a ship unless it exercises prescriptive and enforcement jurisdiction over the owner or, as the case may be, the operator of the ship. Guinea contends that, in the absence of such jurisdiction, there is no genuine link between the ship and Saint Vincent and the Grenadines and that, accordingly, it is not obliged to recognize the claims of Saint Vincent and the Grenadines in relation to the ship.

77. Saint Vincent and the Grenadines maintains that there is nothing in the Convention to support the contention that the existence of a genuine link between a ship and a State is a necessary precondition for the grant of nationality to the ship, or that the absence of such a genuine link deprives a flag State of the right to bring an international claim against another State in respect of illegal measures taken against the ship.

78. Saint Vincent and the Grenadines also challenges the assertion of Guinea that there was no genuine link between the Saiga and Saint Vincent and the Grenadines. It claims that the requisite genuine link existed between it and the ship. Saint Vincent and the Grenadines calls attention to various facts which, according to it, provide evidence of this link. These include the fact that the owner of the Saiga is represented in Saint Vincent and the Grenadines by a company formed and established in that State and the fact that the Saiga is subject to the supervision of the Vincentian authorities to secure compliance with the International Convention for the Safety of Life at Sea (SOLAS), 1960 and 1974, the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), and other conventions of the International Maritime Organization to which Saint Vincent and the Grenadines is a party. In addition, Saint Vincent and the Grenadines maintains that arrangements have been made to secure regular supervision of the vessel’s seaworthiness through surveys, on at least an annual basis, conducted by reputable classification societies authorized for that purpose by Saint Vincent and the Grenadines. Saint Vincent and the Grenadines also points out that, under its laws, preference is given to Vincentian nationals in the manning of ships flying its flag. It further draws attention to the vigorous efforts made by its authorities to secure the protection of the Saiga on the international plane before and throughout the present dispute.

79. Article 91, paragraph 1, of the Convention provides: “There must exist a genuine link between the State and the ship.” Two questions need to be addressed in this connection. The first is whether the absence of a genuine link between a flag State and a ship entitles another State to refuse to recognize the nationality of the ship. The second question is whether or not a genuine link existed between the Saiga and Saint Vincent and the Grenadines at the time of the incident.

80. With regard to the first question, the Tribunal notes that the provision in article 91, paragraph 1, of the Convention, requiring a genuine link between the State and the ship, does not provide the answer. Nor do articles 92 and 94 of the Convention, which together with article 91 constitute the context of the provision, provide the answer. The Tribunal, however, recalls that the International Law Commission, in article 29 of the Draft Articles on the Law of the Sea adopted by it in 1956, proposed the concept of a “genuine link” as a criterion not only for the attribution of nationality to a ship but also for the recognition by other States of such nationality. After providing that “[s]hips have the nationality of the State whose flag they are entitled to fly”, the draft article continued: “Nevertheless, for purposes of recognition of the national character of the ship by other States, there must exist a genuine link between the State and the ship”. This sentence was not included in article 5, paragraph 1, of the Convention on the High Seas of 29 April 1958 (hereinafter “the 1958 Convention”), which reads, in part, as follows:

There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

Thus, while the obligation regarding a genuine link was maintained in the 1958 Convention, the proposal that the existence of a genuine link should be a basis for the recognition of nationality was not adopted.

81. The Convention follows the approach of the 1958 Convention. Article 91 retains the part of the third sentence of article 5, paragraph 1, of the 1958 Convention which provides that there must be a genuine link between the State and the ship. The other part of that sentence, stating that the flag State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag, is reflected in article 94 of the Convention, dealing with the duties of the flag State.

82. Paragraphs 2 to 5 of article 94 of the Convention outline the measures that a flag State is required to take to exercise effective jurisdiction as envisaged in paragraph 1. Paragraph 6 sets out the procedure to be followed where another State has “clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised”. That State is entitled to report the facts to the flag State which is then obliged to “investigate the matter and, if appropriate, take any action necessary to remedy the situation”. There is nothing in article 94 to permit a State which discovers evidence indicating the absence of proper jurisdiction and control by a flag State over a ship to refuse to recognize the right of the ship to fly the flag of the flag State.

83. The conclusion of the Tribunal is that the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States.
84. This conclusion is not put into question by the United Nations Convention on Conditions for Registration of Ships of 7 February 1986 invoked by Guinea. This Convention (which is not in force) sets out as one of its principal objectives the strengthening of "the genuine link between a State and ships flying its flag". In any case, the Tribunal observes that Guinea has not cited any provision in that Convention which lends support to its contention that "a basic condition for the registration of a ship is that also the owner or operator of the ship is under the jurisdiction of the flag State".

85. The conclusion is further strengthened by the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks opened for signature on 4 December 1995 and the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas of 24 November 1993. These Agreements, neither of which is in force, set out, inter alia, detailed obligations to be discharged by the flag States of fishing vessels but do not deal with the conditions to be satisfied for the registration of fishing vessels.

91. Saint Vincent and the Grenadines challenges this objection of Guinea. It argues that the rule on the exhaustion of local remedies does not apply in the present case since the actions of Guinea against the Saïga, a ship flying its flag, violated its rights as a flag State under the Convention, including the right to have its vessels enjoy the freedom of navigation and other internationally lawful uses of the sea related to that freedom, as set out in articles 56 and 58 and other provisions of the Convention. It points out that the actions of Guinea complained of include: the attack on the Saïga and its crew outside the limits of the exclusive economic zone of Guinea in circumstances that did not justify hot pursuit in accordance with article 111 of the Convention; the illegal arrest of the ship by the use of excessive and unreasonable force; the escort of the ship to Conakry and its detention there; the confiscation of the cargo; the criminal prosecution and conviction of the Master and the imposition of a penal sentence and fine on him, as well as the confiscation of the cargo and the seizure of the ship as security for the fine. Saint Vincent and the Grenadines' other complaints are that Guinea violated articles 292, paragraph 4, and 296 of the Convention by failing to comply with the Judgment of the Tribunal of 4 December 1997; and that the rights of Saint Vincent and the Grenadines were violated by Guinea when it was cited as the flag State of the M/V Saïga in the criminal courts and proceedings instituted by Guinea.

86. In the light of the above considerations, the Tribunal concludes that there is no legal basis for the claim of Guinea that it can refuse to recognize the right of the Saïga to fly the flag of Saint Vincent and the Grenadines on the ground that there was no genuine link between the ship and Saint Vincent and the Grenadines at the material time.

92. Saint Vincent and the Grenadines further contends that the rule that local remedies must be exhausted applies only where there is a jurisdictional connection between the State against which a claim is brought and the person in respect of whom the claim is advanced. It argues that this connection was absent in the present case because the arrest of the ship took place outside the territorial jurisdiction of Guinea and the ship was brought within the jurisdiction of Guinea by force. According to Saint Vincent and the Grenadines, this is further reinforced by the fact that the arrest was in contravention of the Convention and took place after an alleged hot pursuit that did not satisfy the requirements set out in the Convention.

87. With regard to the second question, the Tribunal finds that, in any case, the evidence adduced by Guinea is not sufficient to justify its contention that there was no genuine link between the ship and Saint Vincent and the Grenadines at the material time.

93. Saint Vincent and the Grenadines rejects Guinea's submission that the voluntary presence of the Saïga in its exclusive economic zone to supply gas oil to fishing vessels established the jurisdictional connection between the ship and the State of Guinea needed for the application of the rule on the exhaustion of local remedies. It argues that the activity engaged in by the Saïga did not affect matters over which Guinea has sovereign rights or jurisdiction within the exclusive economic zone, pursuant to article 56 of the Convention. Accordingly, the presence of the ship in the exclusive economic zone did not establish a jurisdictional connection with Guinea.

88. For the above reasons, the Tribunal rejects the objection to admissibility based on the absence of a genuine link between the Saïga and Saint Vincent and the Grenadines.

Exhaustion of local remedies

89. Guinea further objects to the admissibility of certain claims advanced by Saint Vincent and the Grenadines in respect of damage suffered by natural and juridical persons as a result of the measures taken by Guinea against the Saïga. It contends that these claims are inadmissible because the persons concerned did not exhaust local remedies, as required by article 295 of the Convention.

94. Finally, Saint Vincent and the Grenadines argues that there were no local remedies which could have been exhausted by the persons who suffered damages as a result of the measures taken by Guinea against the Saïga. It maintains that, in any case, the remedies, if any, were not effective. Saint Vincent and the Grenadines claims that, “having regard to all the circumstances of the present case, including … the manner in which the Guinean authorities and courts dealt with the master, vessel, cargo and crew; the manner in which St. Vincent and the Grenadines were added to the cédule de citation; the speed and manner with which the master was summonsed once the guarantee of US$ 400,000 had been posted; the speed and manner with which the tribunal de première instance and cour d'appel proceeded to judgment thereafter; and the errors contained in those judgments, … the master, owners and owners or consignees of the cargo were not, in any event, bound to exercise any right of appeal that they might have had”.

90. In particular, Guinea claims that the Master did not exhaust the remedies available to him under Guinean law by failing to have recourse to the Supreme Court (cour suprême) against the Judgment of 3 February 1998 of the Criminal Chamber (chambre correctionnelle) of the Court of Appeal of Conakry. Similarly, the owners of the Saïga, as well as the owners of the confiscated cargo of gas oil, had the right to institute legal proceedings to challenge the seizure of the ship and the confiscation of the cargo, but neither of them exercised this right. Guinea also states that the Master and owners of the ship as well as the owners of the cargo could have availed themselves of article 251 of the Customs Code which makes provision for a compromise settlement.
95. Before dealing with the arguments of the parties, it is necessary to consider whether the rule that local remedies must be exhausted is applicable in the present case. Article 295 of the Convention reads as follows:

**Article 295**

*Exhaustion of local remedies*

Any dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in [section 2 of Part XV] only after local remedies have been exhausted where this is required by international law.

96. It follows that the question whether local remedies must be exhausted is answered by international law. The Tribunal must, therefore, refer to international law in order to ascertain the requirements for the application of this rule and to determine whether or not those requirements are satisfied in the present case.

97. The Tribunal considers that in this case the rights which Saint Vincent and the Grenadines claims have been violated by Guinea are all rights that belong to Saint Vincent and the Grenadines under the Convention (articles 33, 56, 58, 111 and 292) or under international law. The rights claimed by Saint Vincent and the Grenadines are listed in its submissions and may be enumerated as follows:

(a) the right of freedom of navigation and other internationally lawful uses of the seas;

(b) the right not to be subjected to the customs and contraband laws of Guinea;

(c) the right not to be subjected to unlawful hot pursuit;

(d) the right to obtain prompt compliance with the Judgment of the Tribunal of 4 December 1997;

(e) the right not to be cited before the criminal courts of Guinea.

98. As stated in article 22 of the Draft Articles on State Responsibility adopted on first reading by the International Law Commission, the rule that local remedies must be exhausted is applicable when “the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens ....”. None of the violations of rights claimed by Saint Vincent and the Grenadines, as listed in paragraph 97, can be described as breaches of obligations concerning the treatment to be accorded to aliens. They are all direct violations of the rights of Saint Vincent and the Grenadines. Damage to the persons involved in the operation of the ship arises from those violations. Accordingly, the claims in respect of such damage are not subject to the rule that local remedies must be exhausted.

99. But even if the Tribunal accepts Guinea’s contention that some of the claims made by Saint Vincent and the Grenadines in respect of natural or juridical persons did not arise from direct violations of the rights of Saint Vincent and the Grenadines, the question remains whether the rule that local remedies must be exhausted applies to any of these claims. The parties agree that a prerequisite for the application of the rule is that there must be a jurisdictional connection between the person suffering damage and the State responsible for the wrongful act which caused the damage. Saint Vincent and the Grenadines argue that no such jurisdictional connection existed in this case, while Guinea contends that the presence and activities of the Saiga in its customs radius were enough to establish such connection.

100. In the opinion of the Tribunal, whether there was a necessary jurisdictional connection between Guinea and the natural or juridical persons in respect of whom Saint Vincent and the Grenadines made claims must be determined in the light of the findings of the Tribunal on the question whether Guinea’s application of its customs laws in a customs radius was permitted under the Convention. If the Tribunal were to decide that Guinea was entitled to apply its customs laws in its customs radius, the activities of the Saiga could be deemed to have been within Guinea’s jurisdiction. If, on the other hand, Guinea’s application of its customs laws in its customs radius were found to be contrary to the Convention, it would follow that no jurisdictional connection existed. The question whether Guinea was entitled to apply its customs laws in this case, the Tribunal concludes that there was no jurisdictional connection between Guinea and the natural and juridical persons in respect of whom Saint Vincent and the Grenadines made claims. Accordingly, on this ground also, the rule that local remedies must be exhausted does not apply in the present case.

101. In the light of its conclusion that the rule that local remedies must be exhausted does not apply in this case, the Tribunal does not consider it necessary to deal with the arguments of the parties on the question whether local remedies were available and, if so, whether they were effective.

102. The Tribunal, therefore, rejects the objection of Guinea to admissibility based on the non-exhaustion of local remedies.

**Nationality of claims**

103. In its last objection to admissibility, Guinea argues that certain claims of Saint Vincent and the Grenadines cannot be entertained by the Tribunal because they relate to violations of the rights of persons who are not nationals of Saint Vincent and the Grenadines. According to Guinea, the claims of Saint Vincent and the Grenadines in respect of loss or damage sustained by the ship, its owners, the Master and other members of the crew and other persons, including the owners of the cargo, are clearly claims of diplomatic protection. In its view, Saint Vincent and the Grenadines is not competent to institute these claims on behalf of the persons concerned since none of them is a national of Saint Vincent and the Grenadines. During the oral proceedings, Guinea withdrew its objection as far as it relates to the shipowners, but maintained it in respect of the other persons.
104. In opposing this objection, Saint Vincent and the Grenadines maintains that the rule of international law that a State is entitled to claim protection only for its nationals does not apply to claims in respect of persons and things on board a ship flying its flag. In such cases, the flag State has the right to bring claims in respect of violations against the ship and all persons on board or interested in its operation. Saint Vincent and the Grenadines, therefore, asserts that it has the right to protect the ship flying its flag and those who serve on board, irrespective of their nationality.

105. In dealing with this question, the Tribunal finds sufficient guidance in the Convention. The Convention contains detailed provisions concerning the duties of flag States regarding ships flying their flag. Articles 94 and 217, in particular, set out the obligations of the flag State which can be discharged only through the exercise of appropriate jurisdiction and control over natural and juridical persons such as the Master and other members of the crew, the owners or operators and other persons involved in the activities of the ship. No distinction is made in these provisions between nationals and non-nationals of a flag State. Additionally, articles 106, 110, paragraph 3, and 111, paragraph 8, of the Convention contain provisions applicable to cases in which measures have been taken by a State against a foreign ship. These measures are, respectively, seizure of a ship on suspicion of piracy, exercise of the right of visit on board the ship, and arrest of a ship in exercise of the right of hot pursuit. In these cases, the Convention provides that, if the measures are found not to be justified, the State taking the measures shall be obliged to pay compensation “for any loss or damage” sustained. In these cases, the Convention does not relate the right to compensation to the nationality of persons suffering loss or damage. Furthermore, in relation to proceedings for prompt release under article 292 of the Convention, no significance is attached to the nationalities of persons involved in the operations of an arrested ship.

106. The provisions referred to in the preceding paragraph indicate that the Convention considers a ship as a unit, as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States and to institute proceedings under article 292 of the Convention. Thus the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant.

107. The Tribunal must also call attention to an aspect of the matter which is not without significance in this case. This relates to two basic characteristics of modern maritime transport: the transient and multinational composition of ships’ crews and the multiplicity of interests that may be involved in the cargo on board a single ship. A container vessel carries a large number of containers, and the persons with interests in them may be of many different nationalities. This may also be true in relation to cargo on board a break-bulk carrier. Any of these ships could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such person is a national, undue hardship would ensue.

108. The Tribunal is, therefore, unable to accept Guinea’s contention that Saint Vincent and the Grenadines is not entitled to present claims for damages in respect of natural and juridical persons who are not nationals of Saint Vincent and the Grenadines.

109. In the light of the above considerations, the Tribunal rejects the objection to admissibility based on nationality of claims.

Arrest of the Saiga

110. Saint Vincent and the Grenadines asserts that the arrest of the Saiga and the subsequent actions of Guinea were illegal. It contends that the arrest of the Saiga was unlawful because the ship did not violate any laws or regulations of Guinea that were applicable to it. It further maintains that, if the laws cited by Guinea did apply to the activities of the Saiga, those laws, as applied by Guinea, were incompatible with the Convention.

111. The laws invoked by Guinea as the basis for the arrest of the Saiga and the prosecution and conviction of its Master are the following:

(a) Law L/94/007;
(b) The Merchant Marine Code;
(c) The Customs Code;
(d) The Penal Code.

112. Articles 1, 4, 6 and 8 of Law L/94/007 read (in translation) as follows:

Article 1:
The import, transport, storage and distribution of fuel by any natural person or corporate body not legally authorized are prohibited in the Republic of Guinea.

Article 4:
Any owner of a fishing boat, the holder of a fishing licence issued by the Guinean competent authority who-refuels or attempts to be refuelled by means other than those legally authorized, will be punished by 1 to 3 years imprisonment and a fine equal to twice the value of the quantity of fuel purchased.

Article 6:
Whoever illegally imports fuel into the national territory will be subject to 6 months to 2 years imprisonment, the confiscation of the means of transport, the confiscation of the items used to conceal the illegal importation and a joint and several fine equal to double the value of the subject of the illegal importation where this offence is committed by less than three individuals.

Article 8:
Where the misdemeanor referred to in article 6 of this Law has been committed by a group of more than 6 individuals, whether or not they are in possession of the subject of the illegal importation, the offenders will be subject to a sentence of imprisonment from 2 to 5 years, a fine equal to four times the value of the confiscated items in addition to the additional penalties provided for under article 6 of this Law.
Article 40 of the Merchant Marine Code reads (in translation) as follows:

The Republic of Guinea exercises, within the exclusive economic zone which extends from the limit of the territorial sea to 188 nautical miles beyond that limit, sovereign rights concerning the exploration and exploitation, conservation and management of the natural resources, biological or non-biological, of the sea beds and their sub-soils, of the waters lying underneath, as well as the rights concerning other activities bearing on the exploration and exploitation of the zone for economic purposes.

The Republic of Guinea exercises, within the exclusive economic zone which extends from the limit of the territorial sea to 188 nautical miles beyond that limit, sovereign rights concerning the exploration and exploitation, conservation and management of the natural resources, biological or non-biological, of the sea beds and their sub-soils, of the waters lying underneath, as well as the rights concerning other activities bearing on the exploration and exploitation of the zone for economic purposes.

The term “Guinea”, referred to in article 1 of the Law L/94/007, includes the customs radius, and that, consequently, the prohibition of the import of gas oil into Guinea extends to the importation of such oil into any part of the customs radius. According to Guinea, the fact that the Saiga violated the laws of Guinea has been authoritatively established by the Court of Appeal. In its view, that decision cannot be questioned in this case because the Tribunal is not competent to consider the question whether the internal legislation of Guinea has been properly applied by the Guinean authorities or its courts.

Saint Vincent and the Grenadines contends that the Saiga did not violate Law L/94/007 because it did not import oil into Guinea, as alleged by the authorities of Guinea. It points out that article 1 of the Customs Code defines the “customs territory” of Guinea as including “the whole of the national territory, the islands located along the coastline and the Guinean territorial waters”. It notes also that, according to articles 33 and 34 of the Customs Code, the customs radius is not part of the customs territory of Guinea but only a “special area of surveillance” and that Guinea is not entitled to enforce its customs laws in it. Saint Vincent and the Grenadines, therefore, argues that the Saiga could not have contravened Law L/94/007 since it did not at any time enter the territorial sea of Guinea or introduce, directly or indirectly, any gas oil into the customs territory of Guinea, as defined by the Customs Code.

For these reasons, Saint Vincent and the Grenadines maintains that, on a correct interpretation of Law L/94/007 read with articles 1 and 34 of the Customs Code, the Saiga did not violate any laws of Guinea when it supplied gas oil to the fishing vessels in the exclusive economic zone of Guinea.

In the alternative, Saint Vincent and the Grenadines contends that the extension of the customs laws of Guinea to the exclusive economic zone is contrary to the Convention. It argues that article 56 of the Convention does not give the right to Guinea to extend the application of its customs laws and regulations to that zone. It therefore contends that Guinea’s customs laws cannot be applied to ships flying its flag in the exclusive economic zone. Consequently, the measures taken by Guinea against the Saiga were unlawful.

In the view of the Tribunal, there is nothing to prevent it from considering the question whether or not, in applying its laws to the Saiga in the present case, Guinea was acting in conformity with its obligations towards Saint Vincent and the Grenadines under the Convention and general international law. In its Judgment in the Case Concerning Certain German Interests in Polish Upper Silesia, the Permanent Court of International Justice stated:

From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court’s giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.
A denial of the competence of the Tribunal to examine the applicability and scope of the laws applied or the measures taken by the coastal State under the Convention does not expressly attribute to the coastal States, do not automatically fall under the freedom of the high seas.

In the exclusive economic zone, the coastal State has jurisdiction to apply customs laws and regulations in respect of artificial islands, installations and structures (article 60, paragraph 2). In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

A denial of the competence of the Tribunal to examine the applicability and scope of the laws applied or the measures taken by the coastal State under the Convention does not expressly attribute to the coastal States, do not automatically fall under the freedom of the high seas.

In exercising their rights and performing their duties under this Convention, they shall act in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

The Tribunal notes that, under the Convention, a coastal State is entitled to apply customs laws and regulations within its territory or territorial sea. In the exclusive economic zone, the coastal State can exercise the control necessary to:

(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations committed within its territory or territorial sea;

(b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

In the exclusive economic zone, the coastal State has jurisdiction to apply customs laws and regulations in respect of artificial islands, installations and structures (article 60, paragraph 2). In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

122. The Tribunal notes that Guinea produces no evidence in support of its contention that the laws cited by it provide a basis for the action taken against the Saiga beyond the assertion that it reflects the consistent practice of its authorities, supported by its courts. Even if it is conceded that the laws of Guinea which the Saiga is alleged to have violated are applicable in the manner that Guinea claims, the question remains whether these laws are compatible with the Convention.

123. Saint Vincent and the Grenadines claims that, in applying its customs laws to the exclusive economic zone, it is exercising a power which is not justiciable under the Convention. The Tribunal notes that the laws of Saint Vincent and the Grenadines which the Saiga is alleged to have violated are clearly those of a coastal State committed to the exercise of its jurisdiction over the Saiga in the exclusive economic zone. The Tribunal further notes that the coastal State in question is exercising power in respect of the Saiga, which is the subject of the dispute, in the manner in which it is intended to be exercised by a coastal State in the exclusive economic zone.

124. Guinea further argues that the legal basis of its law prohibiting the supply of gas oil to fishing vessels in the customs radius is to be found in article 58 of the Convention. It relies on the reference, contained in paragraph 3 of that article, to the "other rules of international law" which Guinea claims to be applicable in the exclusive economic zone.

The Tribunal finds it necessary to distinguish between the two main concepts referred to in the submissions of Guinea. Article 58 of the Convention is concerned with the "other rules of international law" which Guinea invokes to expand the scope of its jurisdiction in the exclusive economic zone, and the second is "state of necessity" which it relies on to justify measures that would otherwise be considered to be contrary to the freedom of the high seas.

125. The main public interest which Guinea claims to be protecting by applying its customs laws to the exclusive economic zone is said to be the "considerable fiscal losses" incurred by a developing country like Guinea due to the unauthorized sale of gas oil to fishing vessels operating in its exclusive economic zone. It further asserts that such supply is not part of the freedom of navigation or other internationally lawful uses of the sea in the exclusive economic zone, since the supply of gas oil is not considered to be genuinely commercial in nature.

126. The Tribunal notes that the question of whether the laws applied by the coastal State are in accordance with the Convention is to be determined by the Tribunal. In the case of the Saiga, the Tribunal notes that Guinea has failed to justify the application and exercise of its customs laws in the manner in which it is claimed to be applicable.

127. The Tribunal finds it necessary to distinguish between the two main concepts referred to in the submissions of Guinea. Article 58 of the Convention is concerned with the "other rules of international law" which Guinea invokes to expand the scope of its jurisdiction in the exclusive economic zone, and the second is "state of necessity" which it relies on to justify measures that would otherwise be considered to be contrary to the freedom of the high seas.

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The Tribunal notes that Guinea produces no evidence in support of its contention that the laws cited by it provide a basis for the action taken against the Saiga beyond the assertion that it reflects the consistent practice of its authorities, supported by its courts. Even if it is conceded that the laws of Guinea which the Saiga is alleged to have violated are applicable in the manner that Guinea claims, the question remains whether these laws are compatible with the Convention.

129. Saint Vincent and the Grenadines claims that, in applying its customs laws to the exclusive economic zone, it is exercising a power which is not justiciable under the Convention. The Tribunal notes that the laws of Saint Vincent and the Grenadines which the Saiga is alleged to have violated are clearly those of a coastal State committed to the exercise of its jurisdiction over the Saiga in the exclusive economic zone. The Tribunal further notes that the coastal State in question is exercising power in respect of the Saiga, which is the subject of the dispute, in the manner in which it is intended to be exercised by a coastal State in the exclusive economic zone.

130. The main public interest which Guinea claims to be protecting by applying its customs laws to the exclusive economic zone is said to be the "considerable fiscal losses" incurred by a developing country like Guinea due to the unauthorized sale of gas oil to fishing vessels operating in its exclusive economic zone. It further asserts that such supply is not part of the freedom of navigation or other internationally lawful uses of the sea in the exclusive economic zone, since the supply of gas oil is not considered to be genuinely commercial in nature.
Guinea is suffering from illegal off-shore bunkering in its exclusive economic zone". Guinea makes references also to fisheries and environmental interests. In effect, Guinea’s contention is that the customary international law principle of “public interest” gives it the power to impede “economic activities that are undertaken [in its exclusive economic zone] under the guise of navigation but are different from communication”.

131. According to article 58, paragraph 3, of the Convention, the “other rules of international law” which a coastal State is entitled to apply in the exclusive economic zone are those which are not incompatible with Part V of the Convention. In the view of the Tribunal, recourse to the principle of “public interest”, as invoked by Guinea, would entitle a coastal State to prohibit any activities in the exclusive economic zone which it decides to characterize as activities which affect its economic “public interest” or entail “fiscal losses” for it. This would curtail the rights of other States in the exclusive economic zone. The Tribunal is satisfied that this would be incompatible with the provisions of articles 56 and 58 of the Convention regarding the rights of the coastal State in the exclusive economic zone.

132. It remains for the Tribunal to consider whether the otherwise wrongful application by Guinea of its customs laws to the exclusive economic zone can be justified under general international law by Guinea’s appeal to “state of necessity”.

133. In the Case Concerning the Gabčíkovo-Nagymaros Project (Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, pp. 40 and 41, paragraphs 51 and 52), the International Court of Justice noted with approval two conditions for the defence based on “state of necessity” which in general international law justifies an otherwise wrongful act. These conditions, as set out in article 33, paragraph 1, of the International Law Commission’s Draft Articles on State Responsibility, are:

(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

(b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

134. In endorsing these conditions, the Court stated that they “must be cumulatively satisfied” and that they “reflect customary international law”.

135. No evidence has been produced by Guinea to show that its essential interests were in grave and imminent peril. But, however essential Guinea’s interest in maximizing its tax revenue from the sale of gas oil to fishing vessels, it cannot be suggested that the only means of safeguarding that interest was to extend its customs laws to parts of the exclusive economic zone.

136. The Tribunal, therefore, finds that, by applying its customs laws to a customs radius which includes parts of the exclusive economic zone, Guinea acted in a manner contrary to the Convention. Accordingly, the arrest and detention of the Saïga, the prosecution and conviction of its Master, the confiscation of the cargo and the seizure of the ship were contrary to the Convention.

137. In their submissions, both parties requested the Tribunal to make declarations regarding the rights of coastal States and of other States in connection with offshore bunkering, i.e. the sale of gas oil to vessels at sea. The Tribunal notes that there is no specific provision on the subject in the Convention. Both parties appear to agree that, while the Convention attributes certain rights to coastal States and other States in the exclusive economic zone, it does not follow automatically that rights not expressly attributed to the coastal State belong to other States or, alternatively, that rights not specifically attributed to other States belong as of right to the coastal State. Saint Vincent and the Grenadines asks the Tribunal to adjudge and declare that bunkering in the exclusive economic zone by ships flying its flag constitutes the exercise of the freedom of navigation and other internationally lawful uses of the sea related to the freedom of navigation, as provided for in articles 56 and 58 of the Convention. On the other hand, Guinea maintains that “bunkering” is not an exercise of the freedom of navigation or any of the internationally lawful uses of the sea related to freedom of navigation, as provided for in the Convention, but a commercial activity. Guinea further maintains that bunkering in the exclusive economic zone may not have the same status in all cases and suggests that different considerations might apply, for example, to bunkering of ships operating in the zone, as opposed to the supply of oil to ships that are in transit.

138. The Tribunal considers that the issue that needed to be decided was whether the actions taken by Guinea were consistent with the applicable provisions of the Convention. The Tribunal has reached a decision on that issue on the basis of the law applicable to the particular circumstances of the case, without having to address the broader question of the rights of coastal States and other States with regard to bunkering in the exclusive economic zone. Consequently, it does not make any findings on that question.

Hot pursuit

139. Saint Vincent and the Grenadines contends that, in arresting the Saïga, Guinea did not lawfully exercise the right of hot pursuit under article 111 of the Convention. It argues that since the Saïga did not violate the laws and regulations of Guinea applicable in accordance with the Convention, there was no legal basis for the arrest. Consequently, the authorities of Guinea did not have “good reason” to believe that the Saïga had committed an offence that justified hot pursuit in accordance with the Convention.

140. Saint Vincent and the Grenadines asserts that, even if the Saïga violated the laws and regulations of Guinea as claimed, its arrest on 28 October 1997 did not satisfy the other conditions for hot pursuit under article 111 of the Convention. It notes that the alleged pursuit was commenced while the ship was well outside the contiguous zone of Guinea. The Saïga was first detected (by radar) in the morning of 28 October 1997 when the ship was either outside the exclusive economic zone of Guinea or about to leave that zone. The arrest took place after the ship had crossed the southern border of the exclusive economic zone of Guinea.

141. Saint Vincent and the Grenadines further asserts that, wherever and whenever the pursuit was commenced, it was interrupted. It also contends that no visual and auditory signals were given to the ship prior to the commencement of the pursuit, as required by article 111 of the
3. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State.

4. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats is within the limits of the territorial sea of the pursuing State or, as the case may be, within the contiguous zone or the exclusive economic zone or the continental shelf. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

142. Guinea denies that the pursuit was vitiated by any irregularity and maintains that the officers engaged in the pursuit complied with all the requirements set out in article 111 of the Convention. In some of its assertions, Guinea contends that the pursuit under article 111 of the Convention began on 27 October 1997, the evidence adduced by Guinea supports the view that the pursuit began on 28 October 1997. In other assertions, Guinea contends that the pursuit was commenced on 28 October 1997. In its assertions, Guinea relies on article 111, paragraph 2, of the Convention.

143. Guinea states that at about 0400 hours on 28 October 1997 the large patrol boat P328 sent out a radio message to the Saiga ordering it to stop and that they were ignored. It also claims that the small patrol boat P35 that was sent out on 26 October 1997 on a northward course to search for the Saiga was recalled when it came within sight of Guinea. In its assertions, Guinea admits that the arrest took place outside the exclusive economic zone of Guinea. The Tribunal notes that the conditions for the exercise of the right of hot pursuit under article 111 of the Convention were not fulfilled. As far as the pursuit alleged to have commenced on 28 October 1997 is concerned, the evidence adduced by Guinea does not support its claim that the necessary auditory or visual signals to stop were given to the Saiga at the time it came within sight of Guinea. It follows that there was no legal basis for the commencement of the pursuit.

144. The Tribunal notes that the conditions for the exercise of the right of hot pursuit under article 111 of the Convention were not fulfilled. As far as the pursuit alleged to have commenced on 28 October 1997 is concerned, the evidence adduced by Guinea does not support its claim that the necessary auditory or visual signals to stop were given to the Saiga at the time it came within sight of Guinea. It follows that there was no legal basis for the commencement of the pursuit.

145. The right of hot pursuit shall apply mutatis mutandis to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf.
The Tribunal notes that Guinea, in its pleadings and submissions, suggests that the actions against the *Saiga* could, at least in part, be justified on the ground that the *Saiga* supplied gas oil to the fishing vessels in the contiguous zone of the Guinean island of Alcatraz. However, in the course of the oral proceedings, Guinea stated:

[T]he bunkering operation of the ship in the Guinean contiguous zone is also of no relevance in this context, although it may be relevant to the application of the criminal law. The relevant area here is the customs radius. This is a functional zone established by Guinean customs law within the realm of the contiguous zone and a part of the Guinean exclusive economic zone. One can describe it as a limited customs protection zone based on the principles of customary international law which are included in the exclusive economic zone but which are not a part of the territory of Guinea.

The Tribunal has not based its consideration of the question of the legality of the pursuit of the *Saiga* on the suggestion of Guinea that a violation of its customs laws occurred in the contiguous zone. The Tribunal would, however, note that its conclusion on this question would have been the same if Guinea had based its action against the *Saiga* solely on the ground of an infringement of its customs laws in the contiguous zone. For, even in that case, the conditions for the exercise of the right of hot pursuit, as required under article 111 of the Convention, would not have been satisfied for the reasons given in paragraphs 147 and 148.

**Use of force**

Saint Vincent and the Grenadines claims that Guinea used excessive and unreasonable force in stopping and arresting the *Saiga*. It notes that the *Saiga* was an unarmed tanker almost fully laden with gas oil, with a maximum speed of 10 knots. It also notes that the authorities of Guinea fired at the ship with live ammunition, using solid shots from large-calibre automatic guns.

Guinea denies that the force used in boarding, stopping and arresting the *Saiga* was either excessive or unreasonable. It contends that the arresting officers had no alternative but to use gunfire because the *Saiga* refused to stop after repeated radio messages to it to stop and in spite of visual and auditory signals from the patrol boat P35. Guinea maintains that gunfire was used as a last resort, and denies that large-calibre ammunition was used. Guinea places the responsibility for any damage resulting from the use of force on the Master and crew of the ship.

In considering the force used by Guinea in the arrest of the *Saiga*, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.

These principles have been followed over the years in law enforcement operations at sea. The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered.

In the present case, the Tribunal notes that the *Saiga* was almost fully laden and was low in the water at the time it was approached by the patrol vessel. Its maximum speed was 10 knots. Therefore it could be boarded without much difficulty by the Guinean officers. At one stage in the proceedings Guinea sought to justify the use of gunfire with the claim that the *Saiga* had attempted to sink the patrol boat. During the hearing, the allegation was modified to the effect that the danger of sinking to the patrol boat was from the wake of the *Saiga* and not the result of a deliberate attempt by the ship. But whatever the circumstances, there is no excuse for the fact that the officers fired at the ship itself with live ammunition from a fast-moving patrol boat without issuing any of the signals and warnings required by international law and practice.

The Guinean officers also used excessive force on board the *Saiga*. Having boarded the ship without resistance, and although there is no evidence of the use or threat of force from the crew, they fired indiscriminately while on the deck and used gunfire to stop the engine of the ship. In using firearms in this way, the Guinean officers appeared to have attached little or no importance to the safety of the ship and the persons on board. In the process, considerate damage was done to the ship and to vital equipment in the engine and radio rooms. And, more seriously, the indiscriminate use of gunfire caused severe injuries to two of the persons on board.

For these reasons, the Tribunal finds that Guinea used excessive force and endangered human life before and after boarding the *Saiga*, and thereby violated the rights of Saint Vincent and the Grenadines under international law.

**Schedule of summons**

Saint Vincent and the Grenadines requests the Tribunal to find that Guinea violated its rights under international law by citing Saint Vincent and the Grenadines as “civilly liable” in the schedule of summons issued in connection with the criminal proceedings against the Master...
161. The Tribunal notes that the financial losses of the shipowners, the operators of the cargo, and the Master, members of the crew, and other persons on board the ship. Compensation is also claimed in respect of loss of liberty and personal injuries, including pain and suffering. Saint Vincent and the Grenadines requests that interest be given at the rate of 6% on the damages awarded for material damage.

162. While the Tribunal considers that the financial losses of the shipowners, the operators of the cargo, and the Master, members of the crew, and other persons on board the ship, the Tribunal notes that the financial losses of the shipowners, the operators of the cargo, and the Master, members of the crew, and other persons on board the ship. Compensation is also claimed in respect of loss of liberty and personal injuries, including pain and suffering. Saint Vincent and the Grenadines requests that interest be given at the rate of 6% on the damages awarded for material damage.

163. Saint Vincent and the Grenadines requests the Tribunal to declare that Guinean clients of the shipowners, the operators of the cargo, and the Master, members of the crew, and other persons on board the ship. Compensation is also claimed in respect of loss of liberty and personal injuries, including pain and suffering. Saint Vincent and the Grenadines requests that interest be given at the rate of 6% on the damages awarded for material damage.
been taken, in particular, of commercial conditions prevailing in the countries where the expenses were incurred, of the rate of interest adopted in respect of the value of the gas oil to include loss of profit. A lower rate of interest of 3% is adopted for compensation for detention and for injury, pain and suffering.

177. With regard to the amounts of compensation to be awarded, Saint Vincent and the Grenadines has submitted substantial documentation. Guinea challenges the validity of some claims and the reasonableness of the amounts presented. It also questions the evidence submitted in respect of some of the claims in question. The Tribunal considers these declarations constitute adequate reparation.

178. The Tribunal must emphasize that the financial security provided by Saint Vincent and the Grenadines was to provide for the release of the ship and its crew, as required by article 292, paragraph 4, of the Convention. The Tribunal considers that the bank guarantee provided by Saint Vincent and the Grenadines must be treated as no longer effective. Accordingly, the relevant document should be returned to Saint Vincent and the Grenadines.
Costs

181. In the 1998 Agreement, the parties agreed that the Tribunal “shall be entitled to make an award on the legal and other costs incurred by the successful party in the proceedings before the International Tribunal”. In the written pleadings and final submissions, each party has requested the Tribunal to award legal and other costs to it. In addition, in its final submissions in the proceedings on the Request for provisional measures, Guinea requested the Tribunal to award costs to it in respect of those proceedings.

182. The rule in respect of costs in proceedings before the Tribunal, as set out in article 34 of its Statute, is that each party shall bear its own costs, unless the Tribunal decides otherwise. In the present case, the Tribunal sees no need to depart from the general rule that each party shall bear its own costs. Accordingly, with respect to both phases of the present proceedings, it decides that each party shall bear its own costs.

Operative provisions

183. For the above reasons, the Tribunal

(1) Unanimously,

Finds that it has jurisdiction over the dispute.

(2) Unanimously,

Finds that Guinea is not debarred from raising objections to the admissibility of the claims of Saint Vincent and the Grenadines.

(3) By 18 votes to 2,

Rejects the objection to the admissibility of the claims of Saint Vincent and the Grenadines based on Guinea’s contention that there was no genuine link between Saint Vincent and the Grenadines and the Saiga at the time of its arrest;

IN FAVOUR: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: Judges WARIOBA, NDIAYE.

(4) By 18 votes to 2,

Rejects the objection to the admissibility of the claims of Saint Vincent and the Grenadines based on Guinea’s contention that there was no genuine link between Saint Vincent and the Grenadines and the Saiga at the time of its arrest;

IN FAVOUR: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: Judges WARIOBA, NDIAYE.

(5) By 18 votes to 2,

Rejects the objection to the admissibility of certain of the claims of Saint Vincent and the Grenadines based on Guinea’s contention that local remedies were not exhausted;

IN FAVOUR: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: Judges WARIOBA, NDIAYE.

(6) By 18 votes to 2,

Rejects the objection to the admissibility of certain of the claims of Saint Vincent and the Grenadines based on Guinea’s contention that the persons in respect of whom Saint Vincent and the Grenadines brought the claims were not its nationals;

IN FAVOUR: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: Judges WARIOBA, NDIAYE.
(7) By 18 votes to 2,

Decides that Guinea violated the rights of Saint Vincent and the Grenadines under the Convention in arresting the Saiga, and in detaining the Saiga and members of its crew, in prosecuting and convicting its Master and in seizing the Saiga and confiscating its cargo;

IN FAVOUR: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: Judges WARIOBA, NDIAYE.

(8) By 18 votes to 2,

Decides that in arresting the Saiga Guinea acted in contravention of the provisions of the Convention on the exercise of the right of hot pursuit and thereby violated the rights of Saint Vincent and the Grenadines;

IN FAVOUR: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: Judges WARIOBA, NDIAYE.

(9) By 18 votes to 2,

Decides that while stopping and arresting the Saiga Guinea used excessive force contrary to international law and thereby violated the rights of Saint Vincent and the Grenadines;

IN FAVOUR: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: Judges WARIOBA, NDIAYE.

(10) By 18 votes to 2,

 Rejects the claim by Saint Vincent and the Grenadines that Guinea violated its rights under international law by naming it as civilly responsible to be summoned in a schedule of summons;

IN FAVOUR: President MENSAH, Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: Judges CAMINOS, YANKOV, AKL, ANDERSON, VUKAS,

(11) By 17 votes to 3,

Rejects the claim by Saint Vincent and the Grenadines that Guinea violated its rights under the Convention by failing to release promptly the Saiga and members of its crew in compliance with the Judgment of the Tribunal of 4 December 1997;

IN FAVOUR: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: Judges VUKAS, WARIOBA, NDIAYE.

(12) By 18 votes to 2,

Decides that Guinea shall pay compensation to Saint Vincent and the Grenadines in the sum of US$ 2,123,357 (United States Dollars Two Million One Hundred and Twenty-Three Thousand Three Hundred and Fifty-Seven) with interest, as indicated in paragraph 175;

IN FAVOUR: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: Judges WARIOBA, NDIAYE.

(13) By 13 votes to 7,

Decides that each party shall bear its own costs;

IN FAVOUR: President MENSAH, Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, WARIOBA, LAING, MARSIT, NDIAYE;

AGAINST: Judges CAMINOS, YANKOV, AKL, ANDERSON, VUKAS,
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<th>Name</th>
<th>Crew members/other persons</th>
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<tr>
<td>Klyuyev, Sergey</td>
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<tr>
<td>Bilonozhko, Mykola</td>
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<td>Stanislavsky, Denys</td>
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<td><strong>Total</strong></td>
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Done in English and French, both texts being equally authoritative, in the Free and Hanseatic City of Hamburg, this first day of July, one thousand nine hundred and ninety-nine, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of Saint Vincent and the Grenadines and the Government of Guinea, respectively.

(Signed) Thomas A. MENSAH, President.

(Signed) Gritakumar E. CHITTY, Registrar.

Judges CAMINOS, YANKOV, AKL, ANDERSON, VUKAS, TREVES and ERIKSSON, availing themselves of the right conferred on them by article 125, paragraph 2, of the Rules of the Tribunal, append their joint declaration to the Judgment of the Tribunal.

(Initialled) H.C.
(Initialled) A.Y.
(Initialled) J.A.
(Initialled) D.H.A.
(Initialled) B.V.
(Initialled) T.T.
(Initialled) G.E.

President MENSAH, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(Initialled) T.A.M.

Vice-President WOLFRUM, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(Initialled) R.W.

Judge ZHAO, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(Initialled) L.Z.

Judge NELSON, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(Initialled) L.D.M.N.

Judge CHANDRASEKHARA RAO, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(Initialled) P.C.R.

Judge ANDERSON, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(Initialled) D.H.A.

Judge VUKAS, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(Initialled) B.V.

Judge LAING, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(Initialled) E.A.L.

Judge WARIOBA, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his dissenting opinion to the Judgment of the Tribunal.

(Initialled) J.S.W.

Judge NDIAYE, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his dissenting opinion to the Judgment of the Tribunal.

(Initialled) T.M.N.
International Centre for Settlement of Investment Disputes

The Loewen Group, Inc. and Raymond Loewen v.
United States of America
Award of 26 June 2003

State Department of the United States of America,
http://www.state.gov/documents/organization/22094.pdf
INTRODUCTION

1. This is an important and extremely difficult case. Ultimately it turns on a question of jurisdiction arising from (a) the NAFTA requirement of diversity of nationality as between a claimant and the respondent government, and (b) the assignment by the Loewen Group, Inc. of its NAFTA claims to a Canadian corporation owned and controlled by a United States corporation. This question was raised by Respondent's motion to dismiss for lack of jurisdiction filed after the oral hearing on the merits. In this Award we uphold the motion and dismiss Claimants' NAFTA claims.

2. As our consideration of the merits of the case was well advanced when Respondent filed this motion to dismiss and as we reached the conclusion that Claimants' NAFTA claims should be dismissed on the merits, we include in this Award our reasons for this conclusion. As will appear, the conclusion rests on the Claimants' failure to show that Loewen had no reasonably available and adequate remedy under United States municipal law in respect of the matters of which it complains, being matters alleged to be violations of NAFTA.

3. This dispute arises out of litigation brought against first Claimant, the Loewen Group, Inc ("TLGI") and the Loewen Group International, Inc ("LGII") (collectively called "Loewen"), its principal United States subsidiary, in Mississippi State Court by Jeremiah O'Keefe Sr. (Jerry O'Keefe), his son and various companies owned by the O'Keefe family (collectively called "O'Keefe"). The litigation arose out of a commercial dispute between O'Keefe and Loewen which were competitors in the funeral home and funeral insurance business in Mississippi. The dispute concerned three contracts between O'Keefe and Loewen said to be valued by O'Keefe at $980,000 and an exchange of two O'Keefe funeral homes said to be worth $2.5 million for a Loewen insurance company worth $4 million approximately. The action was heard by Judge Graves (an African-American judge) and a jury. Of the twelve jurors, eight were African-American.

4. The Mississippi jury awarded O'Keefe $500 million damages, including $75 million damages for emotional distress and $400 million punitive damages. The verdict was the outcome of a seven-week trial in which, according to Claimants, the trial judge...
repeatedly allowed O’Keefe’s attorneys to make extensive irrelevant and highly prejudicial references (i) to Claimants’ foreign nationality (which was contrasted to O’Keefe’s Mississippi roots); (ii) race-based distinctions between O’Keefe and Loewen and (iii) class-based distinctions between Loewen (which O’Keefe counsel portrayed as large wealthy corporations) and O’Keefe (who was portrayed as running family-owned businesses). Further, according to Claimants, after permitting those references, the trial judge refused to give an instruction to the jury stating clearly that nationality-based, racial and class-based discrimination was impermissible.

5. Loewen sought to appeal the $500 million verdict and judgment but were confronted with the application of an appellate bond requirement. Mississippi law requires an appeal bond for 125% of the judgment as a condition of staying execution on the judgment, but allows the bond to be reduced or dispensed with for “good cause”.

6. Despite Claimants’ claim that there was good cause to reduce the appeal bond, both the trial court and the Mississippi Supreme Court refused to reduce the appeal bond at all and required Loewen to post a $625 million bond within seven days in order to pursue its appeal without facing immediate execution of the judgment. According to Claimants, that decision effectively foreclosed Loewen’s appeal rights.

7. Claimants allege that Loewen was then forced to settle the case “under extreme duress”. Other alternatives to settlement were said to be catastrophic and/or unavailable. On January 29, 1996, with execution against their Mississippi assets scheduled to start the next day, Loewen entered into a settlement with O’Keefe under which they agreed to pay $175 million.

8. In this claim Claimants seek compensation for damage inflicted upon TLGI and LGII and for damage to second Claimant’s interests as a direct result of alleged violations of Chapter Eleven of the North American Free Trade Agreement (“NAFTA”) committed primarily by the State of Mississippi in the course of the litigation.

II. THE PARTIES

9. First Claimant TLGI is a Canadian corporation which carries on business in Canada and the United States. Second Claimant is Raymond Loewen, a Canadian citizen who was the founder of TLGI and its principal shareholder and chief executive officer. TLGI submits claims as “investor of a Party” on its own behalf under NAFTA, Article 1116 and on behalf of LGII under Article 1117. Likewise, Raymond Loewen submits claims as “the investor of a party” on behalf of TLGI under NAFTA, Article 1117.


III. HISTORY OF PROCEEDINGS IN THIS ARBITRATION

11. There is no occasion to set out the procedural history of this arbitration before the Tribunal delivered its Decision dated January 5, 2001, on Respondent’s objection to competence and jurisdiction. The Decision fully recites that history. It will, however, be necessary to refer later to the grounds of that objection because they were not fully determined by the Decision. The Decision is attached to this Award.

12. By that Decision dated January 5, 2001, the Tribunal dismissed Respondent’s objection to competence and jurisdiction so far as it related to the first ground of objection and adjourned the further hearing of Respondent’s other grounds of objection and joined that further hearing to the hearing on the merits which was fixed for October 15, 2001. The Tribunal made orders –

1. Respondent to file its counter-memorial on the merits within 60 days of the date of this Decision.
2. Claimants to file their replies within 60 days of the time limited for the filing of Respondent’s counter-memorial on the merits.
3. Respondent to file its rejoinder within 60 days of the time limited for the filing of Claimants’ replies.

1 Sir Robert Jennings in his Third Opinion misstates the Tribunal’s Decision when he says that the Tribunal rejected Respondent’s argument that the decisions of the Mississippi courts were not “measures” because they were not “final” acts of the United States court system.
IV. REPRESENTATION

13. First Claimant has been represented by –
   Mr Christopher F. Dugan Jones, Day, Reavis & Pogue (until March 10, 2003)
   Mr James A. Wilderotter Jones, Day, Reavis & Pogue
   Mr Gregory A. Castanias Jones, Day, Reavis & Pogue

Second Claimant has been represented by –
   Mr John H. Lewis, Jr. Montgomery, McCracken, Walker & Rhoads
   D. Geoffrey Cowper, QC Fasken Martineau DuMoulin (from October 11, 2001)

14. Respondent has been represented by –
   Mr Kenneth L. Doroshow United States Department of Justice (until July 8, 2002)
   Mr Jonathan B. New United States Department of Justice (from July 8, 2002)
   Mr Mark A. Clodfelter United States Department of State
   Mr Barton Legum United States Department of State

15. On October 10, 2001, the Government of Canada and the Government of Mexico gave written notice of their intention to attend the hearing on the merits.

16. Canada has been represented by –
   Mr Fulvio Fracassi Department of Foreign Affairs and International Trade
   Ottawa, Canada
   Ms Sheila Mann Department of Foreign Affairs and International Trade
   Ottawa, Canada

17. Mexico has been represented by –
   Mr Hugo Perezcano Diaz Secretaría de Comercio y Fomento Industrial
   (SECOFI), Mexico City, Mexico

V. HISTORY OF THE PROCEEDINGS SINCE THE DECISION ON COMPETENCE AND JURISDICTION

18. Respondent’s Counter-Memorial was filed on March 30, 2001, pursuant to an extension of time granted on January 31, 2001.

19. Claimants’ Joint Reply was filed on June 8, 2001, pursuant to an extension of time granted on May 15, 2001.

20. Respondent’s Rejoinder was filed on August 27, 2001, pursuant to an extension of time granted on August 17, 2001.

21. On August 9, 2001, Respondent filed a motion for the disqualification of Yves Fortier, QC as a member of the Tribunal in circumstances arising out of the proposed merger of Mr Fortier’s firm with a firm which had previously acted for Claimants in connection with their bankruptcy reorganisation under Chapter Eleven of the United States Bankruptcy Code.

22. On September 10, 2001, Mr Fortier resigned from his office as a member of the Tribunal.

23. On September 13, 2001, Sir Anthony Mason and Judge Mikva, pursuant to Article 15(3) of the ICSID Arbitration (Additional Facility) Rules consented to Mr Fortier’s resignation.

24. On September 14, 2001, Lord Mustill was duly appointed by Claimants as a member of the Tribunal in place of Mr Fortier.

25. The oral hearing on the merits, incorporating the joined unresolved objections to competence and jurisdiction, took place in Washington DC on October 15, 16, 17, 18 and 19, 2001.

26. At the conclusion of the oral hearing, the Tribunal made orders granting leave to Canada and Mexico to file written submissions pursuant to NAFTA Article 1128 and to the Parties to file written submissions in reply.

27. On November 9, 2001, Canada and Mexico filed written submissions.

29. Subsequently, on January 25, 2002 Respondent filed the motion to dismiss Claimants’ NAFTA claims for lack of jurisdiction, based on the reorganization of TLGI under Chapter Eleven of the United States Bankruptcy Code. An element in that reorganization was the assignment by TLGI of its NAFTA claims to a newly created Canadian corporation, Nafcanco, which was owned and controlled by LGII (re-named "Alderwoods, Inc", a United States corporation).

VI. THE CIRCUMSTANCES GIVING RISE TO CLAIMANTS’ CLAIM

30. The dispute which gave rise to the litigation in Mississippi State Court related to three contracts between O’Keefe and the Loewen companies and a settlement agreement made on August 19, 1991 whereby Loewen agreed to sell an insurance company and a related trust fund to O’Keefe and to provide O’Keefe with the exclusive right to provide certain insurance policies sold through Loewen funeral homes. By the settlement agreement, for its part O’Keefe agreed to dismiss an action it had brought against Loewen relating to the three contracts, to sell to Loewen two O’Keefe funeral homes, and to assign to Loewen an option which O’Keefe held on a cemetery tract north of Jackson, Mississippi.

31. The origin of the dispute lay in competition between two funeral companies in the Gulf Coast region of Mississippi. In the Gulfport area, the Riemann brothers owned and operated funeral homes and funeral insurance companies. In the Biloxi area, O’Keefe owned and operated funeral homes and funeral insurance companies. Gulf National Life Insurance Company (“Gulf”) was one such funeral insurance company owned and operated by O’Keefe.

32. Loewen, which had embarked on a grand strategy of acquiring funeral homes across North America, purchased the Riemann businesses in January, 1990. The Riemann businesses were restructured into a holding company known as “Riemann Holdings, Inc.”, of which LGII became owner as to 90%, the Riemann interests holding the remaining 10%. Loewen retained the previous owners and managers as salaried employees of Loewen. Despite the change in ownership, Riemann continued to advertise itself as locally owned - “we haven’t sold out: we just have a new partner, The Loewen Group International”. O’Keefe challenged Riemann’s claim that it was locally owned. O’Keefe published advertisements in the Gulf Coast community, asserting that Riemann was really owned by Loewen which was a Canadian company financed by an Asian Bank. This was part of an advertising campaign designed to encourage support for the O’Keefe local business as against foreign-owned and foreign financed competition.

33. Loewen extended its Mississippi interests to Jackson, the largest metropolitan area in the State, by purchasing the Wright & Ferguson Funeral Home, the largest funeral home in Jackson. Wright & Ferguson had an association with O’Keefe dating back to 1974, when O’Keefe purchased the exclusive right to sell Gulf funeral insurance through the Wright & Ferguson Funeral Home.

34. Loewen began to sell insurance through Wright & Ferguson Funeral Homes, despite Gulf’s exclusive right under the 1974 contract. O’Keefe’s complaints about this breach of the contract, along with financial difficulties that O’Keefe was experiencing, led to negotiations between O’Keefe and Loewen which failed to result in any agreement. Subsequently O’Keefe began a lawsuit in connection with the breach of contract.

35. It was then that the settlement agreement of August 19, 1991 was reached. The agreement provided for completion within 120 days, time being of the essence. Prompt completion was important to O’Keefe because O’Keefe was under review by the state regulatory authority. There was evidence that Loewen was aware of O’Keefe’s difficulties with the regulatory authority and of the adverse consequences for O’Keefe if the agreement were not completed in the 120 days. Moreover, the Riemanns objected strongly to the agreement, so much so that Loewen told them that the deal would not close without their approval.

36. There was a dispute over the 1991 agreement and its legal effect. While the parties were negotiating about that agreement the US Federal Bureau of Investigation seized
the Mississippi Insurance Commissioner’s records relating to the O’Keefe insurance companies.

37. After the negotiations broke down, O’Keefe filed an amended complaint alleging breach of the 1991 agreement and fresh claims of common law fraud and violations of Mississippi anti-trust law. That complaint sought actual damages of $5 million.

38. In May 1992, the Mississippi Insurance Commissioner placed Gulf under administrative supervision. O’Keefe’s complaint was further amended to include claims for consequential damages allegedly suffered as a result of administrative supervision.

VII. THE NATURE OF CLAIMANT’S CLAIM

39. Claimants’ case is that the verdict for $500,000,000 and the decisions refusing to relax the bonding requirements are “measures adopted or maintained by a Party” relating to:

(a) investors of another Party;
(b) within the meaning of NAFTA, Article 1101.1.

Claimants argue that

(1) the trial court, by admitting extensive anti-Canadian and pro-American testimony and prejudicial counsel comment, violated Article 1102 of NAFTA which bars discrimination against foreign investors and their investments;
(2) the discrimination tainted the inexplicably large verdict;
(3) the trial court, by the way in which it conducted the trial, in particular by its conduct of the voir dire and its irregular reformation of the initial jury verdict for $260,000,000, by permitting extensive nationality-based, racial and class-based testimony and counsel comments, violated Article 1105 of NAFTA which imposes a minimum standard of treatment for investments of foreign investors, including a duty of “full protection and security” and a right to “fair and equitable treatment” of foreign investors;
(4) the excessive verdict and judgment (even apart from the discrimination) violated Article 1105;
(5) the Mississippi courts’ arbitrary application of the bonding requirement violated Article 1105; and
(6) the discriminatory conduct, the excessive verdict, the denial of Loewen’s right to appeal and the coerced settlement violated Article 1110 of NAFTA, which bars the uncompensated appropriation of investments of foreign investors.

40. Claimants allege that Respondent is liable for Mississippi’s NAFTA breaches under Article 105, which requires that the Parties to NAFTA shall ensure that all necessary measures are taken to give effect to the provisions of the Agreement, including their observance by State and provincial governments. Claimants also allege that, by tolerating the misconduct which occurred during the O’Keefe litigation, Respondent directly breached Article 1105, which imposes affirmative duties on Respondent to provide “full protection and security” to investments of foreign investors, including “full protection and security” against third-party misconduct.

VIII. THE GROUNDS OF RESPONDENT’S OBJECTION TO COMPETENCE AND JURISDICTION

41. By its Memorial on Competence and Jurisdiction, Respondent objected to the competence and jurisdiction of this Tribunal on the following grounds:

(1) the claim is not arbitrable because the judgments of domestic courts in purely private disputes are not “measures adopted or maintained by a Party” within the scope of NAFTA Chapter Eleven;
(2) the Mississippi court judgments complained of are not “measures adopted or maintained by a Party” and cannot give rise to a breach of Chapter Eleven as a matter of law because they were not final acts of the United States judicial system;
(3) a private agreement to settle a litigation matter out of court is not a government “measure” within the scope of NAFTA Chapter Eleven;
(4) the Mississippi trial court’s alleged failure to protect against the alien-based, racial and class-based references cannot be a “measure” because Loewen never objected to such references during the trial; and
(5) Raymond Loewen’s Article 1117 claims should be dismissed because he does not “own or control” the enterprise at issue.
IX. THE ISSUES

42. In stating the issues and in dealing with them, we have addressed the sectional and particular arguments presented by counsel. Without in any way criticizing the presentation of the arguments in that form, we emphasise that those particular arguments are designed to elucidate the one substantial question, namely whether the judgment and orders made by the Mississippi Courts against Loewen amounted to violations of NAFTA for which Respondent is liable.

43. Respondent maintains grounds (2) to (4) inclusive of its grounds of objection to competence and jurisdiction. As Respondent’s substantive submissions on the merits cover much of the subject matter dealt with by the unresolved grounds of objection, we shall direct our attention in the first instance to the substantive issues.

(a) Issues concerning the Trial

44. Issues of fact and issues of law arise in connection with the trial of the action in Mississippi State Court before Judge Graves and a jury. According to Claimants, the trial resulted in a grossly excessive verdict, brought about by conduct of O’Keefe’s counsel, notably Mr Gary, which was allowed by the trial judge. Claimants contend that the conduct of the trial, for which Respondent is responsible under NAFTA, involved violations of NAFTA Articles 1102, 1105 and 1110. Respondent, on the other hand, contends that Claimants’ complaints about the trial are grossly exaggerated and that they do not constitute NAFTA violations. Respondent relies upon grounds (2), (3) and (4) of its objection to competence and jurisdiction as substantive defences to the claim. Respondent argues also that Claimants are not entitled to rely on the conduct constituting the alleged NAFTA violations because they did not object to that conduct at the trial. Respondent further contends that flawed decisions taken at trial by Loewen, not NAFTA violations, were the cause of the verdict.

45. The issues of fact which arise for determination, in the light of the cases presented by the Parties, may be expressed as follows:

1. Did the trial court allow O’Keefe to engage in a strategy of exciting anti-Canadian, pro-Mississippi animus?
2. Did the trial court allow O’Keefe to engage in a strategy of racial antagonism?
3. Did the trial court allow O’Keefe to engage in class-based animus?
4. Does the conduct of the trial court give rise to an inference of bias against Loewen?
5. Was the trial flawed by other major irregularities of a kind that could result in manifest injustice?
6. What steps, if any, did Loewen take at the trial to object to conduct of the kind described in (1), (2) and (3) above, or to protect themselves from it?

46. The next question is whether the conduct of which Claimants, if established, complain tainted the verdict and whether that conduct contributed to an excessive verdict. These questions calls for consideration of the decisions taken at the trial by Loewen and for an examination of the amounts awarded for

(a) punitive damages;
(b) economic damages;
(c) emotional damages.

2. A separate question is whether there was any legal or evidentiary basis for O’Keefe’s antitrust and oppression claims.

47. Ultimately, so far as the conduct of the trial is concerned, the following questions of law arise for determination:

1. Was the conduct of the trial so flawed as to violate NAFTA Articles 1102, 1105 and 1110 or any of them, assuming the verdict and judgment of Mississippi State Court to be a “measure adopted or maintained by a Party within the scope of NAFTA Chapter Eleven”?
2. Did Claimants’ failure to object at the trial to conduct constituting NAFTA violations disentitle Claimants from relying upon them?
(b) Issues concerning the supersedeas bonding requirement

48. Other issues concern the supersedeas bonding requirement and the refusal of the Mississippi courts to relax the requirement. Claimants make no challenge to the bonding requirement itself. Claimants argue that the refusals to relax the bonding requirement constituted independent violations of NAFTA provisions. Claimants also argue that the refusal to relax the bonding requirement effectively deprived Loewen of the prospect of appealing the verdict entered by the trial court. In this respect Claimants assert that the deprivation of the prospect of appeal satisfied the principle of finality, if such a principle is applicable to a claim under NAFTA based on the decision of a trial court. Claimants also contend that the decisions not to relax the bonding requirement in a situation in which Loewen was exposed to immediate execution on its assets subjected Loewen to economic duress. The claim of economic duress, if soundly based, would lead to a challenge to set aside the settlement agreement under which Loewen agreed to pay to O’Keefe $175 million. Yet there is no suggestion that Loewen seeks to rescind or set aside that agreement. The claim of economic duress may, however, be relevant in establishing that entry into the agreement was consequential upon violation of one or more of the NAFTA articles.

49. The issues of fact in relation to the decisions of the Mississippi courts refusing relaxation of the bonding requirement and Loewen’s entry into the settlement agreement are:

   (1) Were the refusals to relax the bonding requirement the result of an institutional or other bias on the part of the Mississippi judiciary against Loewen by virtue of Loewen’s nationality?
   (2) Did the refusals to relax the bonding requirement effectively foreclose the options otherwise available to Loewen to challenge by way of appeal or otherwise the verdict entered by the trial court?
   (3) Was Loewen’s decision to enter into the settlement agreement a business judgment or decision on the part of Loewen?

50. The principal questions of law which arise in consequence of the refusals to relax the bonding requirement and the entry into the settlement agreement are:

   (1) Did the refusals constitute a violation of the NAFTA articles on its own or in combination with the jury’s verdict?
   (2) Did the refusals satisfy the principle of finality, thereby enabling Claimants to hold Respondent responsible for NAFTA violations at the trial?
   (3) If entry into the settlement agreement was the result of a business decision by Loewen, does that preclude Claimants from relying on NAFTA violations?

51. The claim before the Tribunal is a claim under international law for violations of NAFTA. It is for the Tribunal to decide the issues in dispute in accordance with NAFTA and applicable rules of international law. NAFTA Article 1131.1. The Tribunal is concerned with domestic law only to the extent that it throws light on the issues in dispute and provides domestic avenues of redress for matters of which Claimants complain. The Tribunal cannot under the guise of a NAFTA claim entertain what is in substance an appeal from a domestic judgment.

52. The claim before the Tribunal relates to the conduct of the Mississippi trial court and the Mississippi Supreme Court for whose acts, if they constitute a violation of NAFTA, Respondent is responsible (NAFTA Article 105). Respondent is not responsible under NAFTA for the conduct of O’Keefe and its counsel in the Mississippi litigation, unless responsibility for that conduct can be attributed to the Mississippi courts.

53. As will appear hereafter, Judge Graves failed in his duty to take control of the trial by permitting the jury to be exposed to persistent and flagrant appeals to prejudice on the part of O’Keefe’s counsel and witnesses. Respondent is responsible for any failure on the part of the trial judge in failing to take control of the trial so as to ensure that it was fairly conducted in this respect.
X. THE TRIAL

54. Having read the transcript and having considered the submissions of the parties with respect to the conduct of the trial, we have reached the firm conclusion that the conduct of the trial by the trial judge was so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law. Whether this conclusion results in a violation of Article 1105 depends upon the resolution of Respondent’s submissions still to be considered, in particular the submission that State responsibility arises only when final action is taken by the State’s judicial system as a whole.

55. In the succeeding paragraphs we set out the reasons for the conclusion stated in para. 54 above as well as the reasons why we conclude that, in other respects, Claimants’ case must be rejected.

(a) O’Keefe’s nationality strategy

56. O’Keefe’s case at trial was conducted from beginning to end on the basis that Jerry O’Keefe, a war hero and “fighter for his country”, who epitomised local business interests, was the victim of a ruthless foreign (Canadian) corporate predator. There were many references on the part of O’Keefe’s counsel and witnesses to the Canadian nationality of Loewen (“Ray Loewen and his group from Canada”). Likewise, O’Keefe’s case was conducted so as to suggest that Loewen was financed by Asian money, these statements being based on the fact that Loewen was partly financed by the Hong Kong Shanghai Bank, an English and Hong Kong bank which was erroneously described by Jerry O’Keefe in evidence as the “Shanghai Bank”. Indeed, Jerry O’Keefe, endeavouring to justify an earlier advertising campaign in which O’Keefe had depicted its business under American and Mississippi flags and Loewen under Canadian and Japanese flags, stated that the Japanese may well control both the “Shanghai Bank” and Loewen but he did not know that. O’Keefe’s strategy of presenting the case in this way was linked to Jerry O’Keefe’s fighting for his country against the Japanese and the exhortation in the closing address of Mr Gary (lead counsel for O’Keefe) to the jury to do their duty as Americans and Mississippians.

This strategy was calculated to appeal to the jury’s sympathy for local home-town interests as against the wealthy and powerful foreign competitor.

57. Several additional examples will serve to illustrate this strategy. In the voir dire and opening statements, Mr Gary stated that he had “teamed up” with Mississippi lawyers “to represent one of your own, Jerry O’Keefe and his family”. Mr Gary also stated “The Loewen Group, Ray Loewen, Ray Loewen is not here to-day. The Loewen Group is from Canada. He’s not here to-day. Do you think that every person should be responsible and should step up to the plate and face their own actions? Let me see a show of hands if you feel that everybody in America should have the responsibility to do that”. Whilst the conduct of the voir dire may not in itself have been conspicuously out of line with practice in Mississippi State courts, the skilful use by counsel for Claimants of the opportunity to implant inflammatory and prejudicial materials in the minds of the jury set the tone for the trial when it actually began.

58. In the voir dire O’Keefe’s counsel sought an assurance from potential jurors that they would be willing to award heavy damages. Once again, in their opening statements, O’Keefe’s counsel urged the jury to exercise “the power of the people of Mississippi” to award massive damages. O’Keefe’s counsel drew a contrast between O’Keefe’s Mississippi antecedents and Loewen’s “descent on the State of Mississippi”.

59. Emphasis was constantly given to the Mississippi antecedents and connections of O’Keefe’s witnesses. By way of contrast Mr Gary, in cross-examination of Raymond Loewen, repeatedly referred to his Canadian nationality, noted that he had not “spent time” in Mississippi and questioned him about foreign and local funeral home ownership. Jerry O’Keefe, in his evidence, pointed out that Loewen was a foreign corporation, its “payroll checks come out of Canada” and “their invoices are printed in Canada”.

60. An extreme example of appeals to anti-Canadian prejudice was evidence given by Mr Espy, former United States Secretary of State for Agriculture who, called to give evidence of the good character of Jerry O’Keefe, spoke of his (Espy’s) experience in protecting “the American market” from Canadian wheat farmers who exported low priced wheat into the American market with which American producers could not
compete and later, having secured a market, then jacked up the price. The tactic of thrusting prejudicial comment on to the cross-examiner was not confined to Mr Espy. It was a feature of Jerry O'Keefe's answers in cross-examination.

61. The strategy of emphasizing O'Keefe's American nationality as against Loewen's Canadian origins reached a peak in Mr Gary's closing address. He likened Jerry O'Keefe's struggle against Loewen with... Loewen's case as "Excuse me, I'm from Canada". Indeed, Mr Gary commenced his closing address by emphasizing nationalism: "[Y]our service on this case is higher than any honor that a citizen of this country can have, short of going to war and dying for your country." (Transcript at 5539).

62. Mr Gary returned to the same theme at the end of his closing address: "[O'Keefe] fought and some died for the laws of this nation, and they're going to put him down for being American" (Transcript at 5588).

63. Respondent argues that the vast majority of references to nationality during the trial were made in a context in which O'Keefe was seeking to identify the location of disputed events. This argument is without substance. The references to nationality were an element in a strategy calculated to appeal to the jury's sentiment in favor of local interests. In conformity with this strategy, O'Keefe's counsel went out of their way to make it clear that they had no quarrel with Mr John Wright and David Riemann, but that they were Mississippian witnesses for O'Keefe in their opening statement. Mr Wright was a director of LCH and the Riemanns held 10% of the share capital of the Riemann companies.

64. Respondent also argues that the introduction of evidence with an anti-Canadian bias was caused by Loewen's plan to portray O'Keefe as "a biased and unfair competitor who had engaged in an anti-foreigner advertising campaign". But the answer to Respondent's argument is correct in saying that Loewen's counsel made any reference to the advertising campaign in their opening statements. In any event, the persistent pursuit by O'Keefe of the nationality strategy went far beyond a response to Loewen's plan based on the advertising campaign.

(b) O'Keefe's racial politics strategy

65. Claimants' case that O'Keefe engaged in a strategy of racial politics is largely based on the efforts of O'Keefe to suggest that O'Keefe did business with black and white people alike whereas Loewen did business with white people. This aspect of Claimants' case must be seen in a context in which both parties were endeavoring to ingratiate themselves with African-American jurors. Both counsel on each side was a prominent African-American lawyer: Mr Gary for O'Keefe, Mr Sinkfield for Peele.
Loewen. Two of the remaining four Loewen lawyers were well-known African-American members of the Mississippi state legislature. Two other O'Keefe lawyers were African-American lawyers. After the midway point of the trial had been reached, Judge Graves observed that “the race card has already been played”. Significantly, Judge Graves remarked “and I know that the jury knows what’s going on”. In allowing an O'Keefe witness to give racially based evidence, Judge Graves acknowledged that Loewen did not start this strategy and “was going to bring up the rear” in that contest.

66. Loewen sought to counter this strategy by showing that it also did business with the black community. Loewen called evidence of its contract with the National Baptist Convention in order to show that Loewen was contributing to the economic development of the black community. O'Keefe countered by claiming that Loewen was racially exploiting the National Baptist Convention and the many black people who were members of the Convention.

67. Respondent seeks to justify O'Keefe’s racial politics strategy by arguing that it was relevant to the O'Keefe anti-trust case. Respondent argues that, in order to define Loewen’s market power, it was necessary to establish that the relevant markets for comparison included white funeral homes owed by Loewen and excluded African-American funeral homes with which they did not compete. Yet O'Keefe’s anti-trust case was that O'Keefe and Loewen competed only in predominantly white markets. In any event, the O'Keefe racial politics strategy went well beyond defining relevant markets.

(c) O'Keefe’s appeal to class-based prejudice

68. Claimants further complain that Mr Gary repeatedly portrayed Loewen as a large, wealthy foreign corporation and contrasted Jerry O'Keefe as a small, local, family businessman. There were a number of references by O'Keefe’s counsel emphasizing this contrast. These references culminated in Mr Gary’s closing address in which he incited the jury to put a stop to Loewen’s activities. Speaking of Jerry O'Keefe, Mr Gary said:

“He doesn’t have the money that they have nor the power, but he has heart and character, and he refused to let them shoot him down.” “You know your job as jurors gives you a lot of power … You have the power to bring major corporations to their knees when they are wrong. You can see wrong, make it right. Suffering and stop it.” “Ray comes down here, he’s got his yacht up there, he can go to cocktail parties and all that, but do you know how he’s financing that? By 80 and 90 year old people who go to get to a funeral, who go to pay their life savings, goes into this here, and it doesn’t mean anything to him. Now, they’ve got to be stopped … Do it, stop them so in years to come anybody should mention your service for some 50 odd days on this trial, you can say ‘Yes, I was there’, and you can talk proud about it.” “1 billion dollars, ladies and gentlemen of the jury. You’ve got to put your foot down, and you may never get this chance again. And you’re not just helping the people of Mississippi but you’re helping poor people, grieving families everywhere. I urge you to put your foot down. Don’t let them get away with it. Thank you, and may God bless you all.”

69. Respondent seeks to justify these tactics on the basis that O'Keefe complained that Loewen exploited “its unequal financial means to oppress the Plaintiffs”. The rhetoric of O'Keefe’s counsel went well beyond any legitimate exercise in ventilating O'Keefe’s oppression claim which, as will appear, was not submitted by Judge Graves to the jury.

70. It is artificial to split the O'Keefe strategy into three segments of nationality-based, race and class-based strategies. When the trial is viewed as a whole right through from the voir dire to counsel’s closing address, it can be seen that the O'Keefe case was presented by counsel against an appeal to home-town sentiment, favouring the local party against an outsider. To that appeal was added the element of the powerful foreign multi-national corporation seeking to crush the small independent competitor who had fought for his country in World War II. Describing ‘Loewen’ as a Canadian was simply to identify Loewen as an outsider. The fact that an investor from another state, say New York, would or might receive the same treatment in a Mississippi court as Loewen received is no answer to a claim that the O'Keefe case as presented invited the jury to discriminate against Loewen as an outsider.
XI. LOEWEN’S FAILURE TO OBJECT TO O’KEEFE’S PREJUDICIAL CONDUCT AT THE TRIAL AND ITS CONSEQUENCES

71. Respondent also argues that Loewen’s counsel were at fault in failing to object to O’Keefe’s nationality and racial politics strategy and appeals to class prejudice. The point of this argument is to avoid attributing to the trial judge any part of the responsibility for allowing O’Keefe to engage in these strategies and appeals. If Loewen’s counsel did not object, then, so the argument runs, there was no error on the part of the trial judge in failing to intervene of his own motion. For Claimants to succeed in their claim, they must establish that the trial judge permitted or failed to take steps (which he should have taken) to prevent the alleged conduct of O’Keefe’s counsel and witnesses. Respondent is only responsible in international law for the conduct of the Mississippi courts.

72. The transcript discloses many occasions when Loewen’s counsel did not object to comments or evidence on these matters when they could have done so. Likewise, there were occasions when they might have moved to have witness’ comments deleted from the record on the ground that they were non-responsive. Mr Espy’s reference to Canadian wheat farmers was an example.

73. In a jury trial, however, counsel are naturally reluctant to create the impression, by continuously objecting, that they are seeking to suppress relevant evidence or that they are relying on technicalities. So it is not to be expected that Loewen’s counsel would object on every occasion when objectionable comment was made or inadmissible evidence was given. The question is whether Loewen’s counsel sufficiently brought their objections to the attention of the trial judge and whether the trial judge was aware of the problem and should have taken action himself.

74. A reading of the transcript reveals that Loewen’s counsel at the trial did not make any objections to evidence or comments on the ground that they were calculated to foment prejudice on the grounds of nationality, race or class. Claimants have been unable to point to any such objection. The silence of Loewen’s counsel on these matters is a matter that calls for consideration in the light of the claims now pursued by Claimants.

75. With respect to O’Keefe’s nationality strategy, the explanation for the absence of objection is obscure. Loewen’s counsel may have considered that the risk of a verdict reflecting local favouritism was inherent in the litigation and that the best way of handling the problem was to nail O’Keefe with his unfair and misleading advertising campaign and rely on an instruction to the jury eliminating local favouritism. As it happened, Judge Graves did not give the jury the instruction sought by Loewen, a matter to which we shall come shortly. Loewen’s counsel were certainly aware of the risk of local favouritism. They explored that risk with potential jurors in the voir dire. It may well be that the trial judge’s unfavourable, dismissive, abrupt responses to their objections during the voir dire, reinforced by similar responses during the trial, led them to make the judgment that objections would be rejected and would result in prejudice to Loewen in the eyes of the jury.

76. With respect to the issue of race, the explanation for the absence of any objection may well be that Loewen’s counsel, conscious of their own efforts to ingratiate themselves with the predominantly African-American jury, considered that the making of objections to O’Keefe’s conduct would appear inconsistent and hypocritical.

77. The probable explanation for the absence of objection to class-based appeals to the jury is that Loewen’s counsel regarded the problem as inherent in the litigation. Further, the making of an objection would only serve to highlight the advantage which Loewen enjoyed over O’Keefe in both wealth and power. So the giving of an appropriate jury instruction would be the best answer to the difficulty.

XII. STEPS TAKEN BY LOEWEN TO PROTECT ITS POSITION

78. In pre-trial proceedings, Loewen moved to dismiss the anti-trust, unfair competition and oppression claims on the ground that they were frivolous. These claims generated at the trial many of the appeals to prejudice. Judge Graves peremptorily dismissed this motion. Loewen also moved pre-trial to exclude evidence of special damages, including the emotional distress claim. This motion was also dismissed by Judge Graves.
79. Claimants now submit that the denial of the two motions effectively preserved the issues that prejudicial error was committed at trial by allowing evidence and arguments of counsel based on these claims. It does not follow, however, that the filing of these motions preserved Loewen’s position in so far as their claim is based on prejudicial conduct and evidence.

80. In the voir dire, Loewen’s counsel objected to Mr. Gary seeking commitments from the jury panel in relation to their treatment of Loewen which he had described as “Ray Loewen and his group from Canada”. The objection was overruled. Mr. Gary then asked whether potential jurors would be willing “to render a verdict against Ray Loewen and his group and render a verdict for over $600 million?” An objection to that question was overruled.

81. On the first day of the trial, Judge Graves ruled in response to two objections by Loewen’s counsel that character evidence would be admitted generally. Loewen counsel stated that the purpose of such evidence was to attract “sympathy and favor” from the jury. At the end of the trial, Judge Graves dismissed two motions for mistrial based on the character evidence. And, prior to the opening statements, the trial judge overruled objections to the placing before the jury panel an enlarged picture of all the members of the O’Keefe family and pictures of Jerry O’Keefe’s military service.

82. Judge Graves, at the conclusion of the trial, rejected a jury instruction proposed by Loewen’s counsel. The proposed instruction told the jury that they were not to be swayed by bias, prejudice, favour or other improper motive. This instruction was refused on the basis that it duplicated standard instruction “C-1”. Judge Graves began his instructions to the jury with instruction “C-1”, which is given in every case and addresses such general topics as the role of the jury, the court, the evidence and counsel’s argument. Included in “C-1” was a short one-sentence warning against bias in general, which made no reference to nationality-based or racial bias in particular. The warning was in these terms:

“You should not be influenced by bias, sympathy or prejudice.”

83. When Judge Graves asked if there were any objections to the instructions (including C-1) which he had prepared, Loewen counsel sought a more elaborate direction on the topic. Although Judge Graves summarily rejected this objection when counsel acknowledged that there was nothing wrong with the Judge’s proposed direction, it was clear that Claimant’s counsel was seeking an expanded direction to fit the particular circumstances of the case.

84. Later Loewen’s counsel submitted a specific instruction to address the risk of nationality-based, racial and class bias. The proposed instruction provided (App. at A2231-32):

“The law is a respecter of no persons. All are equal in the eyes of the law without regard to race, ethnicity, national origin, wealth or social status.

In deciding the issues presented in this case, you must not be swayed by bias or prejudice or favor or any other improper motive. The parties, the court and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the court, and reach a just verdict based on these two things alone, regardless of the consequences.

This case should be considered and decided by you as a matter between parties of equal standing in the community, between persons or businesses of equal standing and holding the same or similar stations in life. A corporation or other business entity is entitled to the same fair trial at your hands as a private individual.

The Loewen Group, Inc. is a corporation organized and having its principal place of business in Vancouver, British Columbia, Canada. Loewen Group International, Inc. is a corporation having its principal place of business in Covington, Kentucky, just across the Ohio River from Cincinnati. These parties are entitled to the same fair trial at your hands as are other parties who are residents of Mississippi such as the O’Keefes and the eight separate O’Keefe corporations that are Plaintiffs in this case. All persons and parties stand equal before the law and are to be dealt with as equals in this court of justice.”

85. O’Keefe’s counsel objected to this instruction as “cumulative” of the one-sentence warning. This objection was summarily upheld by Judge Graves, notwithstanding that the proposed instruction went far beyond the one-sentence warning in C-1 which was, in the light of the circumstances of this case, inadequate to counter the prejudice created by the way in which O’Keefe’s case had been presented.
86. Loewen’s counsel did not object to the prejudicial and extravagant appeals in Mr Gary’s closing address to the jury. In the light of the trial judge’s refusal of the jury instruction that had been sought, they may well have concluded that no purpose would be served by objecting.

87. Having regard to the history of the trial, and the way in which it was conducted by Judge Graves, we do not consider that failures to object on the part of Loewen’s counsel amounted to a waiver of the grounds on which Claimants now contend that the conduct of the trial constituted a violation of NAFTA. There was a gross failure on the part of the trial judge to afford the due process due to Loewen in protecting it from the tactics employed by O’Keefe and its counsel. It defies common sense to suggest that Loewen’s counsel by their conduct made an election not to pursue their objections to those tactics and that Loewen waived its objections to the lack of due process and to the grounds on which it now complains. Although “a State cannot base the charges made before an international court or tribunal … on objections or grounds, which were not previously raised before the municipal courts” (Judge Jiménez de Aréchaga, “International Law in the Past Third of a Century” 159 “Recueil des Cours” (1978) at p 282), Claimants’ grounds were sufficiently raised at trial.

XIII. THE REFORM OF THE INITIAL JURY VERDICT

88. In punitive damages cases, Mississippi law requires a bifurcated trial procedure. At the first stage, the jury determines liability and compensatory damages; at the second stage, the jury considers whether to award punitive damages. The jury cannot consider liability and punitive damages at the same time. Miss. Code Ann. §11-1-65(b-c).

89. In conformity with this provision, Judge Graves instructed the jury only on liability and compensatory damages issues. The parties did not adduce evidence or present argument on punitive damages in the first stage of the trial. Nor did Judge Graves give the jury any instructions about punitive damages.

90. In the jury voir dire, however, O’Keefe’s counsel informed the panel of potential jurors that there was a claim for punitive damages. O’Keefe’s counsel asked the panel whether they would have any hesitation in awarding a verdict for over $600 million damages if the plaintiffs’ case was proved according to law. Loewen’s counsel’s objection that this question amounted to seeking a commitment from the jury was overruled. In the early stages of the trial, O’Keefe’s counsel made reference to the claim for punitive damages. Loewen’s counsel objected but the trial judge gave no instruction to the jury in response to the objection.

91. The matters mentioned in paras. 89 and 90 may well have induced the jury to understand that they were to award both compensatory and punitive damages together if they found for O’Keefe on liability.

92. On November 1, 1995, the jury returned a verdict for O’Keefe of $260,000,000. This amount was said to be made up as follows (App. at A651-658):

(Wright and Ferguson contracts)
- Breach of three of the Wright and Ferguson contracts: 31,200,000
- Tortious interference with one or more of the three Wright and Ferguson contracts: 7,800,000
- Tortious (wilful, intentional) breach of a Wright and Ferguson contract: 23,400,000
- Breach of implied covenants of good faith and Fair dealing in a Wright and Ferguson contract: 15,600,000

(1991 Agreement)
- Wilful and malicious breach of the 1991 Agreement: 54,600,000
- Tortious (wilful and intentional) breach of the 1991 Agreement: 54,600,000
- Breach of an implied covenant of good faith and Fair dealing in the 1991 Agreement: 36,400,000
- State anti-monopoly law breaches: 18,200,000
- Common law fraud: 18,200,000

$ 300,000,000

93. The individual amounts listed in the previous paragraph total $260,000,000 (the verdict brought in by the jury) not $300,000,000. There was no allocation in the individual amounts or in the total amount of the verdict as between compensatory and punitive damages.
94. A note written by the jury foreman to Judge Graves, after the verdict was announced, stated that the $260 million covered both compensatory damages of $100 million and punitive damages of $160 million, and that the $260,000,000 was a “negotiated compromise” between a low of $100,000,000 and a high of $300,000,000 (App. at A659).

95. How, in the light of the way the amount of $260,000,000 was calculated, the verdict was divided into $100,000,000 compensatory damages and $160,000,000 punitive damages remains a complete mystery. The way in which the verdict was constructed, including, as it did, compensatory and punitive damages, demonstrates that there was a failure adequately to instruct the jury to limit their initial award to compensatory damages.

96. Immediately after announcement of the verdict, Loewen moved for a mistrial, contending that the verdict was biased, excessive and procedurally defective because it covered punitive damages. Judge Graves denied the motion without discussion (Transcript at 5739). Judge Graves purported to reform the verdict. He informed the jury that he accepted the verdict of $100,000,000 compensatory damages but did not accept the award of $160,000,000 punitive damages. The jury may well have interpreted the rejection of this award as an indication that it was inadequate.

XIV. THE PUNITIVE DAMAGES HEARING AND VERDICT

97. Judge Graves then directed that the trial enter the punitive damages stage. It took place on November 2, 1995. Bernard Pettingill, an O’Keefe witness, testified that the net worth of Loewen was almost $3.2 billion, though he conceded that its market capitalization, based on the current value of its shares, was less than $1.8 billion. He explained the difference by saying that the market had failed to take into account the “future value” of Loewen’s contract with the National Baptist Convention (Transcript at 5762).

98. On the other hand Loewen presented expert evidence that its entire net worth, as reflected in filings with the US Securities and Exchange Commission was between $600 and $700 million (Transcript at 5771-5772) and that its market value was approximately $1.7 billion (Transcript at 5777).

99. In his closing address, Mr Gary returned to his earlier themes: “Ray Loewen is not here to day. He’s not here and I think that’s the ultimate arrogance … That’s the ultimate arrogance for him to think that he can do what he’s doing to people like Jerry O’Keefe … and to the consumers of this stage, and he can deal with it in this fashion” (Transcript at 5794-5795). Mr Gary claimed that Loewen officials were “smiling when they charge grieving families in Corinth, Mississippi”(Transcript at 5796).

100. As he had done in his earlier closing address, Mr Gary asserted that Loewen would make “over $7.9 billion” off the National Baptist Convention Contract, an assertion unsupported by evidence. He further asserted that this profit would be made from “just selling vaults” because Loewen would not admit black people to Loewen funeral homes for burial. Again this assertion was unsupported by evidence. The closing address concluded with the exhortation:

“1 billion dollars, 1 billion dollars … You’ve got to put your foot down, and you may not ever get this chance again. And you’re not just helping people of Mississippi, but you’re helping … families everywhere.” (Transcript at 5809).

101. The jury returned a verdict for $400,000,000 punitive damages. On November 6, 1995, judgment for a total verdict of $500,000,000 was entered.

102. On that day Loewen filed a motion to reduce the punitive damages on the grounds of bias and excessiveness (App. at A1196). On November 15, 1995, Loewen filed another motion for judgment notwithstanding the verdict, or for a new trial, or for remittitur (App. at A660) on the ground that the jury’s verdict exhibited bias, passion and prejudice against Loewen and on the ground that each element in the damage’s award was excessive.

XV. THE CLAIM THAT THE $500 MILLION VERDICT WAS EXCESSIVE

104. The total damages award of $500 million was by far the largest ever awarded in Mississippi.

105. Claimants had a very strong case for arguing that the damages awarded, both compensatory and punitive, were excessive, and that the amounts were so inflated as to invite the inference that the jury was swayed by prejudice, passion or sympathy. The initial award of punitive damages, despite the trial judge's instruction that the jury was then to confine itself to issues of liability and compensatory damages, indicates that the jury was minded to award punitive damages against Loewen without instructions from the trial judge and without evidence to support the amount of an award. Further, the initial award of damages included amounts for anti-trust oppression breaches and the fraud claim, although Mr Gary, in his closing address, had not asked for damages on those claims. The award of $100,000,000 compensatory damages was very close to the total amount of $105,852,000 which was the amount sought by Mr Gary from the jury for all claims, though it was calculated by reference to the contract and tort claims.

106. The award on the breach of the Wright and Ferguson contracts greatly exceeds the value placed on those contracts in evidence by the O'Keefe witness, $980,000 (Transcript at 2367), which was the amount sought from the jury by Mr Gary (Transcript at 5711-5712). The total amount initially awarded in respect of the various claims made in relation to these contracts, $78,000,000, allowing for what was at that stage of the case an impermissible punitive component, bore no relationship to the apparent value of the contracts. It is difficult to avoid the conclusion that there was a multiplication of damages on claims which overlapped.

107. Likewise, the damages awarded in relation to the 1991 settlement agreement appear to be grossly excessive. In his closing address, Mr Gary sought a total of $104,852,000 for the claims based on the 1991 agreement, made up of $74,500,000 for emotional distress and the remainder in economic damages, yet in the O'Keefe “Amended and Supplemental Complaint” sought $625,000 only in emotional damages for Jerry O'Keefe and his son (App. at A202). This amount was mentioned by O'Keefe’s counsel in the opening statement. The only evidence of emotional distress was given by Jerry O’Keefe and his daughter Susan. They spoke of his sleepless nights, worry and stress. There was no expert evidence, no evidence of medical or psychiatric treatment, medication, physical manifestation of distress and no evidence whatsoever relating to the son.

108. Mr Gary sought from the jury, at least by implication, an amount of $30 to $35 million in economic damages (Transcript at 5713-5715), resulting from breach of the 1991 agreement. Yet, allowing for an impermissible element of punitive damages, the jury initially awarded $145,600,000 damages for the claims on the 1991 agreement. The amount of $30 to $35 million sought by Mr Gary included $20 million in lost “future revenue” from the Family Care Company (Transcript at 4848-4864), $6 million in lost “future revenue” from Riemann Trust Funds (Transcript at 1400-1401) and $4.5 million in lost “future revenue” from the Family Care Trust Rollover (Transcript at 2366, 5566-5568). Under Mississippi law, lost future profits are recoverable as damages but lost future revenue is not recoverable (Fred's Stores of Mississippi v M & H Drugs Inc. 725 So. 2d 902, 914-915 (1998)).

109. The duplication of awards on the Wright and Ferguson contracts and the 1991 agreement is an obvious problem. That agreement extinguished all claims arising out of the then existing litigation between O'Keefe and Loewen. The pending lawsuit included claims for breach of the Wright and Ferguson contracts. If the 1991 agreement was enforceable, claims for breaches of the Wright and Ferguson contracts could not be maintained.

110. Again, Claimants had a strong ground for claiming that the fraud damages were excessive. As already noted, Mr Gary did not ask for these damages. The only fraud claim involved alleged misstatements about the 1991 agreement and its performance. Why the fraud claim would result in damages additional to the damages awarded on the other claims made in respect of the 1991 agreement is by no means apparent.

111. Claimants’ challenge to the award on the anti-trust claims appears to misconceive the nature of the claim. It was not, as Claimants seem to suggest, confined to a claim based on loss sustained as a result of impermissible pricing below cost. The O’Keefe
case was mainly based on the unfair means by which Loewen attempted to attain its monopoly power. It was O’Keefe’s case that Loewen violated the anti-monopoly laws by manipulating the 1991 agreement in bad faith in order to drive O’Keefe out of funeral home markets, thereby enabling Loewen to raise prices without fear of competition. It was also O’Keefe’s case that Loewen’s treatment of O’Keefe was part of a broader practice of destroying or excluding smaller competitors by unfair means. There is expert evidence before us in the form of a declaration by Mr Jack Dunbar that O’Keefe’s allegations were more than sufficient to state a claim for a violation of Mississippi anti-monopoly laws. And evidence was presented at the trial to substantiate the monopolization claims. That evidence included the testimony of a credible expert Mr Dale Espich whose testimony dealt in detail with Loewen’s monopolistic practices. He described Loewen’s domination of various Mississippi markets, its persistent practice in raising prices, particularly in dominated markets (Transcript at 1837-1840), its tendency to cluster its purchases of funeral homes to dominate markets (Transcript at 1845-1846) and Loewen’s success in excluding O’Keefe from the largest Mississippi market – Jackson. (Transcript at 1867). This testimony was not challenged in cross-examination. So Claimants’ argument that there was no legal basis for the anti-trust claim appears to be without substance.

112. There is no occasion to deal with the so-called “oppression” claim. No such claim was submitted by Judge Graves to the jury and no verdict was rendered on such a claim. That O’Keefe pleaded “oppression” as a separate count is therefore immaterial.

113. The total award (even the award of compensatory damages) appears to be grossly disproportionate to the damage suffered by O’Keefe. The dispute involved three contracts valued at $980,000 and an exchange of two funeral homes worth approximately $2.5 million for a Loewen funeral insurance company valued at approximately $4 million. The jury foreman said “May be O’Keefe lost $1 million dollars. $6 million to $8 million I’d say was right …” (App. at A3079). Respondent seeks to justify the award of $500 million not by reference to the substance of the dispute but by reference to Loewen’s “monopolization of funeral home markets and overcharging of grief-stricken consumers of funeral services”. Granted that a substantial award of damages on this claim might well be justified, Claimants had very strong grounds for arguing that verdict of $500,000,000 was excessive.

114. Notwithstanding the viability of the anti-trust claim, Claimants had very strong prospects of successfully appealing the damages awarded on the ground that they were excessive.

XVI. RESPONDENT’S CASE THAT EXCESSIVE VERDICT WAS CAUSED BY LOEWEN’S FLAWED TRIAL STRATEGY

115. Respondent argues that the excessive verdict was not caused by inadmissible appeals to prejudice and local favouritism but by Loewen’s flawed trial strategy. First, it is said that because the foreman of the jury was formerly a Canadian, it would be wrong to impute anti-Canadian bias to the jury. This argument is based very largely on post-trial interviews with the jurors, including the foreman. We do not regard these interviews as establishing that the verdict was uninfluenced by appeals to local sentiment, racial or class-based prejudice. These influences may well have played a part in the verdict, even if there was an absence of actual bias on the part of the jurors themselves. The magnitude of the verdict suggests that the verdict was influenced by bias, prejudice, passion or sympathy.

116. Respondent’s argument on this point is based on the Opinion of Professor Stephan Landsmann who has pointed to a number of strategical or tactical decisions taken by Loewen’s counsel during the course of the trial, particularly in relation to the punitive damages stage of the trial. There is much to be said for the view that a number of decisions taken by Loewen’s counsel, viewed with the advantage of hindsight, were unwise. Further, four individuals who had been employed by Loewen gave evidence which was very critical of Loewen’s business practices. One of them testified to a policy of constant and aggressive price increases for funeral services (Transcript at 1228,1240). The same witness described communications in which O’Keefe was given misleading information or in which material information was withheld in evident breach of contract (Transcript at 1217-1223). The Riemann brothers wrote letters to Loewen complaining about the business methods of Loewen.
117. Professor Landsmann points also to four matters which would have strengthened the O’Keefe charges against Loewen. They were:

(1) the belated disclosure and production of the Riemann letters (already mentioned) which appear to support a number of significant O’Keefe allegations;

(2) the striking by the Court of the testimony of a Loewen witness, Ellis, after it was revealed that Loewen’s counsel had not complied with the court’s sequestration order with respect to his pre-trial preparation;

(3) frequent claims of memory failure by Raymond Loewen in direct and cross-examination, a matter commented upon by Judge Graves; and

(4) the contradiction by Loewen witnesses and by documents of Loewen’s counsel’s statements about the net worth of Loewen during the punitive damages stage of the trial.

118. The matters referred to in the two preceding paragraphs unquestionably strengthened the O’Keefe case against Loewen and highlighted Loewen’s predatory and aggressive conduct. But these matters do not erase the prejudicial conduct at trial on O’Keefe’s part or eliminate the influence it was calculated to have on the jury.

XVII. EVALUATION OF THE TRIAL

119. By any standard of measurement, the trial involving O’Keefe and Loewen was a disgrace. By any standard of review, the tactics of O’Keefe’s lawyers, particularly Mr. Gary, were impermissible. By any standard of evaluation, the trial judge failed to afford Loewen the process that was due.

120. The trial before Judge Graves lasted some 50 days. During such a protracted period of adversarial behavior, mistakes and errors will occur; even the most even-handed judge will not be able to entirely preclude appeals to the jury’s passions. Appellate courts in the United States, and indeed, in most countries in the world, have recognized that “perfect trials” are not to be expected. Doctrines of harmless error, invited error, and waiver of the right to object to prejudicial conduct are commonly invoked to sustain the results of less than perfect trials. Clearly, an arbitral tribunal applying the provisions of a treaty and of international law is even more constrained to avoid nitpicking a trial record and the rulings of a trial judge. Even when all of those limitations are applied most rigorously, the trial and its $500,000,000 verdict cannot be countenanced.

121. Respondent obviously could not defend some of the lawyer conduct and trial judge inadequacy previously referred to. Instead it argued that some of the appellate doctrines mentioned above precluded the tribunal from relying on specific flaws that were the most egregious. We need not resolve the domestic procedural disputes which arose at the trial such as the question whether Loewen was entitled to the particular instruction which it sought as to bias. The question is whether the whole trial, and its resultant verdict, satisfied minimum standards of international law, or the “fair and equitable treatment and full protection and security” that the Contracting States pledged in Article 1105 of NAFTA. This question is addressed in paras. 124-137.

122. If a single instance of the unfair treatment that was accorded Loewen at the trial level need be cited, it would be the manner in which the large and excessive verdict was constructed by the judge and the jury. As has previously been detailed, the jury originally came in with a verdict of $260,000,000, which the foreman indicated included compensatory damages of $100,000,000 and punitive damages of $160,000,000. Since Mississippi law required a separate prove up of punitive damages (which had not occurred), the judge accepted the $100,000,000 compensatory damages portion of the verdict, but conducted a further, and minimal, hearing of evidence on the punitive damages question. The jury subsequently came back with the much enhanced punitive damages award of $400,000,000, making the total verdict of $500,000,000 the largest in Mississippi history. Whether the jury interpreted Judge Graves’ procedure as an invitation to increase the verdict or not, the results compounded the excessiveness of the original verdict. The methods employed by the jury and countenanced by the judge were the antithesis of due process. But we repeat this is only one instance of many.

123. In reaching the conclusion stated in the previous paragraph, we take it to be the responsibility of the State under international law and, consequently, of the courts of a State, to provide a fair trial of a case to which a foreign investor is a party. It is the
responsibility of the courts of a State to ensure that litigation is free from
discrimination against a foreign litigant and that the foreign litigant should not
become the victim of sectional or local prejudice. In the United States and in other
jurisdictions, advocacy which tends to create an atmosphere of hostility to a party
because it appeals to sectional or local prejudice, has been consistently condemned
and is a ground for holding that there has been a mistrial, at least where the conduct
amounts to an irreparable injustice (New York Central R.R. Co. v Johnson 279 US
310, 319 (1929); Le Blanc v American Honda Motor Co. Inc. 688 A 2d 556, 559). In
Walt Disney World Co. v Blalock 640 So 2d 1156,1158, a new trial was ordered where
closing argument was pervaded with inflammatory comment and personal opinion
of counsel, although the offensive comments were not objected to. See also Whitehead v
Food Max of Mississippi Inc. 163 F 3d 265, 276-278 (where a new trial was ordered
on the ground that plaintiffs’ counsel repeatedly “reminded the jury that [defendant] Kmart is a national … corporation … [and] contrasted that with” his and his client’s
status as a Mississippi resident, despite the fact that most of the objectionable
comments were not objected to); Norma v Gloria Farms Inc. 668 So 2d 1016,1021,1023 (new trial ordered where defense counsel in closing remarks appealed to jurors’ self-interest, despite plaintiff’s counsel’s failure to object). In
such circumstances the trial judge comes under an affirmative duty to prevent
improper tactics which will result in an unfair trial (Pappas v Middle Earth
Condominium Association 963 F 2d 534 539, 540; Koufakis v Carvel 425 F 2d 892,
900).

XVIII. NAFTA ARTICLE 1105

124. Article 1105 which is headed “Minimum Standard of Treatment” provides:

“1. Each party shall accord to investments of investors of another party
treatment in accordance with international law, including fair and
equitable treatment and full protection and security.”

The precise content of this provision, particularly the meaning of the reference to
“international law” and the effect of the inclusory clause has been the subject of
controversy.

125. On July 31, 2001, the Free Trade Commission adopted an interpretation of Article
1105(1). The Commission’s interpretation is in these terms:

“Minimum Standard of Treatment in Accordance with International Law

(1) Article 1105(1) prescribes the customary international law minimum
standard of treatment of aliens as the minimum standard of treatment to be
afforded to investments of investors of another Party.

(2) The concepts of “fair and equitable treatment” and “full protection and
security” do not require treatment in addition to or beyond that which is
required by the customary international law minimum standard of treatment
of aliens.

(3) A determination that there has been a breach of another provision of the
NAFTA, or of a separate international agreement, does not establish that
there has been a breach of Article 1105(1).”

126. An interpretation issued by the Commission is binding on the Tribunal by virtue of
Article 1131(2).

127. Although Claimants, in their written materials, submitted that the Commission’s
interpretation adopted on July 31, 2001 went beyond interpretation and amounted to
an unauthorized amendment to NAFTA, Claimants did not maintain that submission
at the oral hearing. The oral argument presented by Mr Cowper QC on behalf of
Claimants was consistent with the Commission’s interpretation of Article 1105(1).
Mr Cowper QC submitted that, accepting that Article 1105(1) prescribes the
customary international law standard of treatment of aliens as the minimum standard
of treatment to be afforded to investments of an investor of another Party, the
treatment of Loewen by the Mississippi courts violated that minimum standard.

128. The effect of the Commission’s interpretation is that “fair and equitable treatment”
and “full protection and security” are not free-standing obligations. They constitute
obligations only to the extent that they are recognized by customary international law.
Likewise, a breach of Article 1105(1) is not established by a breach of another
provision of NAFTA. To the extent, if at all, that NAFTA Tribunals in Metalclad
Corp v United Mexican States ICSID Case No. ARB(AF)/97/1 (Aug 30, 2000), S.D.
Myers, Inc. v Government of Canada (Nov 13, 2000) and Pope & Talbot, Inc. v
Canada, Award on the Merits, Phase 2, (Apr 10, 2001) may have expressed contrary views, those views must be disregarded.

129. It is not in dispute between the parties that customary international law is concerned with denials of justice in litigation between private parties. Indeed, Respondent’s expert, Professor Greenwood QC, acknowledges that customary international law imposes on States an obligation “to maintain and make available to aliens, a fair and effective system of justice” (Second Opinion, para. 79).

130. Respondent submits that, in conformity with the accepted standards of customary international law, it is for Loewen to establish that the decisions of the Mississippi courts constituted a manifest injustice. Professor Greenwood states in his Second Opinion:

“the awards and texts make clear that error on the part of the national court is not enough, what is required is “manifest injustice” or “gross unfairness” (Garner, “International Responsibility of States for Judgments of Courts and Verdicts of Juries amounting to Denial of Justice”, 10 BYIL (1929), p 181 at p 183), “flagrant and inexcusable violation” (Arechaga, “International Law in the Past Third of a Century”, 159 “Recueil des Cours” (1978) at p 282) or “pulpable violation” in which “bad faith not judicial error seems to be the heart of the matter” (O’Connell, International Law, 2nd ed, 1970) p 498). As Baxter and Sohn put it (in the Commentary to their Draft Convention on the Responsibility of States for Injuries to Aliens) “the alien must sustain a heavy burden of proving that there was an undoubted mistake of substantive or procedural law operating to his prejudice”.

131. In *Pope & Talbot Inc. v Canada*, Award in respect of damages, May 31, 2002 a NAFTA Tribunal considered the effect of the Interpretation of July 31, 2001. The Tribunal concluded (para. 62 of its Award) that the content of custom in international law is now represented by more than 1800 bilateral investment treaties which have been negotiated. Nevertheless the Tribunal did not find it necessary to go beyond the formulation by the International Court of Justice in *Elettronica Sicula SpA (ELSI) United States v Italy* (1989) ICJ 15 at 76:

“Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law... It is wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety.”

132. Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice. Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough, even if one applies the Interpretation according to its terms.

133. In the words of the NAFTA Tribunal in *Mondev International Ltd v United States of America* ICSID Case No. ARB (AF)/99/2, Award dated October 11, 2002, “the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the facts that the impugned decision was clearly improper and disgraceful, with the result that the investment has been subjected to ‘unfair and inequitable treatment’.”

134. If that question be answered in the affirmative, then a breach of Article 1105 is established. Whether the conduct of the trial amounted to a breach of municipal law as well as international law is not for us to determine. A NAFTA claim cannot be converted into an appeal against the decisions of municipal courts.

135. International law does, however, attach special importance to discriminatory violations of municipal law (Harvard Law School, Research in International Law, Draft Convention on the Law of Responsibility of States for Damage Done in Their Territory to the Persons or Property of Foreigners (“1929 Draft Convention”) 23 American Journal of International Law 133, 174 (Special Supp. 1929) (“a judgment [which] is manifestly unjust, especially if it has been inspired by ill-will towards foreigners as such or as citizens of a particular state”); Adeva, A Fresh Look at the Meaning of Denial of Justice under International Law, XIV Can YB International Law 91 (“a... decision which is clearly at variance with the law and discriminatory cannot be allowed to establish legal obligations for the alien litigant”). A decision which is in breach of municipal law and is discriminatory against the foreign litigant amounts to manifest injustice according to international law.

136. In the present case, the trial court permitted the jury to be influenced by persistent appeals to local favouritism as against a foreign litigant.
137. In the light of the conclusions reached in paras. 119-123 (inclusive) and 136, the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment. However, because the trial court proceedings are only part of the judicial process that is available to the parties, the rest of the process, and its availability to Loewen, must be examined before a violation of Article 1105 is established. We address this question in paras. 142-157 (inclusive), 165-171 (inclusive) and 207-217 (inclusive).

XIX. THE CLAIM OF BIAS

138. Claimants’ argument that Judge Graves and the jury were actually biased against Loewen is not made out. There is no direct evidence of bias on the part of Judge Graves or the jury. Nor do the jury interviews demonstrate that the jury was biased. The interviews reveal that the jury took an adverse view of Loewen’s conduct based on evidence which included testimony of Loewen employees and former employees. Nor does the evidence warrant the drawing of an inference of bias against the jury, though there is strong reason for thinking that the jury were affected by the persistent and extravagant O’Keefe appeals to prejudice. Although the trial judge’s conduct of the trial is explicable by reference to bias, the evidence does not support a finding that he was biased against Loewen. We take the view that the judge, for reasons which do not clearly appear, failed to discharge his paramount duty to ensure that Loewen received a fair trial.

XX. NAFTA ARTICLE 1102

139. Article 1102 bars discrimination against foreign investors and their investments. Article 1102(1) and (2) requires each Party to accord investors and investments of another Party “treatment no less favorable than it accords in like circumstances to its own investors” or their investments. With respect to a state or province Article 1102(3) requires “treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms part.”

The effect of these provisions, as Respondent’s expert Professor Bilder states, is that a Mississippi court shall not conduct itself less favourably to Loewen, by reason of its Canadian nationality, than it would to an investor involved in similar activities and in a similar lawsuit from another state in the United States or from another location in Mississippi itself. We agree also with Professor Bilder when he says that Article 1102 is direct only to nationality-based discrimination and that it proscribes only demonstrable and significant indications of bias and prejudice on the basis of nationality, of a nature and consequence likely to have affected the outcome of the trial.

140. A critical problem in the application of Article 1102 to the facts of this case is that we do not have an example of “the most favorable treatment accorded, in like circumstances” by a Mississippi court to investors and investments of the United States. Claimants submit that the treatment accorded O’Keefe is an appropriate comparator, that Loewen and O’Keefe were “in like circumstances” because they were litigants in the same case. But their circumstances as litigants were very different and it is not possible to apply Article 1102(3) by reference to the treatment accorded to O’Keefe. What Article 1102(3) requires is a comparison between the standard of treatment accorded to a claimant and the most favourable standard of treatment accorded to a person in like situation to that claimant. There are no materials before us which enable such a comparison to be made.

XXI. NAFTA ARTICLE 1110

141. Claimants’ reliance on Article 1110 adds nothing to the claim based on Article 1105. In the circumstances of this case, a claim alleging an appropriation in violation of Article 1110 can succeed only if Loewen establishes a denial of justice under Article 1105.
XXII. THE NECESSITY FOR FINALITY OF ACTION ON THE PART OF THE STATE'S LEGAL SYSTEM

142. Having reached the conclusion that the trial and the verdict were improper and cannot be squared with minimum standards of fair international law and fair and equitable treatment, we must now consider the question whether, in the light of subsequent proceedings, the trial and the verdict are to be considered as final. Respondent’s argument is that the expression “measures adopted or maintained by a Party” must be understood in the light of the principle of customary international law that, when a claim of injury is based on a breach of international law, the State is responsible for the errors of its courts if the decision has not been appealed to the court of last resort. The State is not responsible for the errors of its courts when the decision has been appealed to the highest court where the decision is subject to appeal. Respondent distinguishes this substantive rule of international law, from international law’s procedural requirement of exhaustion of local remedies (“the local remedies rule”).

143. Claimants submit, first, that “the Article eliminates the necessity to exhaust local remedies when a Chapter Eleven claim is brought by an investor or enterprise” (B. Sepulveda Amor, International Law and International Sovereignty: The NAFTA and the Claims of Mexican Jurisdiction, 19 Houston Journal of International Law 565 at 574 (1997)). Claimants submit, secondly, that the so-called substantive principle of finality is no different from the local remedies rule and that international tribunals have reviewed the decisions of inferior municipal courts where the exhaustion requirement has been waived or is otherwise inapplicable.

144. Respondent submits that there is nothing to show that in Chapter Eleven the Parties intended to derogate from this substantive rule of international law when judicial action is the basis of the claim for violation of NAFTA. Respondent argues that the substantive principle of finality is not a substantive rule of international law when judicial action is the basis of the claim for violation of NAFTA. Respondent submits that the so-called substantive principle of finality is a substantive rule of international law when judicial action is the basis of the claim for violation of NAFTA. Respondent argues that the substantive principle of finality is a substantive rule of international law when judicial action is the basis of the claim for violation of NAFTA.

145. Claimants’ response to this argument is that Article 1121(1)(b) of NAFTA requires an arbitral claimant to waive its local remedies, not exhaust them. This Article authorizes the filing of a Chapter Eleven claim only if “the investor and the enterprise waive their right to initiate or continue before any administrative tribunal or court under the law of any Party an appeal or other dispute settlement procedures, with respect to the measure of the dispute referred to in Article 1116.”

146. Respondent argues that Article 1121(2)(b) is not a waiver provision and that it does not waive the local remedies rule or for that matter the requirement that the judicial process be pursued to the highest court where the judicial action is a breach of international law. Respondent appears to acknowledge, however, that the Article speaks of a breach of local remedies, not of local remedies per se. Respondent relies on the decisions of inferior municipal courts where the exhaustion requirement has been waived or is otherwise inapplicable.

147. As Professor Greenwood points out in his First Opinion, usually there are three separate issues to be considered: (a) whether there is an act which is imputable to the respondent State; (b) whether that act is contrary to international law; and (c) whether the respondent State can be held responsible for that act in international proceedings until local remedies have been exhausted.

148. In this case, we are not concerned with the question whether there is an act which is imputable to Respondent. A decision of the court of a State is imputable to the State because the court is an organ of the State. This proposition was acknowledged in the
Tribunal’s Decision of January 5, 2001. We are, of course, concerned with the question whether the relevant decisions of the Mississippi courts constitute violations of international law because this is not a case where the alleged violation of international law is constituted by a non-judicial act or decision.

149. The local remedies rule which requires a party complaining of a breach of international law by a State to exhaust the local remedies in that State before the party can raise the complaint at the level of international law is procedural in character. Article 44 of the latest International Law Commission (ILC) Draft Articles on State Responsibility demonstrates that the local remedies rule deals with the admissibility of a claim in international law, not whether the claim arises from a violation or breach of international law (Text provisionally adopted on 31 May, 2001, UN Doc. A/CN 4/L 602. Article 44 is identical to Article 45 of the 2000 draft referred to in the Decision of January 5, 2001, para. 67). Article 22 of the earlier draft, which had been prepared in 1975, embodied a substantive approach which was strongly criticized by governments (most notably the United Kingdom) and was not followed in Elettronica Sicula SpA (ELSI) United States v Italy (1989) ICJ 15 at para. 50. See Second Opinion of Professor Greenwood, paras 52-54).

150. Although Loewen submits, in accordance with an Opinion of Sir Robert Jennings, that the local remedies rule is essentially confined to cases of diplomatic protection, that view does not coincide with that of other commentators. See Garcia-Amador, Soln and Baxter, Recent Codification of the Law of State Responsibility for Injuries to Aliens (1974) pp 143, 129-132; see also Garcia-Amador’s Draft Articles on State Responsibility prepared in 1960 for the International Law Commission, noting his comment at p. 79:

“Article 21 of the draft sets forth the basis of a procedure which would enable the alien himself, once local remedies have been exhausted, to submit an international claim to obtain reparation for injury suffered by him.”

See also OECD Draft Convention on the Protection of Foreign Property, 1967, Article 7(b) and Commentary (OECD Publication No. 23081 (1967) pp 36-41. Professor James Crawford SC, rapporteur on State Responsibility of the ILC has stated “the exhaustion of local remedies rule is not limited to diplomatic protection” (UN Doc. A/CN 4/517, p 33).

151. Professor Greenwood in his First Opinion refers to “the principle that a court decision which can be challenged through the judicial process does not amount to a denial of justice”. The principle is supported by a number of decisions of the United States-Mexican Claims Tribunal (Jennings, Laughland & Co v Mexico (Case No. 374, 3 Moore, International Arbitrations (1898) p 3135); Green v Mexico (ibid, at p 3139); Burn v Mexico (ibid at 3140); The Ada (ibid at 3143); Smith v Mexico (ibid at 3146); Blumbergt v Mexico (ibid at 3146); The Mechanic (Corwin v Venezuela) (ibid 3210 at 3218). In the first of these decisions, Umpire Thornton observed (at p 3136):

“The Umpire does not conceive that any government can thus be made responsible for the conduct of a judicial officer when no attempt has been made to obtain justice from a higher court.”

152. Text writers also give support to the principle (Oppenheim’s International Law, 9th ed, 1992, vol I, pp 543-545; Freeman, International Responsibility of States for Denial of Justice, (1938) pp 291-292, 311-312), although Freeman regards the rule as linked to the local remedies rule (at p 415).

153. The principle that a court decision which can be challenged through the judicial process does not amount to a denial of justice at the international level has been linked to the duty imposed upon a State by international law to provide a fair and efficient system of justice. Professor James Crawford SC, rapporteur to the ILC, has stated:

“There are also cases where the obligation is to have a system of a certain kind, e.g. the obligation to provide a fair and efficient system of justice. There systematic considerations enter into the question of breach, and an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not of itself amount to an unlawful act”.

(UN Doc. A/CN 4/498, para. 75). Judge Jiménez de Aréchaga took the same view of the State’s responsibility, stating that it was an essential condition of a State being held responsible for a judicial decision in breach of municipal law that the decision must be a decision of a court of last resort, all remedies having been exhausted (“International Law in the Past Third of a Century”, 159 Recueil des Cours (1978) at
p 282, where the judge expressed the reason for the requirement as being that States provide remedies to correct the natural fallibility of their judges). He considered that a corollary of the requirement is that “a State cannot base the charges made before an international court or tribunal … on objections or grounds which were not previously raised before the municipal courts”.

154. No instance has been drawn to our attention in which an international tribunal has held a State responsible for a breach of international law constituted by a lower court decision when there was available an effective and adequate appeal within the State’s legal system.

155. That there is a difference in the purposes served by this principle was recognized by the Iran-United States Claims Tribunal in *Oil Fields of Texas* 12 Iran-US CTR 308 at 318-319. The question there was whether a judicial decision could amount to a measure of appropriation. The decision was that of the Islamic Court of Ahwaz, which appears to have been a lower court. The Tribunal held that the order of the Court amounted to a permanent deprivation of use. The Tribunal said (at p 319):

“In these circumstances, and taking into account the Claimant’s impossibility to challenge the Court order in Iran, there was a taking of the three blowout preventers for which the Government is responsible” (p 319).

156. The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the violation caused by the lower court decision. The requirement has application to breaches of Articles 1102 and 1110 as well as Article 1105.

157. The questions whether there was an adequate and effective municipal remedy available to Loewen and whether Loewen took sufficient steps to pursue such a remedy are questions which remain to be considered. It is convenient, first, however, to deal with Article 1121 and the problem of waiver.

XXIII. ARTICLE 1121 AND WAIVER

158. In para. 71 of the Decision of January 5, 2001, the Tribunal expressed the view that “the rule of judicial finality is no different from the local remedies rule. Its purpose is to ensure that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own judicial system”.

159. This statement requires qualification in light of the preceding discussion of Article 1105, denial of justice and the local remedies rule. The requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision means that this requirement and the local remedies rule, though they may be similar in content, serve two different purposes.

160. An important principle of international law should not be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so (*Elettronica Sicula SpA (ELSI) United States v Italy* (1989) ICJ 15 at 42). Such an intention may be exhibited by express provisions which are at variance with the continued operation of the relevant principle of international law.

161. Although the precise purpose of NAFTA Article 1121 is not altogether clear, it requires a waiver of domestic proceedings as a condition of making a claim to a NAFTA tribunal. Professor Greenwood and Sir Robert Jennings agree that Article 1121 “is not about the local remedies rule”. One thing is, however, reasonably clear about Article 1121 and that is that it says nothing expressly about the requirement that, in the context of a judicial violation of international law, the judicial process be continued to the highest level.

162. Nor is there any basis for implying any dispensation of that requirement. It would be strange indeed if sub silentio the international rule were to be swept away. And it would be very strange if a State were to be confronted with liability for a breach of international law committed by its magistrate or low-ranking judicial officer when domestic avenues of appeal are not pursued, let alone exhausted. If Article 1121 were to have that effect, it would encourage resort to NAFTA tribunals rather than resort to
the appellate courts and review processes of the host State, an outcome which would seem surprising, having regard to the sophisticated legal systems of the NAFTA Parties. Such an outcome would have the effect of making a State potentially liable for NAFTA violations when domestic appeal or review, if pursued, might have avoided any liability on the part of the State. Further, it is unlikely that the Parties to NAFTA would have wished to encourage recourse to NAFTA arbitration at the expense of domestic appeal or review when, in the general run of cases, domestic appeal or review would offer more wide-ranging review as they are not confined to breaches of international law.

163. Article 1121 may have consequences where a claimant complains of a violation of international law not constituted by a judicial act. That is not a matter which arises here.

164. For the reasons given, Article 1121 involves no waiver of the duty to pursue local remedies in its application to a breach of international law constituted by a judicial act.

XXIV. THE SCOPE AND CONTENT OF THE OBLIGATION TO PURSUE LOCAL REMEDIES

165. The question then is as to the scope and content of the obligation to pursue local remedies in a case in which the alleged violation of international law is founded upon a judicial act. In such a case the pursuit of local remedies plays a part in creating the ground of complaint that there has been a breach of international law. There is a body of opinion which supports the view that the complainant is bound to exhaust any remedy which is adequate and effective (The Finnish Ships Arbitration Award, May 9, 1934, 3 RIAA, 1480 at 1495; Nielsen v Denmark [1958-1959] Yearbook of the European Commission on Human Rights, 412 at 436, 438, 440, 444) so long as the remedy is not “obviously futile” (The Finnish Ships Arbitration Award at 1503-1505).

166. On the other hand, the requirement has been described as one “which is not a purely technical or rigid rule” and one “which international tribunals have applied with a considerable degree of elasticity” (Norwegian Loans Case (1957) ICJR 9 at 39 per Lauterpacht J). In conformity with this approach, one commentator has suggested that the result in any particular case will depend upon a balancing of factors. So in a case where it is highly unlikely that resort to further remedies will be favourable to a claimant, the correct conclusion may be that local remedies have been exhausted “if the cost involved in the proceeding further considerably outweighs the possibility of any satisfaction resulting” (Mummery, “The Content of the Duty to Exhaust Local Remedies” (1964) 58 Am. Jo. Intl. Law 389 at 401). The same commentator favours formulation of the issue in terms of whether the local remedy “may reasonably be regarded as incapable of producing satisfactory reparation” (ibid). Although this formulation appears to be directed to a case in which the claim is based on an antecedent breach of international law, the formulation is equally appropriate to obtaining redress as to producing reparation.

167. Here, however, the question concerns the availability of the remedy rather than its adequacy or even its effectiveness. At least that is true of the appeal to the Mississippi Supreme Court. It was an adequate and fully effective appeal. The obligation of the claimant, who complains that a judicial act is a violation of international law, to afford the host State the opportunity of remedying the default in the court below, by taking the matter to a higher court, is subject to reasonable practical limitations. Thus, Sohn and Baxter, “Convention on the International Responsibility of States for Injuries to Aliens”, 12th Draft (1961) 168 in their commentary on Article 19, sub-paragraph 2(b), state:

“The subparagraph is intended to preclude a respondent State from maintaining that a local remedy exists when in fact resort to that remedy is a practical impossibility and to permit a claimant to introduce evidence of the practical workings of justice, as distinct from the theoretical state of the law as reflected in code, statute, decision and learned writing. (...) It may be that an alien in fact finds it difficult to employ an existing local remedy by reason of the existence of some other procedural barrier in the law, such as a requirement of posting excessive security for costs, or where the law leaves to the discretion of a court official the amount of security for costs to be posted, an order for the posting of a prohibitive amount (...). Since the purpose of the Article as a whole is to require exhaustion of a remedy only if it is reasonably available, it is important to provide not only for the case where a remedy is unavailable as a matter of law, but also for the case where a theoretically available remedy cannot in fact be utilized.”
This passage, in our view, correctly expresses the scope and content of the principle relating to exhaustion of local remedies. It is an obligation to exhaust remedies which are effective and adequate and are reasonably available to the complainant in the circumstances in which it is situated.

Availability is not a standard to be determined or applied in the abstract. It means reasonably available to the complainant in the light of its situation, including its financial and economic circumstances as a foreign investor, as they are affected by any conditions relating to the exercise of any local remedy.

If a State attaches conditions to a right of appeal which render exercise of the right impractical, the exercise of the right is neither available nor effective nor adequate. Likewise, if a State burdens the exercise of the right directly or indirectly so as to expose the complainant to severe financial consequences, it may well be that the State has by its own actions disabled the complainant from affording the State the opportunity of redressing the matter of complaint. The scope of the need to exhaust local remedies must be considered in the light of these considerations.

Whether it has been satisfied in this case depends upon an examination of events subsequent to the trial, events to which we now turn.

**XXV. LOEWEN'S APPEAL, THE COURT DECISIONS ON THE BONDING REQUIREMENT AND THE SETTLEMENT AGREEMENT**

On November 5, 1995, Loewen’s counsel set out a timetable for future procedures. They proposed an appeal to the Supreme Court of Mississippi which was expected to take six months to two years before it was finalized. Loewen’s counsel contemplated an appeal to the United States District Court, if necessary.

On November 6, 1995, final judgment was entered in favour of O’Keefe. On that day, Marsh & McLellan, a firm experienced in placing supersedeas bonds in appeals in civil lawsuits, began to assemble a package of parties willing to furnish a bond. By November 22, 1995, it was arranged that surety companies would underwrite a total of $625,000,000, this being the amount of the bond required by Miss. R. App. P.8(a).

By posting a bond in that amount, Loewen would have prevented O’Keefe from enforcing the judgment while Loewen’s appeal was pending.

By about November 20, 1995, it became clear that the sureties would all require that 100% of their risk be supported by collateral in the form of bank letters of credit and that Loewen’s bankers would not promise such letters. On November 25, Loewen filed an affidavit stating that it was unable to provide an appeal bond with supersedeas in the amount, form and conditions required by the Mississippi Supreme Court and the surety companies.

Meantime, immediately after judgment was entered, O’Keefe began to enrol it within the counties of Mississippi, enrolment being a condition precedent to execution.

On November 15, 1995, Loewen moved for judgment notwithstanding the verdict, and/or for a new trial and for remittitur. In these motions Loewen advanced numerous grounds, including grounds discussed in this Award, for challenging the verdict both as to liability and as to the damages awarded (compensatory and punitive). On the following day Loewen filed motions seeking a reduction of the compensatory and punitive damages awarded.

On November 20, 1995, the motions came on for hearing before Judge Graves. The court announced that each side would be given fifteen minutes for argument and Loewen would be allowed a further ten minutes for rebuttal. After argument, the court denied all six Loewen motions, without giving reasons.

On the same day, Mr Gary was reported as saying “They have ten days to post the cash bond. If they don’t, my client will proceed to take over their assets. That’s every funeral home they own, every insurance company, every cemetery, their corporate jet and their yacht”. On November 21, 1995, Loewen’s lawyers sought an assurance from O’Keefe’s lawyers that they would not seek enforcement during the thirty day period for perfecting the appeal. The assurance was not forthcoming.
On November 27, 1995, Loewen filed an appeal of the trial court judgment with the Mississippi Supreme Court. Under Mississippi law, a party may pursue such an appeal without posting a bond.

On November 28, 1995, Loewen filed a motion asking the trial court to stay enforcement of its judgment on Loewen filing a conventional supersedeas bond in the penal sum of $125,000,000 and providing covenants that Loewen would maintain its financial strength and net worth. By this motion Loewen asked the trial court to reduce the bond to $125,000,000 – 125 per cent of the compensatory damages component of the judgment. The Mississippi Court Rules empower the court, for “good cause shown” and in an “appropriate” case, to grant a stay of enforcement upon a bond or upon conditions less than or other than a bond in an amount of 125 per cent of the judgment (Miss. R. App. P. Rule 8(b)). Loewen argued that security for the compensatory damages component was all that O’Keefe was entitled to, that Loewen was unable to provide more than a bond for $125,000,000 at the time, (though claiming it had the financial ability to satisfy the judgment to make the judgment fully collectible), that its net worth was sufficient to make the judgment fully collectible. Loewen also argued that denial of the stay would cause it and innocent third parties irreparable harm and deprive it of appellate review. Loewen further argued that the appeal had strong prospects of success, in particular that the damages were grossly excessive. Loewen also stated that its major credit agreements all had cross-default clauses and agreed that an uncured default in any of their long term credit agreements would operate to vacate the stay.

On the same day, Loewen filed a motion in seeking a stay pending consideration by the court of the motion for a stay.

On November 29, 1995, the motions for a stay came on for hearing before Judge Graves in the trial court. The hearing began with Judge Graves again fixing fifteen minutes for oral argument on each side with ten minutes for rebuttal. In doing so, he exhibited resentment at statements made by Loewen’s counsel in their brief that they were “stumped” by the time limits fixed for argument on the earlier motion and about the “error-infested” trial. A reading of the transcript, however, reveals that Judge Graves applied himself to the issues. He questioned O’Keefe’s counsel about the problem that would arise if execution on the judgment was not stayed and execution followed, yet on appeal the judgment was set aside or reduced. He asked whether it might not be more prudent to maintain the status quo. O’Keefe’s counsel responded that there was no assurance that the status quo could be maintained, that there were other lawsuits pending against Loewen and the judgments might be bigger than the O’Keefe judgment. O’Keefe’s counsel also said “they would go into Chapter Eleven [of the Bankruptcy Code] and in the meantime pursue us” and “[t]hey can appeal without supersedeas”. Loewen made no response on the Chapter Eleven argument even though it had that option under consideration. In argument, Judge Graves discussed other alternatives with Loewen’s counsel and finally asked whether security could be given in an amount between $125,000,000 and $625,000,000. Nothing came of this after some discussion between the parties.

Judge Graves then delivered judgment on the motions, dismissing them. He accepted that the court had a discretion under Rule 8(b) to reduce the amount of the bond for “good cause shown”, an expression which was not defined. However, Judge Graves considered, in the light of the Mississippi Supreme Court decision in In re Estate of Taylor 539 So 2d 1029, that the general purpose of a supersedeas bond was to give absolute security to the party affected by the appeal and that the security was to cover the entire verdict, including the amount of punitive damages. Judge Graves concluded that, although it was arguable that a stay would not result in harm to O’Keefe,

“the Court has no reason to believe that there are assets [of Loewen] in this case which would not dissipate or that the same assets which are subject to levy right now would still be there and subject to levy a year from now or eighteen months from now if there were an appeal allowed without the bond”.

In reaching this conclusion, Judge Graves referred to matters relied upon by O’Keefe’s counsel – the financial inability of Loewen to obtain the bond, the pendency of other lawsuits, that investors were looking to get out and that the price of the shares had plummeted. The critical finding in the judgment was:

“The Court … finds that there exists no viable alternative for securing this Plaintiff’s interest absent the requirement of a [$625 million] bond pursuant to Rule 8.”
184. Judge Graves stressed that the Rule required that the amount of the bond was to give absolute security to the party affected by the appeal. If one accepts this interpretation of the Rules, and Judge Graves was bound by the interpretation, his decision did not reflect an error in principle. Further he took into consideration the various factors relied upon by the parties and, after weighing them, came up with a decision in favour of O'Keefe.

185. It is not a decision which we would have reached on the materials before Judge Graves. That is because we would not read the Rules as having the purpose of securing absolute security for the verdict awarded, more particularly when (a) there was a strong case for regarding the verdict as excessive and one which should be set aside, (b) the provision of absolute security was beyond the capacity of the appellant and (c) the prosecution of an appeal without a stay would work an injustice and in all probability foreclose the possibility of an appeal, eventualities rendered the more likely by the sheer size of the bond stipulated by Rule 8(a).

186. We repeat what we said earlier, that Claimants make no challenge to the bonding requirement in Rule 8(a) notwithstanding the potential harshness of its operation. That operation constitutes a very good reason for interpreting the discretion conferred by Rule 8(b) more liberally than it was construed by the Mississippi courts.

187. After this case, the Mississippi Supreme Court made changes to its Rules, in particular Rule 8, which would preclude what happened before Judge Graves, and later what happened on appeal. The changes acknowledge that Rule 8 could operate in an extreme way so as to produce an unjust result. But the challenge here is not to Rule 8(a); it is to the way Rule 8 was applied.

188. It was common ground between the parties that there is no principle of international law which requires a State to provide a right of appeal from a decision of its courts. Here the refusal to relax the bonding requirement was not a denial of the appeal. Loewen, at least in theory, could proceed with its appeal, albeit subject to the risk of execution, if it did not pursue the Chapter Eleven Bankruptcy option.

189. Claimants submit that the decisions refusing to relax the bonding requirements were a violation of Article 1105, because there was a procedural denial of justice, there was a denial of fair and equitable treatment and a denial of full protection and security. Notwithstanding the criticisms already made of Judge Graves' decision, that decision does not transgress the minimum standard of treatment mandated by Article 1105. It was at worst an erroneous or mistaken decision.

190. On November 30, 1995, the Supreme Court of Mississippi granted an interim stay of execution on the judgment, conditional on the posting of a bond in the sum of $125,000,000. On December 20, 1995, the Supreme Court extended the stay indefinitely, pending further order of the court.

191. At this time Loewen was considering raising further capital by way of equity and debt. Loewen's lawyers were examining the effect of an equity, raising on the court's appreciation of its ability to post a $625,000,000 bond.

192. On December 12, 1995, Loewen filed in the Mississippi Supreme Court an addendum to their motion for a stay, informing the court of their intention to file a preliminary prospectus for an offering of preferred securities to the public in Canada. The proceeds of the offering would be deposited with a trustee for the funding of acquisitions of funeral homes, cemeteries and related businesses. Although not available to fund a supersedeas bond, the use of the funds for acquisitions would benefit O'Keefe by increasing Loewen's underlying value.

193. While the appeal to the Mississippi Supreme Court was pending Loewen issued new stock in the Canadian equity market to fund new acquisitions and was preparing to raise an additional $200 million in a debt offering.

194. On December 17, 1995, Raymond Loewen and others conducted a conference call with financial institutions in Canada concerning an offer of some $200 million convertible preferred shares. In response to questions, Raymond Loewen stated that "... the Supreme Court in Mississippi has already given us one stay, and we are now waiting for the permanent stay, and the permanent reduction of the bond, and there is every reason to believe that in fact we will get that. In addition to that, our company we believe is – we are quite
confident that with our banks and with our investment bankers we will be able to deal with the very worst case scenario”.

And, in response to a question about the punitive damages owed Raymond Loewen said:

“Obviously, we don’t think that a 500 million liquidity thing will ever come, but being a responsible corporation we have the contingency plan for every possible contingency, and we’ve looked at that, discussed it with our bankers, and we have a plan which we believe would address that without any major long-term harm on liquidity after a brief to adjust that.”

195. On January 23, 1996, Loewen’s lawyers pointed out the tactical dangers of raising money to fund the existing acquisition obligations, but not the bond. They noted that Loewen’s Mississippi counsel thought that this course would result in loss of credibility and could result in loss of the stay. The current settlement strategy advised by the lawyers was to get Loewen to the point where it could post the $625 million, ask the Court to be relieved of that burden and point out to O’Keefe the need for them to settle before the court acted or the bond was posted.

196. On January 24, 1996, the Supreme Court of Mississippi with two dissentients dismissed defendants’ motion for stay of execution, and ordered that the interim stay entered on November 30 and extended on December 20, 1995 be dissolved with effect from 1200 pm on January 31, 1996. The Court did not give reasons for its decision. The Court’s formal order simply recited:

“The Court finds that the question before it is whether the trial court abused its discretion in refusing to lower the amount of the supersedeas bond at Appellants’ request. The Court finds no abuse of discretion in the trial court’s refusal to lower the amount of the supersedeas bond, and that the trial court properly followed M.R.A.P.8.”

197. Whether the Supreme Court’s ruling on this point was appropriate or not, it stands in the same position as Judge Graves’ decision under appeal. The Supreme Court’s ruling did not transgress the minimum standard of treatment under Article 1105.

198. On January 25, 1996, a memorandum was circulated within the Loewen Group reporting the decision of the Mississippi Supreme Court, and informing readers that the Group was currently pursuing three alternative avenues:

1. securing funds to finance the bond;
2. negotiating a reasonable settlement;
3. filing for Chapter Eleven Bankruptcy protection without posting a bond.

Chapter Eleven was considered to be by far the least desirable but would be utilised if absolutely necessary.

199. On January 25, 1996, plaintiffs’ lawyers wrote to defendants’ lawyers advising that they would start execution on all Loewen’s property in Mississippi and other states at noon on January 31, adding:

“… we are willing to give you a second chance to resolve this case and avoid bankruptcy. However, I am renewing my offer to resolve this case for four hundred and seventy-five million dollars”.

Respondent suggests that Loewen would have discounted O’Keefe’s threats to levy execution on the judgment because O’Keefe would have been deterred by the potential liability for damages it would face if, ultimately, the judgment was set aside.

In our view, Loewen was entitled to treat the threat of prompt execution on some of its assets in Mississippi as real and as having adverse consequences for market perceptions of Loewen.

200. On January 27 and 28, 1996, Loewen’s lawyers were drafting and redrafting an application to the Hon Justice Scalia, as Circuit Justice for the Fifth Circuit, for a stay of execution pending the filing of a petition for writ of certiorari. The petition invited the court to take up a question unresolved in Pennzoil v Texaco, Inc. 481 U.S.1 (1987) whether it comports with due process of law to condition a stay on execution on the posting of a bond that serves no purpose where the defendant cannot obtain such a bond, and where the defendant’s inability to post the bond could result in severe, irreparable harm before the defendant has the chance to obtain appellate review.

201. During the night of January 27/28, 1996, an informal agreement was reached and recorded, in a handwritten document, which was not signed formally until February 1, 1996. On January 29, 1996, Loewen announced the settlement in a press release:

“We are confident of a successful appeal, but it would have meant several years of financial uncertainty at significant cost to the Company … After analysing the financial and other alternatives we determined that, at this time, a settlement is in the best interests of the Company and its shareholders.”
202. On February 1, 1996, the formal settlement agreement was executed. On the same day the parties executed an Absolute Release with Indemnity Agreement and Covenants.

203. On February 2, 1996, on the joint motion of all parties, the Supreme Court of Mississippi dismissed Loewen’s appeal with prejudice, revesting the Circuit Court with jurisdiction to consummate a release, settlement and dismissal of the suit on the terms described in the parties’ joint motion to dismiss. The order of January 24, 1996 was vacated and dissolved, nunc pro tunc, so that the amount of the required bond reverted to $125 million. The order was conditional on the performance of the monetary part of the agreed settlement.

204. On February 2, 1996, Judge Graves ordered:
   (i) that the bond be released and discharged; and
   (ii) that (subject to performance of the settlement agreement) the judgment of 6 November 1996 was satisfied and cancelled.

XXVI. DOES THE SETTLEMENT AGREEMENT OPERATE TO RELEASE ALL CLAIMS AGAINST RESPONDENT?

205. It is convenient to deal here with an argument based on a release of claims provided for by the settlement agreement. Respondent submitted that, on its true construction, the settlement agreement operated to release all claims by Loewen, including the NAFTA claims in issue in this arbitration, against Respondent, notwithstanding that Respondent is not a party to the agreement. The argument is based on the release executed by Loewen which forms part and is exhibited as “Exhibit C” to the settlement agreement. The release is a release by Loewen of all claims whatsoever that Loewen may have against the O’Keefe interests and persons affiliated with the O’Keefe interests. The release incorporates the accord and satisfaction of “all claims and causes of action as against the Releases and all other persons, firms, and/or corporations having any liability in the premises”. The instrument further provides that the release extends and applies to future claims. The release is expressed to be governed by the law of Mississippi.

206. Respondent relies on the “intent” rule of construction in force in Mississippi. Respondent’s argument is that, according to this rule in determining whether a person falls within the class of persons intended to take the benefit of a release, a relevant factor to be taken into account is that the person is not a stranger to the agreement and has given consideration. Respondent submits that the State of Mississippi was not a stranger and gave consideration in that it dismissed the appeal and made judicial orders as requested by the parties. The answer to Respondent’s submission is that when the settlement agreement and the release are read in their entirety and in context, we do not regard them as releasing Loewen’s NAFTA claims. They lie outside the ambit of the claims dealt with.

XXVII. DID LOEWEN PURSUE AVAILABLE LOCAL REMEDIES?

207. In the light of the conclusions reached in para 156, the next question is whether the appeal to the Mississippi Supreme Court was an available remedy which Loewen should have pursued before it could establish that the verdict and judgment at trial constituted a measure “adopted or maintained” by Respondent amounting to a violation of Art. 1105. Respondent argues that confronted with the adverse bonding decision by the Mississippi Supreme Court, Loewen should have (i) pursued its appeal despite the risk of execution on its assets; or (ii) sought protection under Chapter Eleven of the Bankruptcy Code which would have resulted in a stay of execution against Loewen’s assets; or (iii) filed a petition for certiorari and sought a stay of execution in the Supreme Court of the United States.

208. The first alternative suggested by Respondent raises the question whether the appeal is “a reasonably available remedy”, having regard to the risk of execution against Loewen’s assets if the bond was not posted. Here, the bonding requirement is attached, not to the right of appeal, but to the stay of execution. Granted the distinction, the practical impact of the requirement had severe consequences for Loewen’s right of appeal. Without posting the bond, Loewen’s right of appeal could be exercised only at the risk of sustaining immediate execution on Loewen’s assets in Mississippi, to be followed by execution against Loewen’s assets in other States, with the inevitable consequence that Loewen’s share price would collapse. In this respect, we reject Respondent’s contention that the risk of execution was remote and
theoretical. It is possible that O'Keefe may have exercised some restraint in relation to execution lest it might ultimately lose the appeal and suffer financial consequences by reason of executions which could not be justified. But this possibility does not persuade us that the risk of immediate execution was other than real. In these circumstances, if exercising the right of appeal, at the risk of immediate execution on Loewen’s Mississippi assets, was the only alternative available to Loewen, it would not have been, “a reasonably available remedy” to Loewen.

209. Filing under Chapter Eleven of the Bankruptcy Code would have resulted in a stay of execution. In this respect, Chapter Eleven would have enabled Loewen’s appeal to proceed without generating all the consequences that would have flowed from execution. Chapter Eleven results in re-organization not in liquidation, so that a company can continue to conduct its business under Court supervision. Although Court supervision would not necessarily bring to an end Loewen’s acquisitions program, Court supervision could be expected to restrict and moderate the program. Quite apart from that consequence, a Chapter Eleven filing may have had an effect on the public market perception of Loewen with a detrimental impact on its share price. The question then is whether, in these circumstances, the need to pursue local remedies extends to requiring a claimant to file under Chapter Eleven in order to ensure that a right of appeal remains effective and reasonably available. No doubt there are some situations in which it would be reasonable to expect an impecunious claimant to file under Chapter Eleven in order to exercise an available right of appeal. Whether it was reasonable to expect Loewen to file under Chapter Eleven depends at least in part on the reasons why Loewen elected to enter into the settlement agreement in preference to exercising other options, a matter examined in paras. 214-216 (inclusive).

210. The third alternative is the petition for certiorari coupled with the application for a stay. There is a conflict of opinion about the prospects of success of such an application between Professor Drew S. Days III (former United States Solicitor-General) and Professor Tribe. Professor Days is of the opinion that Loewen would have had “a reasonable opportunity” of obtaining review by the Supreme Court of the United States of the application of the Mississippi bonding requirement on the ground that it prevented, inconsistently with due process, appellate review of the Mississippi trial court judgment. Professor Tribe is of a contrary opinion. He bases his opinion on a number of grounds. First, the case was fact-intensive and the Court is very unlikely to review a fact-intensive case. Secondly, there was a dispute between the parties as to whether the bonding requirement precluded judicial review of the judgment. The Mississippi Supreme Court did not make such a finding and did not adopt Loewen’s version of the facts. Thirdly, the presence of a substantial punitive damages award was irrelevant to the issues which the Supreme Court would have been called upon to decide.

211. This Tribunal is not in a position to decide whether the opinion of Professor Days or that of Professor Tribe is to be preferred. Nor is the Tribunal in a position to decide which of their conflicting opinions is to be preferred on a related question, namely whether collateral review was available in the Federal District Court. But the Tribunal notes that Professor Days does not assert that either the Supreme Court or the Federal Court would grant the relief suggested. It is fair to say that, on his view, there was a prospect, at most a reasonable prospect or possibility, of such relief being granted.

212. The decision not to relax the bonding requirement, an act for which Respondent is responsible in international law, generated the risk of immediate execution with its attendant detrimental consequences for Loewen. In this situation, was either the certiorari petition or the collateral review option a reasonably available and adequate remedy? The pursuit of either remedy, more particularly the Supreme Court remedy, if it resulted in a failure to obtain a stay, would worsen Loewen’s position and reinforce adverse market perceptions about Loewen. So, the absence of any certainty about the outcome of either option is a significant consideration in deciding whether either option involved an adequate remedy which was reasonably available to Loewen.

213. Entry into the settlement agreement no doubt reflected a business judgment by Loewen that, of the various options then open, settlement was the most attractive, in all probability because it provided certainty. Other alternatives involved financial consequences which would not have been easy to predict.
214. Respondent argues that, because entry into the settlement agreement was a matter of business judgment, Loewen voluntarily decided not to pursue its local remedies. That submission does not dispose of the point. The question is whether the remedies in question were reasonably available and adequate. If they were not, it is not to the point that Loewen entered into the settlement, even as a matter of business judgment. It may be that the business judgment was inevitable or the natural outcome of adverse consequences generated by the impugned court decision.

215. Here we encounter the central difficulty in Loewen’s case. Loewen failed to present evidence disclosing its reasons for entering into the settlement agreement in preference to pursuing other options, in particular the Supreme Court option which it had under active consideration and preparation until the settlement agreement was reached. It is a matter on which the onus of proof rested with Loewen. It is, however, not just a matter of onus of proof. If, in all the circumstances, entry into the settlement agreement was the only course which Loewen could reasonably be expected to take, that would be enough to justify an inference or conclusion that Loewen had no reasonably available and adequate remedy.

216. Although entry into the settlement agreement may well have been a reasonable course for Loewen to take, we are simply left to speculate on the reasons which led to the decision to adopt that course rather than to pursue other options. It is not a case in which it can be said that it was the only course which Loewen could reasonably be expected to take.

217. Accordingly, our conclusion is that Loewen failed to pursue its domestic remedies, notably the Supreme Court option and that, in consequence, Loewen has not shown a violation of customary international law and a violation of NAFTA for which Respondent is responsible.

XXVIII. A PRIVATE AGREEMENT IS NOT A GOVERNMENT MEASURE WITHIN THE SCOPE OF NAFTA CHAPTER ELEVEN

218. Respondent argues that a private agreement to settle litigation out of court is not a “government measure” within the scope of NAFTA Chapter Eleven (ground 3 of Respondent’s objection to competence and jurisdiction). The argument may well be correct as a general proposition. But the Claimants’ case rests on the judgment and judicial orders made by the Mississippi trial court and the Mississippi Supreme Court. Claimants’ case is that these judicial acts are the relevant government measures within NAFTA Chapter Eleven, not that the settlement is such a measure. This ground of objection is overruled.

XXIX. THE JURISDICTIONAL OBJECTION TO MR RAYMOND LOEWEN’S CLAIMS

219. This objection is dealt with together with the Respondent’s additional objection to competence and jurisdiction.

XXX. RESPONDENT’S ADDITIONAL OBJECTION TO COMPETENCE AND JURISDICTION

220. Subsequent to the October 2001 hearings on the merits, events occurred which raised questions about TLGI’s capacity to pursue its NAFTA claims and gave rise to Respondent filing a further objection to competence and jurisdiction on January 25, 2002. TLGI had filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code, and a reorganization plan was approved by the bankruptcy courts of the United States and Canada. Under that plan, TLGI ceased to exist as a business entity. All of its business operations were reorganized as a United States corporation. In apparent recognition of the obvious problem that would be caused by a United States entity pursuing a claim against the United States under NAFTA, TLGI, immediately prior to its going out of business, assigned all of its right, title and interest to the NAFTA claim to a newly created corporation (discretely called Nafanco - a play on the words NAFTA and Canada). It would appear that the NAFTA claim is the only asset of Nafanco, and the pursuit of the claim its only business.

221. Following the filing of Respondent’s objection, appropriate pleadings were filed by both sides and on June 6, 2002, the Tribunal held a hearing on the objection. Canada and Mexico again submitted their views on the issues that were raised at the hearing.
222. NAFTA is a treaty intending to promote trade and investment between Canada, Mexico and the United States. Since most international investment occurs in the private sector, investment treaties frequently seek to provide some kind of protection for persons engaging in such investment. Until fairly recently, such protection was implemented and pursued by the States themselves. When Mexico expropriated the investment of some American oil companies many years ago, the claims of the American companies were pursued by American diplomatic authorities. When the United States seized the assets of Iranian nationals during the hostage crisis of the 1970s, Iran and the United States worked out a settlement as sovereign nations.

223. Chapter Eleven of NAFTA represents a progressive development in international law whereby the individual investor may make a claim on its own behalf and submit the claim to international arbitration, as TLGI has done in the instant case. The format of NAFTA is clearly intended to protect the investors of one Contracting Party against unfair practices occurring in one of the other Contracting Parties. It was not intended to and could not affect the rights of American investors in relation to practices of the United States that adversely affect such American investors. Claims of that nature can only be pursued under domestic law and it is inconceivable that sovereign nations would negotiate treaties to supplement or modify domestic law as it applies to their own residents. Such a collateral effect on the domestic laws of the NAFTA Parties was clearly not within their contemplation when the treaty was negotiated.

224. If NAFTA could be used to assert the rights of an American investor in the instant case, it would in effect create a collateral appeal from the decision of the Mississippi courts, by definition a unit of the United States government. As was pointed out earlier, the object of NAFTA is to protect outsiders who do not have access to the political or other avenues by which to seek relief from nefarious practices of governmental units.

225. Claimant TLGI urges that since it had the requisite nationality at the time the claim arose, and, antedate the time that the claim was submitted, it is of no consequence that the present real party in interest - the beneficiary of the claim - is an American citizen. Both as a matter of historical and current international precedent, this argument must fail. In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the dies a quo, through the date of the resolution of the claim, which date is known as the dies ad quem.

226. Claimants’ first argument strand is that NAFTA itself, in Articles 1116 and 1117, require nationality only to the date of submission. However, those articles deal only with nationality requirements at the dies a quo, the beginning date of the claim. There is no language in those articles, or anywhere else in the treaty, which deals with the question of whether nationality must continue to the time of resolution of the claim. It is that silence in the Treaty that requires the application of customary international law to resolve the question of the need for continuous national identity.

227. Nor does the recent arbitral decision in the Mondev case help Claimants in any way. In that case, the Tribunal dealt with the issue of whether the investment itself had to remain of the claimant’s identity. Significantly, the reasoning of the Tribunal implicated other sections of NAFTA, namely Articles 1105 and 1110. The investment in Mondev, some Boston real estate, had been foreclosed on by an American mortgage holder. Even though it denied Mondev’s claim on the merits, the Tribunal appropriately found that the loss of the investment through foreclosure of the mortgage could not be the basis for denying Mondev’s right to pursue its remedies under NAFTA. It pointed out that such a set of events could occur quite often to indenters and that the whole purpose of NAFTA’s protection would be frustrated if such disputes could not be pursued. It said:

“Secondly the Tribunal would again observe that Article 1105, and even more so Article 1110, will frequently have to be applied after the investment in question has failed. In most cases, the dispute submitted to arbitration will concern precisely the question of responsibility for that failure. To require the claimant to maintain a continuing status as an investor under the law of the host State at the time the arbitration is commenced would tend to frustrate the very purpose of Chapter 11, which is to provide protection to investors against wrongful conduct including uncompensated expropriation of their investment and to do so throughout the lifetime of an investment up to the moment of its “sale or other disposition” (Article 1101(2)). On that basis, the Tribunal concludes that NAFTA should be interpreted broadly to cover any legal claims arising out of the treatment of an investment as defined in Article 1139, whether or not the investment subsists as such at the time of the treatment which is complained of. Otherwise issues of the effective protection of investment at the international level will be overshadowed by technical questions of
the application of local property laws and the classification of local property interests affected by foreclosure or other action subsequent to the failure of the investment.”

228. In sum, neither the language of the Treaty, nor any of the cases decided under it answers the question as to whether continuous nationality is required until the resolution of the claim. Respondent correctly contends that Article 1131 requires the Tribunal to decide the issues in dispute in accordance with “applicable rules of international law”.

229. There is only limited dispute as to the history of the requirement of continuous nationality to the end of any international proceeding. When investment claims were negotiated and resolved only at a governmental level, any change in nationality of the claimant defeated the only reason for the negotiations to continue. The claiming government no longer had a citizen to protect. This history has changed as the nature of the claim process has changed. As claimants have been allowed to prosecute claims in their own right more often, provision has been made for amelioration of the strict requirement of continuous nationality. But those provisions have been specifically spelled out in the various treaties that TLGI cites as proof that international law has changed. Thus, in the claims settlement agreement between Iran and the United States arising out of the hostage crisis, the requirement of continuous nationality was specifically altered in the agreement. Many of the bilateral investment treaties, the so-called “BITs”, contain specific modifications of the requirement. But such specific provisions in other treaties and agreements only hinder TLGI’s contentions, since NAFTA has no such specific provision.

230. As with most hoary international rules of law, the requirement of continuous nationality was grounded in comity. It was not normally the business of one nation to be interfering into the manner in which another nation handled its internal commerce. Such interference would be justified only to protect the interests of one of its own nationals. If that tie were ended, so was the justification. As international law relaxed to allow aggrieved parties to pursue remedies directly, rather than through diplomatic channels, the need for a rigid rule of dies ad quem also was relaxed. But as was previously noted, such relaxations came about specifically in the language of the treaties. There is no such language in the NAFTA document and there are substantial reasons why the Tribunal should not stretch the existing language to affect such a change.

231. We address at this stage an aspect of the problem which might well puzzle a private lawyer. Such a lawyer would of course be familiar with the inhibitions which can stand in the way of the enforcement of liabilities when changes in corporate status, or in the proprietorship of the claims, intervene after the proceedings to enforce the claim have commenced. Insolvency or judicial administration or a moratorium may affect one of the parties so that under the relevant domestic law the liability ceases to be enforceable for a while, or is compulsorily transferred to a third party, or entirely changes its juristic character, or may become a right to share in the proceedings of a winding up. Equally, the lawyer would recognise the potential for difficulties in enforcing a liability after a voluntary transfer to a third party, when the right to pursue the complaint may be enforceable only by the transferee, or only in the name of the transferor for the benefit of the transferee; and he could well foresee that particular difficulties could arise when, under an arbitration agreement between A and B, the former begins an arbitration, and afterwards transfers the right to C, a stranger to the arbitration agreement. These are no more than examples. These procedural difficulties are of a kind which many domestic systems of law have confronted.

232. The same lawyer might well, however, have much more difficulty in visualising the outcome in the quite different situation where, through subsequent events of the kind indicated above, a vested claim, already the subject of valid proceedings, simply ceases to exist, together with the breach of obligation or delict which have brought it into being. True, it is possible to imagine that a change of identity with a consequent change of nationality by the enforcing party might deprive a tribunal of territorial jurisdiction under its domestic rules of procedure. This is not the present case. If the submissions of the United States are right, the fatal objection to success by the Claimants is that a NAFTA claim cannot exist or cannot any longer exist, once the diversity of nationality has come to an end, so that the Tribunal cannot continue with the resolution of the original dispute, there being no dispute left to resolve. The private lawyer might well exclaim that the unenjoined benefit to the defendant would produce a result so unjust that it could be sustained only by irresistible logic or compelling precedent, and neither exists. The spontaneous disappearance of a vested
cause of action must be the rarest of incidents, and no warrant has been shown for it in the present context.

233. Such a reaction, though understandable, in our opinion, would be, wholly misplaced. Rights of action under private law arise from personal obligations (albeit they may be owed by or to a State) brought into existence by domestic law and enforceable through domestic tribunals and courts. NAFTA claims have a quite different character, stemming from a corner of public international law in which, by treaty, the power of States under that law to take international measures for the correction of wrongs done to its nationals has been replaced by an ad hoc definition of certain kinds of wrong, coupled with specialist means of compensation. These means are both distinct from and exclusive of the remedies for wrongful acts under private law; see Articles 1121, 1131, 2021 and 2022. It is true that some aspects of the resolution of disputes arising in relation to private international commerce are imported into the NAFTA system via Article 1120.1(c), and that the handling of disputes within that system by professionals experienced in the handling of major international arbitrations has tended in practice to make a NAFTA arbitration look like the more familiar kind of process. But this apparent resemblance is misleading. The two forms of process, and the rights which they enforce, have nothing in common. There is no warrant for transferring rules derived from private law into a field of international law where claimants are permitted for convenience to enforce what are in origin the rights of Party states. If the effects of a change of ownership are to be ascertained we must do so, not by inapt analogies with private law rules, but from the words of Chapter Eleven, read in the context of the Treaty as a whole, and of the purpose which it sets out to achieve.

234. TLGI urges some equitable consideration be given because it was the underlying Mississippi litigation which brought about the need for it to file bankruptcy in the first place. We have already rehearsed our view of the inequities that befell TLGI in that litigation, and a chancery court would certainly take such claims into account in assessing damages. But this is an international tribunal whose jurisdiction stems from and is limited to the words of the NAFTA treaty. Whatever the reasons for TLGI’s decision to follow the bankruptcy route it chose, the consequences broke the chain of nationality that the Treaty requires.

235. Claimants also seek to rely on provisions of the Convention establishing the International Centre for Settlement of Investment Disputes (ICSID). It claims that under ICSID, there are different nationality rules that should be applied in this case. First, it must be noted that neither Canada nor Mexico are signatories of ICSID and it would be most strange to apply provisions of that Convention to a NAFTA dispute. The only relevance of ICSID to this proceeding is that the Parties have elected to function under its structure. That election cannot be used to change or supplement the substance of the Treaty that the three nations have entered into. Whatever specificity ICSID has on the requirement of continuous nationality through the resolution of the dispute only points up the absence of such provisions in NAFTA. Claimants have not shown that international law has evolved to the position where continuous nationality to the time of resolution is no longer required.

236. TLGI further contends that the International Law Commission issued a report which proposed eliminating the continuous nationality rule even in cases of diplomatic protection, a field that would seem more nationality oriented than the protection of investors. The report itself met with criticism in many quarters and from many points of view. In any event, the ILC is far from approving any recodification based on the report.

237. Article 1109 fully authorizes transfers of property by an investor. TLGI contends that such provision for free assignment somehow strengthens its position. The assignment from TLGI to Nafcanco is not being challenged, except as to what is being assigned. By the terms of the assignment, the only item being assigned was this NAFTA claim. All of the assets and business of TLGI have been reorganized under the mantle of an American corporation. All of the benefits of any award would clearly inure to the American corporation. Such a naked entity as Nafcanco, even with its catchy name, cannot qualify as a continuing national for the purposes of this proceeding. Claimants also urge that TLGI remains in existence, since its charter remains in existence. The Tribunal is being asked to look at form rather than substance to resolve a complicated claim under an international treaty. Even if TLGI has some kind of ethereal existence, it sought to place any remaining NAFTA marbles in the Nafcanco ring. Claimants insist that Respondent is asking the Tribunal to “pierce” the corporate veil
of Nafanco and point out the legal complications involved in such a piercing. The Tribunal sees no need to enter into that thicket. The question is whether there is any remaining Canadian entity capable of pursuing the NAFTA claim.

238. Claimants state that there were good and sufficient business reasons for reorganizing under an American corporate character including pressure from TLGI’s creditors. The Tribunal has no reasons to doubt the legitimacy of those reasons but the choices made clearly had consequences under the Treaty. There might have been equally compelling reasons for the Loewen interests to choose a United States mantle when it first commenced doing business. NAFTA does not recognize such business choices as a substitute for its jurisdictional requirements under its provisions and under international law.

239. Raymond Loewen argues that his claims under NAFTA survive the reorganization. Respondent originally objected to Raymond Loewen’s claims on the ground that he no longer had control over his stock at the commencement of the proceeding. The Tribunal allowed Raymond Loewen to continue in the proceeding to determine whether he in fact continued any stock holding in the company. No evidence was adduced to establish his interest and he certainly was not a party in interest at the time of the reorganization of TLGI.

240. In regard to the question of costs the Tribunal is of the view that the dispute raised difficult and novel questions of far-reaching importance for each party, and the Tribunal therefore makes no award of costs.

ORDERS

For the foregoing reasons the Tribunal unanimously decides -

(1) That it lacks jurisdiction to determine TLGI’s claims under NAFTA concerning the decisions of United States courts in consequence of TLGI’s assignment of those claims to a Canadian corporation owned and controlled by a United States corporation.

(2) That it lacks jurisdiction to determine Raymond L. Loewen’s claims under NAFTA concerning decisions of the United States courts on the ground that it was not shown that he owned or controlled directly or indirectly TLGI when the claims were submitted to arbitration or after TLGI was reorganized under Chapter 11 of the United States Bankruptcy Code.

(3) TLGI’s claims and Raymond L. Loewen’s are hereby dismissed in their entirety.

(4) That each party shall bear its own costs, and shall bear equally the expenses of the Tribunal and the Secretariat.

XXXI. CONCLUSION

241. We think it right to add one final word. A reader following our account of the injustices which were suffered by Loewen and Mr. Raymond Loewen in the Courts of Mississippi could well be troubled to find that they emerge from the present long and costly proceedings with no remedy at all. After all, we have held that judicial wrongs may in principle be brought home to the State Party under Chapter Eleven, and have criticised the Mississippi proceedings in the strongest terms. There was unfairness here towards the foreign investor. Why not use the weapons at hand to put it right? What clearer case than the present could there be for the ideals of NAFTA to be given some teeth?

242. This human reaction has been present in our minds throughout but we must be on guard against allowing it to control our decision. Far from fulfilling the purposes of NAFTA, an intervention on our part would compromise them by obscuring the crucial separation between the international obligations of the State under NAFTA, of which the fair treatment of foreign investors in the judicial sphere is but one aspect, and the much broader domestic responsibilities of every nation towards litigants of whatever origin who appear before its national courts. Subject to explicit international agreement permitting external control or review, these latter responsibilities are for each individual state to regulate according to its own chosen appreciation of the ends of justice. As we have sought to make clear, we find nothing in NAFTA to justify the exercise by this Tribunal of an appellate function parallel to that which belongs to the courts of the host nation. In the last resort, a failure by that nation to provide adequate means of remedy may amount to an international wrong but only in the last resort. The line may be hard to draw, but it is real. Too great a readiness to step from outside
into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself. The natural instinct, when someone observes a miscarriage of justice, is to step in and try to put it right, but the interests of the international investing community demand that we must observe the principles which we have been appointed to apply, and stay our hands.

Done at Washington, D.C.

(signed)

Sir Anthony Mason  
President of the Tribunal  
Date: 19.06.03

(signed)  
Judge Abner J. Mikva  
Arbitrator  
Date: June 25, 2003

(signed)  
Lord Mustill  
Arbitrator  
Date: 17.06.03