Annex 11

FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW

[Agenda item 11]

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Report of the Study Group of the International Law Commission, finalized by Mr. Martti Koskenniemi**

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ABBREVIATIONS

EURATOM	European Atomic Energy Community
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for Settlement of Investment Disputes
MERCOSUR	Southern Common Market
MOX Plant	Mixed Oxide Reprocessing Plant
OSPAR Convention	Convention for the Protection of the Marine Environment of the North-East Atlantic
RTA	Regional Trade Agreement
UNIDROIT	International Institute for the Unification of Private Law
WTO	World Trade Organization

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AJIL	*American Journal of International Law*
ECHR	European Court of Human Rights, *Reports of Judgments and Decisions*. All judgments and decisions of the Court, including those not published in the official series, can be consulted in the database of the Court (HUDOC), available from the Court's website (www.echr.coe.int).
EJIL	*European Journal of International Law*
I.C.J. Pleadings	International Court of Justice, *Pleadings, Oral Arguments, Documents*; available from the Court's website (www.icj-cij.org).
I.C.J. Reports	International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders*. All judgments, advisory opinions and orders of the Court are available from the Court's website (www.icj-cij.org).
ILM	*International Legal Materials*
ILR	*International Law Reports*
IRAN–U.S. C.T.R.	*Iran–United States Claims Tribunal Reports*
ITLOS Reports	International Tribunal for the Law of the Sea, *Reports of Judgments, Advisory Opinions and Orders*. The Tribunal's case law is available on its website (www.itlos.org).
LGDJ	*Librairie générale de droit et de jurisprudence*
P.C.I.J., Series A	Permanent Court of International Justice, *Collection of Judgments* (Nos. 1–24, up to 1930 inclusive).
P.C.I.J., Series B	Permanent Court of International Justice, *Collection of Advisory Opinions* (Nos. 1–18, up to 1930 inclusive).
P.C.I.J., Series A/B	Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions* (Nos. 40–80, from 1931).
RGDIP	*Revue générale de droit international public*
UNRIAA	United Nations, *Reports of International Arbitral Awards*

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In the present volume, "International Tribunal for the Former Yugoslavia" refers to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

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NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text.

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

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The Internet address of the International Law Commission is **http://legal.un.org/ilc/**.

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Convention relating to the guardianship of minors (The Hague, 12 June 1902)	F. Stoerk, *Nouveau recueil général de traités et autres actes relatifs aux rapports de droit international. Continuation du grand recueil de G. Fr. de Martens*, 2nd series, vol. XXXI, Leipzig, Theodor Weicher, 1904, p. 724.
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Reconstruction of Austria. Protocol No. 1 (Declaration) (Geneva, 4 October 1922)	League of Nations, *Treaty Series*, vol. XII, No. 334, p. 385.
Treaty of Peace between the British Empire, France, Italy, Japan, Greece, Romania, the Serb-Croat-Slovene State, and Turkey (Treaty of Lausanne) (Lausanne, 24 July 1923)	*Ibid*., vol. XXVIII, No. 701, p. 11.
Protocol Relating to Certain Concessions Granted in the Ottoman Empire (Protocol XII) (Lausanne, 24 July 1923)	*Ibid*., No. 707, p. 203.
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General Agreement on Tariffs and Trade (GATT) (Geneva, 30 October 1947)	United Nations, *Treaty Series*, vol. 55, No. 814, p. 187.
Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948)	*Ibid*., vol. 78, No. 1021, p. 277.
North Atlantic Treaty (Washington, D.C., 4 April 1949)	*Ibid*., vol. 34, No. 541, p. 243.
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Geneva Conventions for the protection of war victims (1949 Geneva Conventions) (Geneva, 12 August 1949)	*Ibid*., vol. 75, Nos. 970–973.
Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV)	*Ibid*., vol. 75, No. 973, p. 287.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	*Ibid*., vol. 213, No. 2889, p. 221.
European Convention relating to the Formalities Required for Patent Applications (Paris, 11 December 1953)	*Ibid*., vol. 218, No. 2952, p. 27.
Treaty establishing the European Economic Community (Rome, 25 March 1957)	*Ibid*., vol. 298, No. 4300, p. 3. See also the consolidated version of the Treaty establishing the European Community, *Official Journal of the European Communities*, No. C 340, 10 November 1997, p. 173.

	Source
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Treaty on European Union (Treaty of Maastricht) (Maastricht, 7 February 1992)	*Ibid*., vol. 1757, No. 30615, p. 3.
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European Convention on the Legal Protection of Services based on, or consisting of, Conditional Access (Strasbourg, 24 January 2001)	United Nations, *Treaty Series*, vol. 2246, No. 39989, p. 29.
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Convention on Contact concerning Children (Strasbourg, 15 May 2003)	*Ibid*., vol. 2464, No. 44266, p. 3.
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Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16 May 2005)	*Ibid*., vol. 2569, No. 45795, p. 33.
Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw, 16 May 2005)	*Ibid*., vol. 2569, No. 45796, p. 91.

Introduction

1. At its fifty-second session, in 2000, the International Law Commission decided to include the topic "Risks ensuing from fragmentation of international law" in its long-term programme of work.[1] The following year, the General Assembly requested the Commission to give further consideration to the topics in that long-term programme. At its fifty-fourth session, in 2002, the Commission decided to include the topic, renamed "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", in its programme of work and to establish a Study Group.[2] The Study Group adopted a number of recommendations on topics to be dealt with and requested its then Chairperson, Mr. Bruno Simma, to prepare a study on the function and scope of the *lex specialis* rule and the question of "self-contained regimes".[3] At its fifty-fifth session, in 2003, the Commission appointed Mr. Martti Koskenniemi as Chairperson of the Study Group. The Study Group also set a tentative schedule for its work, distributed the studies decided upon the previous year among its members and agreed on a methodology to be adopted for that work.[4]

2. In 2003 the Chairperson of the Study Group submitted an outline for a study on the function and scope of the *lex specialis* rule and the question of "self-contained regimes" to the Group. After a preliminary debate on that outline, concentrating on substantive and methodological issues, the definitive study on that item was distributed to the Commission the following year.[5] In addition to that study, in 2004 the Study Group also had before it the outlines produced by members of the Study Group on the four remaining items. It held an in-depth discussion of the Chairperson's report and gave some indications to the other members of the Commission in regard to the preparation of the various reports. In addition, it commenced discussion of the tentative "conclusions" it might draw on the basis of its debates.[6]

3. In 2005 the Commission was briefed by the Chairperson of the Study Group on the status of the Study Group's work and held an exchange of views on the topic. The Study Group considered a memorandum on regionalism, prepared by its Chairperson, and received definitive reports on the interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (art. 31, para. 3 (*c*), of the 1969 Vienna Convention) and the modification of multilateral treaties between certain of the parties only (art. 41 of the 1969 Vienna Convention), as well as the final report on hierarchy in international law: *jus cogens*, obligations *erga omnes* and Article 103 of the Charter of the United Nations as conflict rules. In addition, the Study Group also received an informal paper from one of its members on the "disconnection clause". The Study Group envisaged that it would be in a position to submit a consolidated study, as well as a set of conclusions, guidelines or principles, to the Commission at its fifty-eighth session, in 2006.[7]

4. This is the consolidated report of the Study Group. It has been prepared by its Chairperson on the basis of the outlines and reports produced in the course of four years' work by himself (on the function and scope of the *lex specialis* rule and the question of "self-contained" regimes) and by Mr. Riad Daoudi (mdification of multilateral treaties between certain of the parties only (art. 41 of the 1969 Vienna Convention)); Mr. Zdzislaw Galicki (hierarchy in international law: *jus cogens*, obligations *erga omnes* and Article 103 of the Charter of the United Nations as conflict rules); Mr. William Mansfield (interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (art. 31, para. 3 (*c*), of the 1969 Vienna Convention)); and Mr. Teodor Melescanu (application of successive treaties relating to the same subject matter). Several other Commission members took part in the deliberations of the Study Group during its sessions and their special knowledge greatly facilitated the discussion of particular topics. In addition, this report is complemented by an annex containing the proposed set of draft conclusions to be adopted by the Study Group and forwarded to the Commission in 2006 for appropriate action.

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[1] *Yearbook … 2000*, vol. II (Part Two), para. 729. See also the study by Mr. Gerhard Hafner, "Risks ensuing from fragmentation of international law", *ibid.*, annex, p. 143.

[2] *Yearbook … 2002*, vol. II (Part Two), paras. 492–494, 511.

[3] *Ibid.*, paras. 512–513. The five topics were: (*a*) The function and scope of the *lex specialis* rule and the question of "self-contained regimes"; (*b*) The interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (art. 31, para. 3 (*c*), of the 1969 Vienna Convention), in the context of general developments in international law and concerns of the international community; (*c*) The application of successive treaties relating to the same subject matter (art. 30 of the 1969 Vienna Convention); (*d*) The modification of multilateral treaties between certain of the parties only (art. 41 of the 1969 Vienna Convention); (*e*) Hierarchy in international law: *jus cogens*, obligations *erga omnes* and Article 103 of the Charter of the United Nations as conflict rules.

[4] *Yearbook … 2003*, vol. II (Part Two), paras. 413, 424–435.

[5] *Yearbook … 2004*, vol. II (Part Two), paras. 298–358.

[6] *Ibid.*

[7] *Yearbook … 2005*, vol. II (Part Two), paras. 445–493.

Chapter I

Fragmentation as a phenomenon

A. Background

5. The background to fragmentation was sketched half a century ago by Wilfred Jenks, who drew particular attention to two phenomena. On the one hand, the international world lacked a general legislative body; thus:

> law-making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some respects analogous to those of separate systems of municipal law.[8]

6. Very presciently, Jenks envisaged the need for a close analogy with conflict of laws to deal with this type of fragmentation. This would be a law regulating not conflicts between territorial legal systems, but conflicts between treaty regimes. A second reason for the phenomenon he found within the law itself:

> One of the most serious sources of conflict between law-making treaties is the imperfect development of the law governing the revision of multipartite instruments and defining the legal effect of revision.[9]

7. There is little to be added to that analysis today. Of course, the volume of multilateral—"legislative"—treaty activity has grown manifold in the past fifty years.[10] It has also been accompanied by various more or less formal regulatory regimes, not all of which share the public law orientation of multilateral diplomacy.[11] One of the features of late international modernity has been what sociologists have called "functional differentiation", the increasing specialization of parts of society and the related autonomization of those parts. This takes place nationally as well as internationally. It is a well-known paradox of globalization that, while it has led to increasing uniformization in the life of societies around the world, it has also led to the increasing fragmentation thereof—that is, to the emergence of specialized and relatively autonomous spheres of social action and structure.

8. The fragmentation of the international social world has attained legal significance, especially as it has been accompanied by the emergence of specialized and (relatively) autonomous rules or rule complexes, legal institutions and spheres of legal practice.[12] What once appeared to be governed by "general international law" has become the field of operation for such specialist systems as "trade law", "human rights law", "environmental law", the "law of the sea", "European law" and even such exotic and highly specialized knowledge as "investment law" or "international refugee law", etc., each possessing its own principles and institutions. The problem, as lawyers have seen it, is that such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law.[13]

9. While the reality and importance of fragmentation, in both its legislative and its institutional form, cannot be doubted, international lawyers have been divided in their assessment of the phenomenon. Some commentators have been highly critical of what they have seen as the erosion of general international law, the emergence of conflicting jurisprudence, forum-shopping, and loss of legal security. Others have seen here merely a technical problem that has emerged naturally with the increase of international legal activity and may be controlled by the use of technical streamlining and coordination.[14]

10. Without going into details of the sociological or political background that has led to the emergence of special

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[8] C. W. Jenks, "The conflict of law-making treaties", *British Year Book of International Law 1953*, vol. 30, p. 401, at p. 403.

[9] *Ibid.*

[10] Over 50,000 treaties are registered in the United Nations system. See C. J. Borgen, "Resolving treaty conflicts", *George Washington International Law Review*, vol. 37, No. 3 (2005), p. 573. In the twentieth century, about 6,000 multilateral treaties were concluded, of which around 30 per cent were general treaties, open for all States to participate in (C. Ku, *Global Governance and the Changing Face of International Law,* Academic Council on the United Nations System, 2001, p. 5).

[11] Of the various collections that discuss the diversification of the sources of international regulation, particularly useful are E. Loquin and C. Kessedjian (eds.), *La mondialisation du droit,* Paris, Litec, 2000, and P. S. Berman (ed.), *The Globalization of International Law*, Aldershot, Ashgate, 2005. The activity of traditional organizations is examined in J. E. Alvarez, *International Organizations as Law-makers*, Oxford, Oxford University Press, 2005. Different perspectives on non-treaty law-making today are also presented in R. Wolfrum and V. Röben (eds.), *Developments of International Law in Treaty Making*, Berlin, Springer, 2005, pp. 417–586, and R. Lipschutz and C. Fogel, "'Regulation for the rest of us?' Global civil society and the privatization of transnational regulation", in R. B. Hall and T. J. Biersteker (eds.), *The Emergence of Private Authority in Global Governance*, Cambridge, Cambridge University Press, 2002, p. 115.

[12] See, in particular, A. Fisher-Lescano and G. Teubner, "Regime-collisions: the vain search for legal unity in the fragmentation of global law", *Michigan Journal of International Law*, vol. 25, No. 4 (summer 2004), pp. 999–1046. The matter has, however, already been discussed in great detail in L. A. N. M. Barnhoorn and K. C. Wellens (eds.), *Diversity in Secondary Rules and the Unity of International Law,* The Hague, Martinus Nijhoff, 1995.

[13] It should not be forgotten that the tradition of legal pluralism seeks precisely to deal with such problems. So far, however, pluralism has concentrated on studying the coexistence of indigenous and Western law in old colonial territories and the emergence of types of private law in domestic societies. For a famous statement, see S. E. Merry, "Legal pluralism", *Law and Society Review*, vol. 22, No. 5 (1988), p. 869, and, more recently (and critically), S. Roberts, "After government? On representing law without the State", *Modern Law Review*, vol. 68, No. 1 (January 2005), p. 1.

[14] "Fragmentation" is a topic very frequently covered by academic writings and conferences today. In addition to the sources in footnote 11 above, see "Symposium issue—The proliferation of international tribunals: piecing together the puzzle", *New York University Journal of International Law and Politics*, vol. 31, No. 4 (summer 1999) p. 679; A. Zimmermann and R. Hoffmann (eds.), with assistant editor H. Goeters, *Unity and Diversity in International Law: Proceedings of an International Symposium of the Kiel Walther Schücking Institute of International Law, November 4–7, 2004,* Berlin, Duncker & Humblot, 2006; and R. Huesa Vinaixa and K. Wellens (eds.), *L'influence des sources sur l'unité et la fragmentation du droit international. Travaux du séminaire tenu à Palma, les 20-21 mai 2005*, Brussels, Bruylant, 2006. A strong plea for unity is contained in P.-M. Dupuy, "L'unité de l'ordre juridique international. Cours général de droit international public (2000)", *Recueil des cours de l'Académie de droit international de La Haye, 2002,* vol. 297. For more references, see M. Koskenniemi and P. Leino, "Fragmentation of international law? Postmodern anxieties", *Leiden Journal of International Law*, vol. 15, No. 3 (September 2002), p. 553.

or specialist rule systems and institutions, the nature of the legal problem may perhaps best be illustrated by reference to a practical example. The question of the possible environmental effects of the operation of the MOX Plant nuclear facility at Sellafield, United Kingdom, has recently been raised through three different institutional mechanisms: an arbitral tribunal set up under annex VII to the United Nations Convention on the Law of the Sea; the compulsory dispute settlement procedure under the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention); and proceedings under the Treaties establishing the European Community and the European Atomic Energy Community (EURATOM) before the European Court of Justice. Three rule complexes all appear to address the same facts: the (universal) rules of the United Nations Convention on the Law of the Sea, the (regional) rules of the OSPAR Convention and the (regional) rules of the European Community and EURATOM. Which should be determinative? Is the problem principally about the law of the sea, about (possible) pollution of the North Sea, or about relationships within the European Community? The fact of posing such questions already points to the difficulty of providing an answer. How do such rule complexes link to each other, if at all? What principles should be used in order to decide a potential conflict between them?

11. Yet the problem is even more difficult. Discussing the objection to its jurisdiction raised by the United Kingdom on account of the same matter being also pending before an OSPAR arbitral tribunal and the European Court of Justice, the arbitral tribunal set up under annex VII to the United Nations Convention on the Law of the Sea observed:

> [E]ven if the OSPAR Convention, the [Treaty establishing the European Community] and the Euratom Treaty contain rights or obligations similar to or identical with the rights or obligations set out in the [United Nations Convention on the Law of the Sea], the rights and obligations under those agreements have a separate existence from those under the Convention.[15]

12. The tribunal held that even the application of the same rules by different institutions might be different owing to "differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*".[16] The tribunal recognized that the meaning of legal rules and principles is dependent on the context in which they are applied. If the context, including the normative environment, is different, then even identical provisions may appear differently. But what does this do to the objectives of legal certainty and the equality of legal subjects?

13. The previous paragraph raises both institutional and substantive problems. The former have to do with the competence of various institutions applying international legal rules and their hierarchical relations *inter se*. The Commission decided to leave this question aside. The issue of institutional competencies is best dealt with by the institutions themselves. The Commission instead wished to focus on the substantive question—the splitting up of the law into highly specialized "boxes" that claim relative autonomy both from one other and from the general law. What are the substantive effects of such specialization? How should the relationship between such "boxes" be conceived? In terms of the above example, what is the relationship between the United Nations Convention on the Law of the Sea, an environmental treaty and a regional integration instrument?

14. The Commission has understood the subject to have both positive and negative sides, as attested by its reformulation of the title of the topic: "Fragmentation of international law: difficulties arising from the diversification and expansion of international law". On the one hand, fragmentation does create the danger of conflicting and incompatible rules, principles, rule systems and institutional practices. On the other, it reflects the rapid expansion of international legal activity into various new fields and the diversification of its objects and techniques. The title seems to suggest that, although there are "problems", they are neither altogether new nor of such nature that they could not be dealt with through techniques international lawyers have used to deal with normative conflicts that may have arisen in the past.

15. The rationale for the Commission's treatment of fragmentation is that the emergence of new and special types of law, "self-contained regimes" and geographically or functionally limited treaty systems creates problems of coherence in international law. New types of specialized law do not emerge accidentally but seek to respond to new technical and functional requirements. The emergence of "environmental law" is a response to growing concern over the state of the international environment. "Trade law" develops as an instrument to regulate international economic relations. "Human rights law" aims to protect the interests of individuals and "international criminal law" gives legal expression to the "fight against impunity". Each rule complex or "regime" comes with its own principles, its own form of expertise and its own "ethos", not necessarily identical to the ethos of neighbouring specializations. "Trade law" and "environmental law", for example, have highly specific objectives and rely on principles that may often point in different directions. In order for the new law to be efficient, it often includes new types of treaty clauses or practices that may not be compatible with old general law or the law of some other specialized branch. Very often new rules or regimes develop precisely in order to deviate from what was earlier provided by the general law. When such deviations become general and frequent, the unity of the law suffers.

16. Such deviations should not be understood as "mistakes" of legal technique. They reflect the differing pursuits and preferences that actors in a pluralistic (global) society have. In conditions of social complexity, it is pointless to insist on formal unity. A law that failed to articulate the differences experienced between factual situations or between the interests or values that appeared relevant in particular problem areas would seem altogether unacceptable, simultaneously utopian and authoritarian;[17] but if fragmentation is in this sense a "nat-

[15] *MOX Plant* (*Ireland v. the United Kingdom*), International Tribunal for the Law of the Sea, provisional measures, order of 3 December 2001, *ITLOS Reports 2001*, p. 95, at p. 106, para. 50; ILR, vol. 126, p. 273.

[16] *ITLOS Reports 2001*, p. 106, para. 51; ILR, vol. 126, pp. 273–274.

[17] The emergence of an international legal pluralism has been given an ambitious overview in B. de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*, New York, Routledge, 1995, especially pp. 114 *et seq.*

ural" development (indeed, international law was always relatively "fragmented" owing to the diversity of national legal systems that participated in it) then it is not obvious why the Commission should deal with it.

17. The starting point for this report is that it is desirable to provide a conceptual framework within which what is perhaps inevitable can be grasped, assessed and managed from the point of view of the legal professional. That framework is provided by the Vienna Convention on the Law of Treaties (1969 Vienna Convention). One aspect that does seem to unite most of the new regimes is that they claim binding force from, and are understood by their practitioners to be covered by, the law of treaties. As the organ that once prepared the 1969 Vienna Convention, the Commission is in a good position to analyse international law's alleged fragmentation from that perspective. It is useful to note what is involved here: although, sociologically speaking, present fragmentation contains many new features, and its intensity differs from analogous phenomena in the past, it is nevertheless an incidence of the diversity of the international social world—a quality that has always marked the international system, contrasting it with the (relatively) more homogenous domestic context. The fragmentation of the international legal system into technical "regimes", when examined from the point of view of the law of treaties, is not too different from its traditional fragmentation into more or less autonomous territorial regimes called "national legal systems".

18. It is therefore useful to have regard to the wealth of techniques in traditional law for dealing with tensions or conflicts between legal rules and principles. What is common to these techniques is that they seek to establish meaningful relationships between such rules and principles so as to determine how they should be used in any particular dispute or conflict. This report discusses four types of relationships that lawyers have traditionally understood to be involved in normative conflicts:

(*a*) Relationships between special and general law (chapter II);

(*b*) Relationships between prior and subsequent law (chapter III);

(*c*) Relationships between laws at different hierarchical levels (chapter IV); and

(*d*) How law relates to its "normative environment" more generally (chapter V).

19. Such relationships may be conceived in varying ways. At one end of the spectrum is the case where one law (norm, rule, principle, rule complex) simply invalidates another law. This takes place only in hierarchical relations involving *jus cogens*. Much more often, priority is "relative". The "other law" is set aside only temporarily and may often be allowed to influence the interpretation and application of the prioritized law "from the background". Then there is the case where two norms are held to act concurrently, mutually supporting each other. At the other end of the spectrum is the case where, finally, there appears to be no conflict or divergence at all. The laws are in harmony.

20. This report will discuss such relationships especially by reference to the practice of international courts and tribunals. The assumption is that international law's traditional "fragmentation" has already equipped practitioners with techniques to deal with rules and rule systems that point in different directions. This does not mean cancelling out the importance of the recent push towards the functional specialization of regulatory regimes, but it does suggest that these factual developments are of relatively minor significance to the operation of legal reasoning. In an important sense, "fragmentation" and "coherence" are not aspects of the world but lie in the eye of the beholder. What is new and unfamiliar will (by definition) challenge accustomed ways of thinking and organizing the world. Novelty presents itself as "fragmentation" of the old world. In such a case, it is the task of reasoning to make the unfamiliar familiar by integrating it into received patterns of thought or by amending those patterns so that the new phenomenon can be accommodated. Of course, there will always remain some "cognitive dissonance" between the familiar conceptual system and the new information we receive from the world. The problems of coherence raised by the *MOX Plant* case, for example, have not *already* been resolved in some juristic heaven so that the only task would be to try to find that pre-existing solution. But the fact that the potential overlap or conflict between the rules of the United Nations Convention on the Law of the Sea, the OSPAR Convention and European Community law cannot be resolved immediately does not mean that it could not be framed within familiar patterns of legal reasoning. This report is about legal reasoning. Although it does not purport to give ready-made solutions to a problem such as that of the MOX Plant, it does provide a toolbox, with the help of which lawyers dealing with that problem (or any other comparable issue) may be able to proceed to a reasoned decision.

B. What is a "conflict"?

21. This report examines techniques to deal with conflicts (or *prima facie* conflicts) in the substance of international law. This raises the question of what is a "conflict"? This question may be approached from two perspectives: the subject matter of the relevant rules and the legal subjects bound by them. Article 30 of the 1969 Vienna Convention, for example, appears to adopt the former perspective. It suggests techniques for dealing with successive treaties relating to the "same subject-matter". It is sometimes suggested that this removes the applicability of article 30 when a conflict emerges between, for example, a trade treaty and an environmental treaty, because they deal with *different* subjects.[18] But this cannot be so, inasmuch as these characterizations ("trade law", "environmental law") have no normative value *per se*. They are only informal labels that describe the instruments from the perspective of different interests or different policy objectives. Most international instruments may be described from various perspectives: a treaty dealing with trade may have significant human rights and environmental implications and *vice versa*. A treaty on, say, maritime transport of chemicals relates to at least the law of the sea, environmental law, trade law and the law of maritime transport. These characterizations have less to

[18] Borgen (see footnote 10 above), pp. 603–604.

do with the "nature" of the instrument than the interest from which it is described.

22. If conflict were to exist only between rules that deal with the "same" subject matter, then the way a treaty is applied would become crucially dependent on how it would be classified under some (presumably) pre-existing classification scheme of different subjects. But there are no such classification schemes. Everything would in fact be dependent on argumentative success in pigeon-holing legal instruments as having to do with "trade" instead of "the environment", "refugee law" instead of "human rights law", "investment law" instead of "the law of development". Think again about the example of maritime carriage of chemical substances. If there are no definite rules on such classification, and any classification relates to the interest from which the instrument is described, then it might be possible to avoid the appearance of conflict by what seems like a wholly arbitrary choice as to what interests are relevant and what are not: from the perspective of marine insurers, say, the case would be predominantly about carriage, while, from the perspective of an environmental organization, the predominant aspect of it would be environmental. The criterion of "subject matter" leads to *reductio ad absurdum*; therefore, it cannot be decisive in the determination of whether or not there is a conflict.[19] As pointed out by Vierdag in his discussion of this criterion in regard to subsequent agreements under article 30 of the 1969 Vienna Convention:

> [t]he requirement that the instruments must relate to the same subject-matter seems to raise extremely difficult problems in theory, but may turn out not to be so very difficult in practice. If an attempted simultaneous application of two rules to one set of facts or actions leads to incompatible results it can safely be assumed that the test of sameness is satisfied.[20]

23. This seems right. The criterion of "same subject matter" already seems to be fulfilled if two different rules or sets of rules are invoked with regard to the same matter, or if, in other words, as a result of interpretation, the relevant treaties seem to point in different directions in terms of their application by a party.

24. This is not the end of the matter, however. What does "pointing in different directions" mean? A strict notion would presume that a conflict exists if it is possible for a party to two treaties to comply with one rule only by thereby failing to comply with another rule. This is the basic situation of incompatibility. An obligation may be fulfilled only by thereby failing to fulfil another obligation. However, there are other, looser understandings of conflict as well.[21] One treaty may sometimes frustrate the goals of another treaty without there being any strict incompatibility between their provisions. Two treaties or sets of rules may possess different background justifications or emerge from different legislative policies or aim at divergent ends. The law of State immunity and the law of human rights, for example, illustrate two sets of rules that have very different objectives. Trade law and environmental law, too, emerge from different types of policy, and that fact may have an effect on how the relevant rules are interpreted or applied. While such "policy conflicts" do not lead to logical incompatibilities between obligations upon a single party, they may nevertheless also be relevant for fragmentation.[22]

25. This report adopts a wide notion of conflict as a situation where two rules or principles suggest different ways of dealing with a problem. Focusing on a mere logical incompatibility mischaracterizes legal reasoning as logical subsumption. In fact, any decision will involve interpretation and choice between alternative rule formulations and meanings that cannot be pressed into the model of logical reasoning.

26. Conflicts between rules are a phenomenon in every legal order. Every legal order is also familiar with ways to deal with them. Maxims such as *lex specialis* or *lex posterior* are known to most legal systems and, as will be explained in much more detail below, to international law. Domestic legal orders also have robust hierarchical relations between rules and rule systems (in addition to hierarchical institutions to decide rule conflicts). In international law, however, as will also be discussed in chapter IV below, there are far fewer and much less robust hierarchies, and there are many types of interpretative principles that purport to help out in conflict resolution. Nevertheless, it is useful to agree with Jenks:

> Assuming, as it is submitted we must, that the development of a coherent body of principles on the subject is not merely desirable but necessary, we shall be constrained to recognize that, useful and indeed essential as such principles may be to guide us to reasonable conclusions in particular cases, they have no absolute validity.[23]

C. The approach of this study: seeking relationships

27. Conflict ascertainment and conflict resolution are part of *legal reasoning*, that is, of the pragmatic process by which lawyers go about interpreting and applying formal law. In this process, legal rules rarely, if ever, appear alone, without some relationship to other rules. Typically, even single (primary) rules that lay down individual rights and obligations presuppose the existence of (secondary) rules that provide for the powers of legislative agencies to enact, modify and terminate such rules and for the competence of law-applying bodies to interpret and apply them.

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[19] This is not to say that the fact that two treaties may or may not belong to the same "regime" is irrelevant for the way their relationship is conceived. See further, in particular, chapter II, section C.1, below.

[20] E. W. Vierdag, "The time of the 'conclusion' of a multilateral treaty: article 30 of the Vienna Convention on the Law of Treaties and related provisions", *British Year Book of International Law 1988*, vol. 59, p. 75, at p. 100.

[21] The most in-depth discussion is in J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, Cambridge, Cambridge University Press, 2003, pp. 164–200 (noting the way the bodies of the World Trade Organization (WTO) have used a narrow understanding of "conflict" as incompatibility). See also the distinction made by Jenks between "conflicts" and "divergences" (Jenks (see footnote 8 above), pp. 425–427) and, for a rather strict definition of "conflict", J. B. Mus, "Conflicts between treaties in international law", *Netherlands International Law Review*, vol. 45 (1998), p. 208, at pp. 214–217; S. A. Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties,* Leiden, Martinus Nijhoff, 2003, pp. 5–7.

[22] For a discussion, see R. Wolfrum and N. Matz, *Conflicts in International Environmental Law,* Berlin, Springer, 2003, pp. 6–13, and N. Matz, *Wege zur Koordinierung völkerrechtlicher Verträge: Völkervertragsrechtliche und institutionelle Ansätze*, Berlin, Springer, 2005, pp. 8–18 (a categorization of conflict types from logical incompatibility to political conflicts and overlaps of regulatory scope).

[23] Jenks (see footnote 8 above), p. 407.

28. But even substantive primary rules usually appear in clusters, together with exceptions, provisions for technical implementation and larger interpretative principles. The commonplace distinction between "rules" and "principles" captures one set of typical relationships: those between norms of a lower and higher degree of abstraction. A "rule" may thus sometimes be seen as a specific application of a "principle" and understood as *lex specialis* or *lex posterior* in regard to it, and become applicable in its stead. In such a case, the special/general or prior/subsequent distinction does not work as a conflict resolution technique but as an interpretative guideline indicating that one rule should be interpreted in view of the other, of which it is only an instance or an elaboration.[24]

29. Alternatively, the general or earlier principle may be understood to articulate a rationale or a purpose to the specific (or later) rule. Thus, for instance, the fisheries provisions in the United Nations Convention on the Law of the Sea may be seen as background principles, of which any particular treaties concerning fishery resources could be seen as instances or elaborations.[25]

30. For example, in the *Southern Bluefin Tuna* case (2000), Japan had argued *inter alia* that the 1993 Convention for the Conservation of Southern Bluefin Tuna applied to the case both as *lex specialis* and *lex posterior*, excluding the application of the 1982 United Nations Convention on the Law of the Sea.[26] The arbitration tribunal, however, held that both the 1982 and the 1993 instruments were applicable. The tribunal recognized that

> it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. There is no reason why a given act of a State may not violate its obligations under more than one treaty. There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder. The current range of international legal obligations benefits from a process of accretion and cumulation; in the practice of States, the conclusion of an implementing convention does not necessarily vacate the obligations imposed by the framework convention upon the parties to the implementing convention. The broad provisions for the promotion of universal respect for and observance of human rights, and the international obligation to co-operate for the achievement of those purposes, found in Articles 1, 55 and 56 of the Charter of the United Nations, have not been discharged for States Parties by their ratification of the Human Rights Covenants and other human rights treaties … Nor is it clear that the particular provisions of the 1993 Convention exhaust the extent of the relevant obligations of [the United Nations Convention on the Law of the Sea]. In some respects, [the United Nations Convention on the Law of the Sea] may be viewed as extending beyond the reach of the [Convention for the Conservation of Southern Bluefin Tuna].[27]

31. This is quite an appropriate description of a number of situations that may arise between a general multilateral treaty and specific bilateral or regional treaties. In such cases, the characterization of the latter as *lex specialis* or *lex posterior* may not always lead to the setting aside of the general treaty. Instead, that earlier and general instrument remains "in the background", controlling the way the later and more specific rules are being interpreted and applied.[28] Whether this relationship is then conceived in terms of an (informal) hierarchy or a division of labour seems beside the point. However, none of this takes away the difficulty of appreciating what it means for the later or more specific instrument to involve a "development" or "application" of a more general instrument and when it is intended to be an exception or a limitation thereto. Any technical rule that purports to "develop" the freedom of the high seas is also a limitation of that freedom to the extent that it lays down specific conditions and institutional modalities that must be met in its exercise.

32. The Commission has traditionally been aware of the difficulty of making a clear distinction between "progressive development" and "codification". An analogous difficulty affects any attempt to distinguish clearly between "application" of a general rule and "limitation" of or "deviation" from it. All this is dependent on how one interprets the general law to which the specific or later instrument seeks to add something. Care should therefore be taken not to infer that a special law need automatically be interpreted "widely" or "narrowly". How it is interpreted depends on how the relationship between the general and the special law is conceived ("application" or "exception"?). This, again, requires seeing the relationship as part of some "system".

33. It is often said that law is a "system". By this, no more need be meant than that the various decisions, rules and principles of which the law consists do not appear randomly related to each other.[29] Although there may be disagreement among lawyers about just how the systemic relationship between the various decisions, rules and principles should be conceived, there is seldom disagreement that it is one of the tasks of legal reasoning to establish it.

34. This cannot be understood as reaffirming something that already "exists" before the systemic effort itself. There is no single legislative will behind international law. Treaties and custom come about as a result of conflicting motives and objectives—they are "bargains" and "package deals" and often result from spontaneous reactions to events in the environment. But if legal reasoning is understood as a *purposive* activity, then it follows that it should be seen not merely as the mechanical application of apparently random rules, decisions or behavioural patterns, but as the operation of a whole that is directed toward some

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[24] See N. MacCormick, *Legal Reasoning and Legal Theory,* Oxford, Clarendon Press, 1978, p. 156 and generally pp. 152–194. There are many understandings of the nature of the difference between "rules" and "principles". For these, see M. Koskenniemi, "General principles: reflexions on constructivist thinking in international law", in M. Koskenniemi (ed.), *Sources of International Law,* Aldershot, Ashgate, 2000, p. 359. For a recent discussion of the operation of the rule/principle dichotomy in international law (self-determination), see K. Knop, *Diversity and Self-Determination in International Law*, Cambridge, Cambridge University Press, 2002, p. 20.

[25] This also seems to be affirmed in article 87 of the United Nations Convention on the Law of the Sea.

[26] *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan*, decision of 4 August 2000 (jurisdiction and admissibility), UNRIAA, vol. XXIII (Sales No. E/F.04.V.15), p. 1, at p. 23, para. 38 (*c*).

[27] *Ibid.*, pp. 40–41, para. 52.

[28] For example, article 4 of 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 provides that the Agreement "shall be interpreted and applied in the context of and in a manner consistent with the Convention".

[29] The view that holds international law a "primitive" structure bases itself on the claim that the rules of international law do not form a "system" but merely an aggregate of (primary) rules that States have contracted. See H. L. A. Hart, *The Concept of Law*, Oxford, Oxford University Press, 1961, pp. 208–231.

human objective. Again, lawyers may disagree about what the objective of a rule or a behaviour is, but it does not follow that no such objective at all can be envisaged. Much legal interpretation is geared towards linking an unclear rule to a purpose and thus, by showing its position within some system, to providing a justification for applying it in one way rather than another. Thus, while the conclusion of a general treaty may sometimes be intended to set aside previously existing scattered provisions in some area—for example, the 1982 United Nations Convention on the Law of the Sea explicitly set aside the Geneva Conventions on the Law of the Sea of 1958[30]—sometimes no such intention can be inferred. The adoption in 1966 of the two universal human rights covenants (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) did not imply any setting aside or overriding of the (more specific) provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) of 1950.[31] Whether the later regulation intends to preserve or push aside previous legislation cannot, again, be decided *in abstracto*. This can only be decided through interpretation.

35. Legal interpretation, and therefore legal reasoning, builds systemic relationships between rules and principles by envisaging them as part of some human effort or purpose. Far from being merely an "academic" aspect of the legal craft, systemic thinking penetrates all legal reasoning, including the practice of applying the law by judges and administrators.[32] This results precisely from the "clustered" form in which legal rules and principles appear. But it may also be rationalized in terms of a *political obligation* on those who apply the law to make their decisions coherent with the preferences and expectations of the community whose law they administer.[33]

36. It is a preliminary step to any act of applying the law that a *prima facie* view of the matter is formed. This includes, among other things, an initial assessment of what might be the applicable rules and principles. The result will often be that a number of standards may seem *prima facie* relevant. A choice is needed, along with a justification for having recourse to one instead of another. Moving from the *prima facie* view to a conclusion, legal reasoning will either have to seek to harmonize apparently conflicting standards through interpretation or, if that seems implausible, to establish definite relationships of priority among them. Here, interpretative maxims and conflict resolution techniques such as *lex specialis*, *lex posterior* or *lex superior* become useful. They enable a systemic relationship to be seen between two or more rules and may thus justify a particular choice of applicable standard and a particular conclusion. They do not do this mechanically, however, but rather as "guidelines",[34] suggesting a pertinent relationship among the relevant rules in view of the need for the conclusion to be consistent with the perceived purposes or functions of the legal system as a whole.[35] The fact that this takes place in an indeterminate setting takes nothing away from its importance. Through it, the legal profession articulates law and gives it shape and direction. Instead of a random collection of directives, the law begins to assume the shape of a purposive (legal) system.

D. Harmonization: systemic integration

37. In international law, there is a strong presumption against normative conflict. Treaty interpretation is diplomacy, and it is the business of diplomacy to avoid or mitigate conflict. This extends to adjudication as well. As Rousseau describes the duties of a judge, in one of the earlier but still more useful discussions of treaty conflict:

> *lorsqu'il est en présence de deux accords de volontés divergents, il doit être tout naturellement porté à rechercher leur coordination plutôt qu'à consacrer leur antagonisme.*[36]

38. This has emerged into a widely accepted principle of interpretation and it may be formulated in many ways. It may appear as the rule of thumb that, when creating new obligations, States are assumed not to derogate from their existing obligations. Jennings and Watts, for example, note the presence of a

> presumption that the parties intend something not inconsistent with generally recognised principles of international law, or with previous treaty obligations towards third States.[37]

39. As the International Court of Justice stated in the *Right of passage over Indian territory* case:

> [i]t is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it.[38]

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[30] See article 311 of the United Nations Convention on the Law of the Sea.

[31] See article 44 of the International Covenant on Civil and Political Rights and comment in K. Zemanek, "The legal foundations of the international system: general course on public international law", *Recueil des cours de l'Académie de droit international de La Haye, 1997*, vol. 266, pp. 227–228. See also Sadat-Akhavi (footnote 21 above), pp. 120–124.

[32] For "systematization"—that is, the establishment of systemic relationships between legal rules—as a key aspect of legal reasoning, see, for example, A. Aarnio, *Denkweisen der Rechtswissenschaft,* Vienna, Springer, 1979, pp. 50–77 and, generally, J. Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System*, 2nd ed., Oxford, Clarendon Press, 1980. For a treatment of international law through a sociologically oriented ("Luhmannian") systems theory, see A. Fischer-Lescano, "Die Emergenz der Globalverfassung", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht,* vol. 63 (2003), p. 717.

[33] This view is famously articulated in R. Dworkin, *Taking Rights Seriously,* Cambridge (Massachusetts), Harvard University Press, 1977.

[34] As suggested by the comments of the United States of America on the Waldock draft of what became articles 30 and 31 of the 1969 Vienna Convention. See sixth report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur, *Yearbook ... 1966*, vol. II, document A/CN.4/186 and Add.1–7, p. 94.

[35] For the techniques of "second-order justification" that enable the resolution of hard cases (*i.e.* cases where no "automatic" decisions are possible) and that look either to the consequences of a decision or to the systemic coherence and consistency of the decision with the legal system (seen as a purposive system), see MacCormick (footnote 24 above), pp. 100–128.

[36] "[W]hen faced with two treaties that differ in intent, [the judge] must quite naturally be inclined to seek to reconcile them rather than entrench their divergences": C. Rousseau, "De la compatibilité des normes juridiques contradictoires dans l'ordre international", RGDIP, vol. 39 (1932), p. 133, at p. 153.

[37] R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th ed., Harlow, Longman, 1992, p. 1275. For the wide acceptance of the presumption against conflict—that is, the suggestion of harmony—see also Pauwelyn, *Conflict of Norms…* (footnote 21 above), pp. 240–244.

[38] *Case concerning right of passage over Indian territory*, Preliminary Objections, Judgment of 26 November 1957, *I.C.J. Reports 1957*, p.125, at p. 142.

40. There are other reasons, too, why one might wish to avoid formal statements confirming incompatibility. As noted above, this may often be a matter of political assessment. In the controversial *Austro-German Customs Union* case[39] from 1931, for example, the Permanent Court of International Justice observed that the projected union with Germany violated the obligation Austria had undertaken in the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) and the Treaty of Peace between the Allied and Associated Powers and Austria (Treaty of Saint-Germain) not to alienate its independence. As Judge Anzilotti pointed out, the Court was here invited to decide a wholly political question. What legal standards were there to instruct on whether a customs union between Austria and Germany, with all the history of their relationship and its linkage to European problems, would encroach on Austria's independence? In this regard, a treaty with Germany was of a completely different nature than a treaty with, say, Czechoslovakia.[40] The potential "fragmentation" at issue in the *Austro-German* case highlights the linkage of the legal problem of compatibility with the preferences of the actors and the need for some subtlety in coping with them. A straightforward statement of incompatibility might sometimes be strictly inadvisable.

41. There is relatively little—in fact, until recently, astonishingly little—judicial or arbitral practice on normative conflicts. As Borgen suggests, this must result in part from the wish of States parties to negotiate issues of apparent conflict between themselves and not to give the power to outsiders to decide on what may appear as coordination difficulties that may have their roots in the heterogeneous interests represented in national administrations. And negotiation is rarely about the "application" of conflict rules rather than trying to find a pragmatic solution that could re-establish the disturbed harmony. Although it might be interesting to discuss the way States have resolved such problems by negotiation, the fact that any results attained have come about through contextual bargaining makes it difficult to use them as the basis for some customary rule or other.[41]

42. However, although harmonization often provides an acceptable outcome for normative conflict, there is a definite limit to harmonization: "[it] may resolve apparent conflicts; it cannot resolve genuine conflicts".[42] This does not mean that there are normative conflicts whose intrinsic nature renders them unsuitable for harmonization. Between the parties, anything may be harmonized as long as the will to harmonize it is present. Sometimes, however, that will may not be present, perhaps because the positions of the parties are so far apart from each other—something that may ensue from the importance of the clash of interests or preferences that is expressed in the normative conflict, or from the sense that the harmonizing solution would sacrifice the interests of the party in a weaker negotiating position. In this respect, there is a limit to how far a "coordinating" solution may be applied to resolve normative conflicts. Especially where a treaty lays out clearly formulated rights or obligations of legal subjects, care must be taken not to see these merely as negotiating chips in the process of reaching a coordinating solution.

43. When normative conflicts come to be settled by third parties, the pull of harmonization remains strong, though perhaps not as compelling as between the parties themselves. Because ascertaining the presence of a conflict already requires interpretation, it may often be possible to deal with potential conflicts by simply ignoring them, especially if none of the parties has raised the question. But when a party raises a point about conflict and about the precedence of one obligation over another, then a stand must be taken. Of course, in such a case, it is still possible to reach the conclusion that, although the two norms seem to point in diverging directions, it is still possible, after some adjustment, to apply or understand them in such way that no overlap or conflict will remain. This may sometimes call for the application of the kinds of conflict resolution rules which the bulk of this report will deal with. But it may also take place through an attempt to reach a resolution that integrates the conflicting obligations in some optimal way into the general context of international law. Inasmuch as the question of conflict arises with regard to the fulfilment of the *objectives* (instead of the obligations) of the different instruments, little may be done by the relevant body. In any case, a third-party settlement body is always limited in its jurisdiction.

E. Jurisdiction versus applicable law

44. In debates about fragmentation and normative conflict, the suggestion is sometimes made that, whatever the relationships between legal rules and principles as conceived under *general international law*, those relationships cannot be applied as such by treaty bodies or dispute settlement organs whose jurisdiction is limited to or by their constituting instruments. A human rights body, for example, should have no business applying an agreement covered by the World Trade Organization (WTO). This suggestion, which in essence is merely an argument about the self-contained nature of some regimes, will be discussed in detail in chapter II, section C, below. Thus, only a few remarks here will suffice.

45. The jurisdiction of most international tribunals is limited to particular types of dispute or to disputes arising under particular treaties. A limited jurisdiction does not, however, imply a limitation of the scope of the law applicable in the interpretation and application of those treaties. In the WTO context, in particular, a distinction has been made between two notions: jurisdiction and applicable law.[43] While the WTO Understanding on Rules and Pro-

[39] *Customs Régime between Germany and Austria (Protocol of March 19th, 1931)*, Advisory Opinion of 5 September 1931, *P.C.I.J. Series A/B*, No. 41, p. 36.

[40] As pointed out in Rousseau, "De la compatibilité des normes juridiques contradictoires…" (see footnote 36 above), pp. 187–188.

[41] Borgen (see footnote 10 above), pp. 605–606 (but see also his discussion of diplomatic practice, pp. 606–610).

[42] *Ibid.*, p. 640 (quoting Pauwelyn, *Conflict of Norms…* (see footnote 21 above), p. 272).

[43] L. Bartels, "Applicable law in WTO dispute settlement proceedings", *Journal of World Trade*, vol. 35, No. 3 (2001), p. 499, at pp. 501–502; D. Palmeter and P. C. Mavroidis, "The WTO legal system: sources of law", AJIL, vol. 92, No. 3 (July 1998), p. 398, at pp. 398–399; J. Pauwelyn, "The role of public international law in the WTO: how far can we go?", *ibid*., vol. 95, No. 3 (July 2001), p. 535, at pp. 554–566; G. Marceau, "WTO dispute settlement and human

cedures Governing the Settlement of Disputes limits jurisdiction only to claims that arise under agreements covered by WTO, there is no explicit provision identifying the scope of applicable law.[44] By contrast, for example, Article 38 of the Statute of the International Court of Justice, by listing the sources that the Court should have recourse to in deciding cases, does identify the law to be applied by the Court.[45] Similarly, the United Nations Convention on the Law of the Sea provides that the International Tribunal on the Law of the Sea has "jurisdiction over any dispute concerning the interpretation or application of this Convention" and that, when deciding cases, it "shall apply this Convention and other rules of international law not incompatible with this Convention".[46] As no such explicit provision exists in the Understanding on Rules and Procedures Governing the Settlement of Disputes, the question of the scope of applicable law has seemed problematic. However, WTO is certainly not the only context in which a treaty body has been set up without any express mention that it should apply international law. As will be argued at length, especially in chapters II and V below, treaties covered by WTO are creations of, and constantly interact with, other norms of international law.[47] As the WTO Appellate Body stated in its very first case, "the General Agreement [on Tariffs and Trade of 1994] is not to be read in clinical isolation from public international law".[48] What this means in practice is by no means straightforward, but it states what has never been seriously doubted by any international tribunal or treaty-body: that, even as the jurisdiction of a body is limited (as it always—even in the case of the International Court of Justice—is), its exercise of that jurisdiction is controlled by the normative environment.

rights", EJIL, vol. 13, No. 4 (2002), p. 753, at pp. 757–779; A. Lindroos and M. Mehling, "Dispelling the chimera of 'self-contained regimes' international law and the WTO", EJIL, vol. 16, No. 5 (2005), p. 857, at pp. 860–866.

[44] Articles 1, para. 1; 3, para. 2; 7; 11 and 19, para. 2, of the Understanding on Rules and Procedures Governing the Settlement of Disputes have been used to argue both in favour of and against a more extensive scope of applicable law in WTO dispute settlement. See, for example, Bartels, "Applicable law…" (footnote 43 above), pp. 502–509, and Lindroos and Mehling, "Dispelling the chimera of 'self-contained regimes'…" (footnote 43 above), pp. 873–875; see also WTO Panel report, *Korea—Measures Affecting Government Procurement*, WT/DS163/R, adopted 19 June 2000, para. 7.101, footnote 755.

[45] See, for example, Bartels, "Applicable law…" (footnote 43 above), pp. 501–502, and Palmeter and Mavroidis (footnote 43 above), pp. 398–399.

[46] Articles 288, para. 1, and 293, para. 1, of the United Nations Convention on the Law of the Sea.

[47] For instance, Palmeter and Mavroidis (see footnote 43 above), pp. 398–399; J. P. Trachtman, "The domain of WTO dispute resolution", *Harvard International Law Journal*, vol. 40, No. 2 (spring 1999), p. 333; Bartels, "Applicable law…" (footnote 43 above), pp. 501–502; Pauwelyn, "The role of public international law in the WTO…" (footnote 43 above), pp. 554–566; Pauwelyn, *Conflict of Norms…* (footnote 21 above); Marceau, "WTO dispute settlement and human rights" (footnote 43 above), pp. 757–779; Lindroos and Mehling, "Dispelling the chimera of 'self-contained regimes'…" (footnote 43 above), pp. 860–866.

[48] *United States—Standards for Reformulated and Conventional Gasoline*, WTO Appellate Body report, WT/DS2/AB/R, adopted 20 May 1996, p. 17. Similarly, for example, in *Korea—Measures Affecting Government Procurement* (see footnote 44 above), the Panel stated in paragraph 7.96 that "[c]ustomary international law applies generally to the economic relations between the WTO [m]embers. Such international law applies to the extent that the WTO treaty agreements do not 'contract out' from it."

Chapter II

Conflicts between special law and general law

46. This chapter deals with the case where a normative conflict is characterized by a relationship of "speciality" *versus* "generality" between the conflicting norms. The chapter is in five parts. Section A provides a framework for the discussion of conflicts where the speciality or generality of conflicting norms becomes an issue. Section B outlines the role and nature of the *lex specialis* rule as a pragmatic mechanism for dealing with situations where two rules of international law that are both valid and applicable deal with the same subject matter differently.[49] Section C gives an overview of the case law and academic discussion on "self-contained regimes". Section D is a brief discussion of regionalism in international law. Section E presents conclusions on conflicts between special law and general law.

A. Introduction

47. One of the most well-known techniques for analysing normative conflicts focuses on the generality *versus* the particularity of the conflicting norms. In this regard, it is possible to distinguish three types of conflict:

(*a*) Conflicts between general law and a particular, unorthodox interpretation of general law;

(*b*) Conflicts between general law and a particular rule that claims to exist as an exception to it; and

(*c*) Conflicts between two types of special law.

48. Fragmentation appears differently in each of these three types of conflict. While the first type is really about the effects of differing legal interpretations in a complex institutional environment, and therefore falls strictly speaking outside the scope of the Commission's study, the latter two denote genuine types of conflict where the law itself (in contrast to some putative interpretation of it) appears differently depending on which normative framework is used to examine it.[50] Each of the three types of conflict is illustrated briefly below.

1. Fragmentation through conflicting interpretations of general law

49. In the *Tadić* case in 1999, the Appeals Chamber of the International Tribunal for the Former Yugoslavia

[49] To say that a rule is "valid" is to point to its being a part of the ("valid") legal order. To say it is applicable means that it provides rights, obligations or powers to a legal subject in a particular situation.

[50] See discussion of the dependence of normative conflict of different conceptual frameworks in Koskenniemi and Leino, "Fragmentation of international law? …" (footnote 14 above), pp. 553–579.

considered the responsibility of Serbia and Montenegro for the acts of the Bosnian Serb militia in the conflict in the former Yugoslavia. For this purpose it examined the jurisprudence of the International Court of Justice in the *Military and Paramilitary Activities in and against Nicaragua* case of 1986. In the latter case, the United States was not held responsible for the acts of the Nicaraguan *contras* despite organizing, financing, training and equipping them. Such involvement failed to meet the test of "effective control".[51] The International Tribunal for the Former Yugoslavia, for its part, concluded that "effective control" set too high a threshold for holding an outside power legally accountable for domestic unrest. It was sufficient for the power to have "a role in organising, coordinating or planning the military actions of the military group"—*i.e.* to exercise "overall control" over them—for the conflict to be an "international armed conflict".[52]

50. The contrast between *Military and Paramilitary Activities in and against Nicaragua* and *Tadić* is an example of a normative conflict between an earlier and a later interpretation of a rule of general international law.[53] *Tadić* does not suggest that "overall control" exists alongside "effective control", either as an exception to the general law or as a special (local) regime governing the conflict in the former Yugoslavia. It seeks to *replace* that standard altogether.

51. The point is not to take a stand in favour of either *Tadić* or *Military and Paramilitary Activities in and against Nicaragua*, only to illustrate the type of normative conflict where two institutions faced with analogous facts interpret the law in differing ways. This is a common occurrence in any legal system, but its consequences for the international legal system, which lacks a proper institutional hierarchy, might seem particularly problematic. Imagine, for example, a case where two institutions interpret the general (and largely uncodified) law concerning title to territory differently. For one institution, State A has validly acquired title to a piece of territory that another institution regards as part of State B. In the absence of a superior institution that could decide such a conflict, States A and B could not undertake official acts with regard to the territory in question with confidence that those acts would be given legal effect by outside powers or institutions. Similar problems would emerge in regard to any conflicting interpretations concerning a general law granting legal status.

52. Differing views about the content of general law create two types of problem. First, they diminish legal security. Legal subjects are no longer able to predict the reaction of official institutions to their behaviour and to plan their activity accordingly. Second, they place legal subjects in an unequal position *vis-à-vis* each other. The rights they enjoy depend on which jurisdiction is seized to enforce them. Most domestic laws deal with these problems by means of appeals. An authority (usually a court) at a higher hierarchical level will provide a formally authoritative ruling.[54] Such authority is not normally present in international law. To the extent that such conflicts emerge and are considered a problem (which need not always be the case), they can only be dealt with by legislative or administrative means. Either States adopt a *new law* that settles the conflict, or the institutions will seek to coordinate their jurisprudence in the future.

2. Fragmentation through the emergence of special law as an exception to general law

53. A different case is one where an institution makes a decision that deviates from how situations of a similar type have been decided in the past because the new case is held not to come under the general rule, but to form an *exception* to it. This may be illustrated by how human rights organs have dealt with reservations. In the *Belilos v. Switzerland* case (1988), the European Court of Human Rights viewed a declaration made by Switzerland in its instrument of ratification as in fact a reservation, struck it down as incompatible with the object and purpose of the European Convention on Human Rights, and held Switzerland bound by the Convention "irrespective of the validity of the declaration".[55] In subsequent cases, the European Court has pointed out that the normal rules on reservations to treaties do not as such apply to human rights law. In the Court's view:

> a fundamental difference in the role and purpose of the respective tribunals [*i.e.* of the International Court of Justice and the European Court of Human Rights], coupled with the existence of a practice of unconditional acceptance … , provides a compelling basis for distinguishing Convention practice from that of the International Court.[56]

54. Again, the point is neither to endorse nor to criticize the European Court of Human Rights but to point to a phenomenon which, whatever one may think about it, has to do with the emergence of exceptions or patterns of exception in regard to some subject matter that deviate from the general law and that are justified because of the special properties of that subject matter.

3. Fragmentation as differentiation between types of special law

55. Finally, a third case is a conflict between different types of special law. This may be illustrated by reference to debates on trade and the environment. In the 1998 *EC—Hormones* case, the WTO Appellate Body considered the

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[51] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 14, at pp. 64–65, para. 115.

[52] *Prosecutor v. Duško Tadić*, Appeals Chamber, International Tribunal for the Former Yugoslavia, case No. IT-94-1-A, judgment of 15 July 1999, *Judicial Reports 1999*, p. 3, at pp. 47–62, paras. 115, 116–145; ILM, vol. 38, No. 6 (November 1999), pp. 1540–1546.

[53] This need not be the only—nor indeed the correct—interpretation of the contrast between the two cases. As some commentators have suggested, the cases can also be distinguished from each other on the basis of their facts. In this case, there would be no normative conflict. Whichever view seems better founded, the point of principle remains: it cannot be excluded that two tribunals faced with similar facts may interpret the applicable law differently.

[54] From a theoretical perspective, the position of courts is absolutely central in managing the functional differentiation—*i.e.* fragmentation—within the law. Coherence here is based on the duty to decide even "hard cases". See, in this regard, especially N. Luhmann, *Law as a Social System,* (trans. K. A. Zeigert, ed. F. Kastner and others), Oxford, Oxford University Press, 2004, in particular pp. 284–296.

[55] *Belilos v. Switzerland*, judgment of 29 April 1988, European Court of Human Rights, Series A, No. 132, p. 28, para. 60.

[56] *Loizidou v. Turkey*, preliminary objections, judgment of 23 March 1995, European Court of Human Rights, Series A, No. 310, p. 29, para. 85.

status of the so-called "precautionary principle" under treaties covered by WTO, especially the Agreement on the Application of Sanitary and Phytosanitary Measures. It concluded that, whatever the status of that principle in "international environmental law", it had not become binding for the WTO.[57] This approach suggests that "environmental law" and "trade law" might be governed by different principles. Which rule to apply would then depend on how a case would be qualified in this regard. This might seem problematic, as denominations such as "trade law" or "environmental law" have no clear boundaries. For example, maritime transport of oil has links to both trade and the environment, as well as to rules on the law of the sea. Should the obligations of a ship owner in regard to the technical particularities of a ship, for instance, be determined by reference to what is reasonable from the perspective of oil transport considered as a commercial activity or as an environmentally dangerous activity? The responses are bound to vary depending on which is chosen as the relevant frame of legal interpretation.

B. The function and scope of the *lex specialis* □ □x□

1. *Lex specialis* in international law

(a) *Legal doctrine*

56. The principle that special law derogates from general law is a widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts.[58] It suggests that, if a matter is regulated by a general standard as well as by a more specific rule, then the latter should take precedence over the former. The relationship between the general standard and the specific rule may, however, be conceived in two ways. One is the case where the specific rule should be read and understood within the confines or against the background of the general standard, typically as an elaboration, updating or technical specification thereof.[59] The specific and the general both point, as it were, in the same direction.

57. Sometimes *lex specialis* is, however, understood more narrowly to cover the case where two legal provisions, both of which are valid and applicable, are in no express hierarchical relationship and provide incompatible direction on how to deal with the same set of facts. In such a case, *lex specialis* appears as a conflict resolution technique. It suggests that, instead of the (general) rule, one should apply the (specific) exception.[60] In both cases, however, priority falls on the provision that is "special", *i.e.* the rule with a more precisely delimited scope of application.[61]

58. Nonetheless, the maxim does not admit of automatic application. In particular, two sets of difficulties may be highlighted. First, it is often hard to distinguish what is "general" and what is "particular", and, by focusing on the substantive coverage of a provision or the number of legal subjects to whom it is directed, one may arrive at different conclusions. An example would be provided by the relationship between a territorially limited general regime and a universal treaty on some specific subject.[62] Second, the principle also has an unclear relationship to other maxims of interpretation or conflict resolution techniques, such as the principle *lex posterior derogat legi priori* (later law overrides prior law), and may be offset by normative hierarchies or informal views about "relevance" or "importance".[63]

59. The idea that special enjoys priority over general has a long pedigree in international jurisprudence as well. Its rationale was already being clearly expressed by Grotius:

> *What rules ought to be observed in such cases* [*i.e.* where parts of a document are in conflict]. … Among agreements which are equal … that should be given preference which is most specific and approaches most nearly to the subject in hand; for special provisions are ordinarily more effective than those that are general.[64]

60. This passage refers to two reasons why the *lex specialis* rule is so widely accepted. A special rule is more to the point ("approaches most nearly to the subject in hand") than a general one and it regulates the matter more effectively ("are ordinarily more effective") than general rules. This could also be expressed by saying that special rules are better able to take account of particular circumstances. The need to comply with them is felt more acutely than is the case with general rules.[65] They have greater clarity and definiteness and are thus often felt to be

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[57] *EC Measures Concerning Meat and Meat Products (Hormones)*, WTO Appellate Body report, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, paras. 123–125.

[58] The principle *lex specialis derogat legi generali* has a long history; the principle was included in the *Corpus Iuris Civilis*. See Papinian, Dig. 48, 19, 41 and Dig. 50, 17, 80. The latter states: "*In toto iure generi per speciem derogatur et illud potissimum habetur, quod ad speciem derectum est"* ("In the whole of law, species takes precedence over genus, and anything that relates to species is regarded as most the important") (*The Digest of Justinian*, vol. IV, Philadelphia, University of Pennsylvania Press, 1985, Latin text ed. T. Mommsen and P. Krueger, trans. ed. A. Watson). Some of its alternative formulations are "*generalibus specialia derogant*", "*generi per speciem derogatur*" and "*specialia generalibus, non generalia specialibus*". This report does not deal with another close variant, namely the *ejusdem generis* rule, *i.e.* the rule of interpretation according to which special words control the meaning of general ones. For a discussion, see A. D. McNair, *The Law of Treaties,* Oxford, Clarendon Press, 1961, pp. 393–399.

[59] This understanding appears, for example, in Mus (see footnote 21 above), at p. 218. Fitzmaurice, too, thinks there is *lex specialis* when "a matter governed by a specific provision … is thereby taken out of the scope of a general provision" (G. Fitzmaurice, "The law and procedure of the International Court of Justice 1951–4: treaty interpretation and other treaty points", *British Year Book of International Law 1957*, vol. 33, p. 203, at p. 236).

[60] A. Peczenik, *Juridikens metodproblem,* Stockholm, Gebers, 1980, p. 106.

[61] That is, when the description of the scope of application in one provision contains at least one quality that is not singled out in the other. K. Larenz, *Methodenlehre der Rechtswissenschaft,* Berlin, Springer, 1975, pp. 251–252.

[62] Such conflicts, Jenks suggests, can only be decided on their merits. See Jenks (footnote 8 above), p. 447.

[63] For different possibilities, see H. T. Klami, "Legal heuristics: a theoretical skeleton", *Oikeustiede–Jurisprudentia* XV (1982), pp. 46–53. See also Sadat-Akhavi (footnote 21 above), pp. 189–191. For examples of cases where a more general treaty overrides a more specific one because of its "relevance" or "overriding character", see *ibid.,* pp. 114–125 and 125–131 and *passim*. Ian Sinclair speaks of a mixture of techniques and maxims in *The Vienna Convention on the Law of Treaties*, 2nd ed., Manchester, Manchester University Press, 1984, pp. 95–98.

[64] H. Grotius, *De Jure Belli ac Pacis: Libri Tres*, J. Brown Scott (ed.), *The Classics of International Law*, Oxford, Clarendon Press, 1925, book II, chap. XVI, sect. XXIX, p. 428.

[65] For the reasoning behind the need to prefer "special" over "general", see also Dupuy, "L'unité de l'ordre juridique international…" (footnote 14 above), pp. 428–429.

"harder" or "more binding" than general rules, which may stay in the background and be applied only rarely. Moreover, *lex specialis* may also seem useful as it may provide better access to what the parties may have willed.[66]

61. It is therefore no wonder that the literature generally accepts *lex specialis* as a valid maxim of interpretation or conflict resolution technique in public international law, too, though it is seldom given lengthy treatment. The classical writers (Pufendorf, de Vattel) accepted it among other techniques as a matter of course.[67] Anzilotti gave it a rather absolute formulation: "*in toto iure genus per speciem derogatur; la norme de droit particulier l'emporte sur la norme générale*". As was consistent with his voluntarism, a treaty between two States would prevail over a multilateral treaty just as the latter would have priority over customary law.[68] For him, as, for example, for Charles Rousseau, the power of the *lex specialis* maxim lay in the way in which it seemed to realize party will.[69] For Georges Scelle, by contrast, a special rule would only rarely be allowed to override what he called "*l'économie d'ensemble*" of the general law. It followed from his sociological anti-voluntarism that general regulation, expressive of an objective sociological interest, would always prevent contracting out by individual States.[70]

62. It seems clear, however, that both approaches are too absolute—either too respectful of the wills of individual States or not respectful enough of the need to deviate from abstract maxims. Later lawyers have stressed the relativity of the *lex specialis* principle, the need to balance it with *lex posterior,* and the hierarchical status that the more general provision may enjoy.[71]

63. The Commission has outlined its application at some length in the commentary to article 55 of the draft articles on responsibility of States for internationally wrongful acts:

Article 55. Lex specialis

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

64. This provision establishes normative priority for any special rules in its field of application. Or, as the Commission explains in the commentary, it means "that the present articles operate in a residual way".[72] The provision clearly expresses the wish of the Commission to allow States to develop, apply and derogate from the general rules of State responsibility by agreement between themselves. Yet, of course, such power cannot be unlimited: rules that derogate must have at least the same rank as those they derogate from. It is hard to see how States could, for example, derogate from those aspects of the general law on State responsibility that define the conditions of operation of "serious breaches of obligations under peremptory norms of general international law".[73]

65. In doctrine, *lex specialis* is usually discussed as one factor among others in treaty interpretation (arts. 31–33 of the 1969 Vienna Convention) or in dealing with the question of successive treaties (art. 30 of the 1969 Vienna Convention, especially in relation to the principle of *lex posterior*).[74] Although the principle did not find its way into the text of the Convention, it was still observed during the drafting process that, among techniques for resolving conflicts between treaties, it was useful to pay attention to the extent to which a treaty might be "special" in relation to another treaty.[75]

66. But there is no reason to limit the operation of *lex specialis* to relationships between treaties. Jennings and Watts, for instance, indicate that the principle "has sometimes been applied in order to resolve apparent conflicts between two differing and potentially applicable

[66] See also Pauwelyn, *Conflict of Norms…* (footnote 21 above), p. 388. For the voluntarist understanding of *lex specialis*, rebuttable in view of other evidence, see N. Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law,* Oxford, Clarendon Press, 1994, p. 142 and references.

[67] S. Pufendorf, *Le droit de la nature et des gens, ou Système général des principes les plus importants de la morale, de la jurisprudence, et de la politique* (trans. J. Barbeyrac), Basel, Thourneisen, 1732, book V, chap. XII, pp. 138–140; E. de Vattel, *Le droit des gens, ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains* (London, 1758), Washington, D.C., Carnegie Institution, 1916, vol. I, book II, chap. XVII, para. 316.

[68] D. Anzilotti, *Cours de droit international*, vol. I (trans. G. Gidel), Paris, Sirey, 1929, p. 103.

[69] Rousseau, "De la compatibilité des normes juridiques contradictoires…" (see footnote 36 above), p. 177.

[70] G. Scelle, *Manuel de droit international public*, Paris, Domat-Montchrestien, 1948, p. 642.

[71] See, for example, A. Cavaglieri, "Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international de La Haye, 1929-I,* vol. 26, p. 334; G. E. do Nascimento e Silva, "Le facteur temps et les traités", *Recueil des cours de l'Académie de droit international de La Haye, 1977-I*, vol. 154, p. 246.

[72] Para. (2) of the commentary to article 55 of the draft articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 140.

[73] Commentaries to arts. 40–41 and 48, *ibid.*, pp. 112–116, 126–128.

[74] In addition to sources already cited, see, for example, Rousseau, "De la compatibilité des normes juridiques contradictoires…" (footnote 36 above), pp. 133–192, especially pp. 177–178, 188–189; Jenks (footnote 8 above), pp. 401–453, especially pp. 446–447; M. Zuleeg, "Vertragskonkurrenz im Völkerrecht. Teil I: Verträge zwischen souveränen Staaten", *German Yearbook of International Law*, vol. 20 (1977), pp. 247, especially pp. 256–259; W. Czapliński and G. Danilenko, "Conflicts of norms in international law", *Netherlands Yearbook of International Law*, vol. XXI (1990), p. 3, at pp. 20–21; Kontou (footnote 66 above), pp. 141–144; M. Fitzmaurice and O. Elias, *Contemporary Issues in the Law of Treaties*, Utrecht, Eleven International Publishing, 2005, especially pp. 314–348. See also M. S. McDougal, H. D. Lasswell and J. C. Miller, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure,* New Haven/Dordrecht, New Haven Press/Martinus Nijhoff, 1994, pp. 199–206; Sinclair (footnote 63 above), p. 98; A. Aust, *Modern Treaty Law and Practice*, Cambridge, Cambridge University Press, 2000, p. 201. See also P. Daillier and A. Pellet, *Droit international public*, 7th ed., Paris, LGDJ, 2002, p. 271 (discussing *lex specialis* in the context of art. 30, para. 3, of the 1969 Vienna Convention). Very few commentators expressly reject the principle. See, however, U. Linderfalk, *Om tolkningen av traktater,* Lund, Lunds Universitet, 2001, pp. 353–354 (viewing it as covered by some techniques but overridden by others).

[75] Statement by the Expert Consultant (Waldock), *Official Records of the United Nations Conference on the Law of Treaties, second session, Vienna, 9 April–22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11/Add.1, United Nations publication, Sales No. E.68.V.7), 91st meeting of the Committee of the Whole, 16 April 1969, p. 253. See also P. Reuter, *Introduction au droit des traités*, 2nd rev. ed., Paris, Presses Universitaires de France, 1985, p. 112.

rules" and specifically point out that its scope of application is not limited to treaty law. Like many others, they stress its indicative role as a "discretionary aid" that is "expressive of common sense and of normal grammatical usage".[76] As such, it is often held to regulate the relationship between treaty (as *lex specialis*) and custom (as "general law").[77]

67. Uncertainties about the nature of legal interpretation are equally applicable to the role of *lex specialis*. As O'Connell has put it: "Writers have divided into those who believe it is possible to formulate definite rules for interpretation and those who believe that this is a delusion."[78] This is probably why a number of manuals do not mention the principle at all. If one thinks that legal interpretation is rather an "art than a science", then, of course, there seems little point in tying it down to technical rules or maxims.[79] Nevertheless, dismissing the principle may follow from an excessive expectation of the normative power of interpretative guidelines. The merits that lead interpreters to prefer special law to general law, outlined by Grotius above, provide a reason to include it among the pragmatic considerations that lawyers should take account. With good reason, Schwarzenberger sees this whole branch of the law—namely interpretation—as an aspect of what he calls *jus aequum, i.e.* the rule that "enjoins the parties to interpret and apply each treaty in a spirit of reasonableness and good faith".[80] As an interpretative guideline, *lex specialis* does articulate important concerns: the need to ensure the practical relevance and effectiveness of the standard, as well as to preserve what is often a useful guide to party intentions. These concerns need, of course, to be balanced against countervailing ones: the hierarchical position of the relevant standard and other evidence of State intent. But, however the "balance" is conceived, all of this takes place within an argumentative practice that seeks to justify its outcomes less in terms of technical application than as contributions to a purposive system of law.

(b) *Case law*

68. International case law also appears to accept the *lex specialis* maxim, although again normally without great elaboration. Four different situations may be distinguished. The maxim may operate: (*a*) within a single instrument; (*b*) between two different instruments; (*c*) between a treaty and a non-treaty standard; and (*d*) between two non-treaty standards.

69. The *Beagle Channel arbitration* had to do with the relationship between articles II and III of a Boundary Treaty of 1881, both of which dealt with the drawing of borders. According to the arbitral tribunal, article II did not specify in detail the delimitation of *Tierra del Fuego* or of certain disputed islands. Instead, this was left to article III. While the two articles dealt with the same territories, they did not duplicate each other or create anomalies or redundancy:[81]

> all conflicts or anomalies can be disposed of by applying the rule *generalia specialibus non derogant*, on which basis Article II (*generalia*) would give way to Article III (*specialia*), the latter prevailing; …[82]

70. This is the standard case where *lex specialis* appears within one and the same instrument, regulating the relationship between two of its provisions.[83] The rationale for its use may be derived either from the principle of "normal meaning" in article 31, paragraph 1, of the 1969 Vienna Convention or from the need to respect the intention of the parties.

71. The European Court of Human Rights has frequently applied *lex specialis* in articulating the nature of the relationship between provisions of the European Convention on Human Rights. The Court has, for instance, considered the relationship between article 13, which provides a right of "effective remedy before a national authority", and article 5, paragraph 4, which stipulates that anyone deprived of liberty shall "be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful". It has seemed to follow that:

> Since the requirements of Article 13 … are less strict than those of Article 5 para. 4 …, [the latter] must be regarded as the *lex specialis* in respect of complaints under Article 5…[84]

72. Likewise, the European Court of Human Rights has considered article 6 of the Convention, providing the right to a fair trial, as *lex specialis* in relation to the provision

[76] Jennings and Watts (eds.), *Oppenheim's International Law* (footnote 37 above), pp. 1270, 1280.

[77] See, for example, M. E. Villiger, *Customary International Law and Treaties: A Study of their Interactions and Interrelations with Special Consideration of the 1969 Vienna Convention on the Law of Treaties*, Dordrecht, Martinus Nijhoff, 1985, p. 161.

[78] D. P. O'Connell, *International Law*, 2nd ed., vol. I, London, Stevens and Sons, 1970, p. 253.

[79] See M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (reissue with a new epilogue), Cambridge, Cambridge University Press, 2005, pp. 338–339.

[80] G. Schwarzenberger, *International Law*, vol. I, 3rd ed., *International Law as Applied by International Courts and Tribunals: I*, London, Stevens and Sons, 1957, pp. 474, 477 *et seq.* See also Pauwelyn, *Conflict of Norms…* (footnote 21 above), p. 388.

[81] *Dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, UNRIAA, vol. XXI (Sales No. E/F.95.V.2), p. 53, at pp. 99–100, paras. 36, 38; ILR, vol. 52, p. 93, at p. 143. For the Boundary Treaty between the Argentine Republic and the Republic of Chile, signed at Buenos Aires on 23 July 1881, see United Nations, *Treaty Series*, vol. 2384, No. 1295, p. 205.

[82] *Dispute between Argentina and Chile concerning the Beagle Channel*, UNRIAA, vol. XXI (Sales No. E/F.95.V.2), p. 100, para. 39; ILR, vol. 52, p. 144.

[83] See also the discussion by the European Court of Justice of the relationship between article 5, paragraph 1, and article 13 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1968. As the former provision related to "contractual matters in general" and the latter "specifically cover[ed] various types of contracts concluded by consumers", the latter constituted *lex specialis* in regard to the former, and it was sufficient to apply that provision, if it was applicable. In that case it became "unnecessary to examine whether [the claim] is covered by Article 5 (1)" (European Court of Justice, case No. C-96/00, *Rudolf Gabriel*, judgment of 11 July 2002, *European Court Reports 2002*, p. 6367, at pp. 6398–6399, paras. 35–36, and p. 6404, para. 59).

[84] *Brannigan and McBride v. the United Kingdom*, 26 May 1993, European Court of Human Rights, Series A, No. 258-B, p. 57, para. 76. See also *De Jong, Baljet and Van den Brink v. the Netherlands*, 22 May 1984, European Court of Human Rights, Series A, No. 77, p. 27, para. 60; *Murray v. the United Kingdom*, 28 October 1994, European Court of Human Rights, Series A, No. 300-A, p. 37, para. 98; and *Nikolova v. Bulgaria* [GC], No. 31611/96, ECHR 1999-II, p. 225, para. 69.

for "effective remedy" in article 13.[85] It has also held that article 11, granting freedom of assembly and association, may take precedence as *lex specialis* over the freedom of expression provided for in article 10.[86]

73. These articles are not necessarily always in strict conflict, and it might be possible to apply them concurrently. In fact, article 5, paragraph 4, may also be seen as an *application* of article 13 in a particular case. This is also true when two provisions are closely connected, as is the case of freedom of expression and freedom of assembly. Sometimes freedom of assembly may appear as *lex specialis* in relation to freedom of expression. But the relationship may also be reversed. There is no reason why article 10, providing freedom of expression, may not be seen as *lex specialis* in relation to article 11, granting freedom of peaceful assembly.

74. A second case is where *lex specialis* regulates the relationship between *different* instruments. In the *Mavrommatis Palestine Concessions* case, the Permanent Court of International Justice was faced with two instruments that had a bearing on its jurisdiction: the 1922 Mandate for Palestine and Protocol XII to the Treaty of Lausanne of 1923. The Court concluded that "in cases of doubt, the Protocol, being a special and more recent agreement, should prevail".[87] That view seemed to endorse both the *lex posterior* and the *lex specialis* maxims without entering into the question of their relationship.

75. This matter has been treated in a general way within WTO, where panels and the Appellate Body have occasionally resorted to *lex specialis* in the interpretation of the treaties it covers.[88] In the *Turkey—Restrictions on Imports of Textile and Clothing Products case,* the Panel emphasized that the Marrakesh Agreement establishing the World Trade Organization is a "Single Undertaking" and that the obligations of members are cumulative. Thus, a special provision may only prevail over another provision if it is impossible to apply the two provisions simultaneously.[89] In *Indonesia—Certain Measures Affecting the Automobile Industry,* the Panel similarly explained that there is a presumption against conflicts and that, for a conflict to exist, it must be between the same parties and deal with the same subject matter and the provisions must be mutually exclusive.[90] In WTO, *lex specialis* appears to have a limited role as a subsidiary means of resolving conflicts.[91]

76. When *lex specialis* is applied in a particular institutional context (within a "regime", in the language of chapter III below), then of course it is affected by the relevant (though not necessarily formal) institutional hierarchy. In 2000, the Court of First Instance of the European Union was called upon to determine the relationship between a regulation from 1981 that treated information obtained in customs investigations as confidential and a European Commission decision of 1994 that provided public access to Commission documents. The Court observed that the regulation,

> as far as it is to be applied as a *lex specialis*, cannot be interpreted in a sense contrary to [the decision], whose fundamental objective is to give citizens the opportunity to monitor more effectively the lawfulness of the exercise of public powers…[92]

77. The normative hierarchy between the earlier Council regulation and the later Commission decision, incorporating a Code of Conduct concerning public access to Commission and Council documents, may not have been quite clear. Nonetheless, in this case, the Court interpreted a prior *lex specialis,* which, if anything, was at least not of inferior status to the subsequent Commission decision, so as to be in conformity with the latter.[93] It is not difficult to understand why, in 1999, considerations of transparency might override a regulation from 1981. But this relationship was the "automatic" result neither of a formal hierarchy nor of *lex specialis* as a conflict resolution rule.

78. A third case is where *lex specialis* is resorted to in order to privilege a treaty standard over a non-treaty standard. In *INA Corporation v. The Government of the*

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[85] *Yankov v. Bulgaria*, No. 39084/97, ECHR 2003-XII (extracts), para. 150. See also *Brualla Gómez de la Torre v. Spain*, 19 December 1997, European Court of Human Rights, *Reports of Judgments and Decisions* 1997-VIII, p. 2957, para. 41; *Vasilescu v. Romania*, 22 May 1998, European Court of Human Rights, *Reports of Judgments and Decisions* 1998-III, p. 1076, para. 43. Cf. *Kudła v. Poland* [GC], No. 30210/96, ECHR 2000-XI, pp. 234–236, paras. 146–148.

[86] *Ezelin v. France*, 26 April 1991, European Court of Human Rights, Series A, No. 202, p. 20, para. 35, and *Djavit An v. Turkey*, No. 20652/92, ECHR 2003-III, p. 251, para. 39.

[87] *Mavrommatis Palestine Concessions*, Judgment, 30 August 1924, *P.C.I.J., Series A*, No. 2, p. 31.

[88] These interpretations have taken place both between provisions in single instruments and between provisions in two different "covered treaties". There appear to have been no cases of reference to *lex specialis* between a WTO treaty and a non-WTO treaty. See *Brazil—Export Financing Programme for Aircraft*, WTO Panel report, WT/DS46/R, adopted 20 August 1999, para. 7.40, as modified by Appellate Body report WT/DS46/AB/R; *Turkey—Restrictions on Imports of Textile and Clothing Products*, WTO Panel report, WTO/DS34/R, adopted 19 November 1999, para. 9.92, as modified by Appellate Body report WT/DS34/AB/R; and *Indonesia—Certain Measures Affecting the Automobile Industry*, WTO Panel report, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and Corr.4, paras. 14.28–14.34.

[89] *Turkey—Restrictions on Imports of Textile and Clothing Products* (see footnote 88 above), para. 9.92.

[90] *Indonesia—Certain Measures Affecting the Automobile Industry* (see footnote 88 above), para. 14.28.

[91] *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WTO Panel report, WT/DS90/R, adopted 22 September 1999, para. 4.20, upheld by Appellate Body report WT/DS90/AB/R.

[92] *JT's Corporation Ltd. v. Commission of the European Communities*, Court of First Instance, judgment of 12 October 2000, European Court of Justice, case T-123/99, *European Court Reports 2000*, p. 3269, at p. 3292, para. 50.

[93] A similar type of argument was employed in a recent case that dealt with the relationship between two directives, one dealing with waste (Council Directive 75/442/EEC of 15 July 1975, *Official Journal of the European Communities*, L 194, vol. 18, 25 July 1975, p. 39) and the other, much more recent, with packaging and packaging waste (European Parliament and Council Directive 94/62/EC of 20 December 1994, *ibid.*, L 365, vol. 37, 31 December 1994, p. 10). The provisions of the latter were identified by the European Court of Justice as *lex specialis vis-à-vis* the former "so that its provisions prevail over" those of that earlier directive "in situations which it specifically seeks to regulate". No full setting aside was involved, however: "Nevertheless", the judgment reads, "Directive 75/442 remains very important for the interpretation and application of Directive 94/62" (European Court of Justice, case C-444/00, *The Queen, on the application of Mayer Parry Recycling Ltd., v. Environment Agency and Secretary of State for the Environment, Transport and the Regions, and Corus (UK) Ltd. and Allied Steel and Wire Ltd. (ASW)*, judgment of 19 June 2003, *European Court Reports 2003*, p. 6163, at pp. 6228–6229, paras. 53 and 57).

Islamic Republic of Iran, the corporation sought compensation for the expropriation of its 20-per-cent share in an Iranian insurance company. The claimant argued that, on the basis of international law and the Iran–United States Treaty of Amity of 1955, compensation should be "prompt, adequate and effective". The respondent held that compensation was to be calculated on the basis of the net book value of the nationalized shares. The Tribunal considered that in cases of large-scale lawful nationalizations general international law no longer provided for full compensation. It did not, however, attempt to establish the exact content of the customary norm, as it considered that, for the purposes of the case,

> we are in the presence of a *lex specialis,* in the form of the Treaty of Amity, which in principle prevails over general rules.[94]

79. That treaty rules enjoy priority over custom is merely incidental to the fact that most general international law is *jus dispositivum,* so that parties are entitled to derogate from it by establishing specific rights or obligations to govern their behaviour. As the International Court of Justice has pointed out, "it is well understood that, in practice, rules of [general] international law can, by agreement, be derogated from in particular cases, or as between particular parties".[95] This approach, together with the practical priority of treaty over custom, was also affirmed by the Court in *Military and Paramilitary Activities in and against Nicaragua*:

> 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 a such a claim.[96]

80. In the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, the Court suggested that States might be able to opt out from the development of general law by this means. It had been authorized by the Special Agreement to take into account the "new accepted trends" at the Third United Nations Conference on the Law of the Sea. In this regard, the Court noted that

> [i]t would no doubt have been possible for the Parties to have identified in the Special Agreement certain specific developments in the law of the sea … , and to have declared that in their bilateral relations in the particular case such rules should be binding as *lex specialis*.[97]

81. In these cases, the Court accepted that general international law may be subject to derogation by agreement and that such agreement may be rationalized as *lex specialis*. These cases illustrate the practice of international tribunals to give precedence to treaty law in matters where there is customary law as well—a practice that highlights the dispositive nature of custom and the tribunals' deference to agreements as the "hardest" and presumably most legitimate basis on which their decisions can be based. Thirlway summarizes the jurisprudence as follows:

> It is universally accepted that—consideration of *jus cogens* apart—a treaty as *lex specialis* is law between the parties to it in derogation of the general customary law which would otherwise have governed their relations.[98]

82. None of this means that the general customary law would thereby become extinguished. It will continue to apply in the background and become fully applicable when, for instance, the treaty is no longer in force or, as in the *Military and Paramilitary Activities in and against Nicaragua* case, if the jurisdiction of the relevant law-applying organ fails to cover the treaty.[99]

83. An atypical use of *lex specialis* may be found in a case from 1981, in which the Iran–United States Claims Tribunal concluded that "it is a well recognised and universal principle of interpretation that a special provision overrides a general provision". The Tribunal here invoked *lex specialis* so as to argue that "the terms of the Claims Settlement Declaration are so detailed and so clear that they must necessarily prevail over the purported intentions of the parties, whatever they could have been".[100] As such, the principle seems to have coalesced with the rule in favour of the "ordinary" meaning under article 31, paragraph 1, of the 1969 Vienna Convention.

84. A fourth case is where the same reasoning—though not necessarily the expression *lex specialis*—is applied to two non-treaty standards. This was so in the *Right of Passage over Indian Territory* case. After having determined that the practice accepted by the States concerned (India and Great Britain/Portugal) established a right of transit over Indian territory, the International Court of Justice no longer felt it necessary to investigate what the content of general law on transit passage may have been, for it was evident to the Court that in any case "[s]uch a particular practice must prevail over any general rules".[101] Though express practice is not abundant, it is hard to see why *lex specialis*—or at least the reasoning behind it—would not be applicable to the relationship between general and special custom. What is interesting in *Right of Passage over Indian Territory* is the Court's use of what Thirlway calls the "perfectly recognized and respectable judicial technique" of setting aside any examination of the content of the general law, once the special custom had been

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[94] *INA Corporation v. The Government of the Islamic Republic of Iran*, Iran–United States Claims Tribunal, case No. 161, 12 August 1985, 8 IRAN–U.S. C.T.R., p. 373, at pp. 376, 378. For the Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, signed at Tehran on 15 August 1955, see United Nations, *Treaty Series*, vol. 284, No. 4132, p. 93.

[95] *North Sea Continental Shelf*, Judgment, *I.C.J. Reports 1969*, p. 3, at p. 42, para. 72. See also, however, pp. 38–40, paras. 61–65, and, in particular, para. 63 ("general or customary law rules and obligations … , by their very nature, must have equal force for all members of the international community").

[96] *Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgment of 27 June 1986 (see footnote 51 above), p. 137, para. 274.

[97] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 38, para. 24. For the Special Agreement for the submission to the International Court of Justice of the question of the continental shelf between Tunisia and the Libyan Arab Jamahiriya, signed at Tunis on 10 June 1977, see United Nations, *Treaty Series*, vol. 1120, No. 17408, p. 103.

[98] H. Thirlway, "The law and procedure of the International Court of Justice 1960–1989 (Part One)", *British Year Book of International Law 1989*, vol. 60, p. 147. Similarly, for example, A. Verdross and B. Simma, *Universelles Völkerrecht: Theorie und Praxis*, 3rd ed., Berlin, Duncker and Humblot, 1984, pp. 414–415.

[99] *Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgment of 27 June 1986 (see footnote 51 above), p. 96, para. 179.

[100] Iran–United States Claims Tribunal, case No. A/2, 13 January 1982, 1 IRAN–U.S. C.T.R., p. 101, at p. 104.

[101] *Case concerning Right of Passage over Indian Territory*, Merits, Judgment of 12 April 1960, *I.C.J. Reports 1960*, p. 6, at p. 44.

found, in a way that leaves open the questions of whether the special rule was an elaboration of or an exception to that general law or whether there was any general law in the matter in the first place.[102]

(c) *An informal hierarchy: the point of* lex specialis

85. There is no formal hierarchy among the sources of international law. A number of writers have—correctly, it is submitted—nonetheless suggested that there is a kind of informal hierarchy among them. Inasmuch as "general law" does not have the status of *jus cogens*, treaties generally enjoy priority over custom and particular treaties over general treaties.[103] In the same vein, it may be assumed (as is indeed suggested by the *Right of Passage over Indian Territory* case) that local customs (if proven) have primacy over general customary law and, perhaps, that the body of customary law has primacy over the general principles of law under Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice.[104] This informal hierarchy follows not from any legislative enactment, but emerges rather as a "forensic"[105] or "natural"[106] aspect of legal reasoning. Any court or lawyer will first look at treaties, then custom, and then the general principles of law for an answer to a normative problem. "Empirically," Serge Sur writes, "the Court has given precedence to rules that have the highest degree of specialty, and the clearest and most objective manifestation."[107] The secondary source is not extinguished thereby but plays a "residual part" in directing the interpretation of the special law and becoming applicable in its stead where the special law cannot, for one reason or another, be applied.[108]

86. Such informal hierarchy is an aspect of the pragmatics of legal reasoning that differentiates between "easy" and "hard" cases. As the special law's speciality reflects its relevance to the context and its status as evidence of party will, its application often seems self-evident. In an "easy" case, the speciality of the standard or instrument does not even emerge as an object of argument. The need to look "behind" or "around" the *prima facie* standard or instrument arises only in "hard" cases, when its application is contested and another standard or instrument is invoked in its stead. Only then does the *lex specialis* maxim become expressly relevant, but even then it does so only in relation to countervailing constructions about how the context should be understood (*e.g.* is the case one of "integral" or "interdependent" obligation?) or deviating evidence of party intention (*e.g. lex posterior*) or hierarchy (*e.g. jus cogens*).

87. When a "hard" case does emerge, it is the role of *lex specialis* to point to a set of considerations with practical relevance: the immediate accessibility and contextual sensitivity of the standard. Now, these may not be decisive considerations. They may be outweighed by countervailing ones. Reasoning about such considerations, though impossible to condense in determining rules or techniques, should not, however, be understood as arbitrary.[109] The reasoning may be the object of criticism, and whether it prevails will depend on how it succeeds in condensing what may be called, for instance, the "genuine shared expectations of the parties, within the limits established by overriding community objectives",[110] as reflected and tested against the various sources mentioned in Article 38, paragraph 1, of the Statute of the International Court of Justice, legal precedent and doctrine. In such debates, all parties assume that the justifiability of what they say depends on how it links to such larger views about the purposes of the international legal system.

2. The two types of *lex specialis* reference

88. There are two ways in which law may take account of the relationship of a particular rule to a general one. A particular rule may be considered an *application* of a general standard in a given circumstance. The special relates to the general as administrative regulation does to law in the domestic legal order.[111] Alternatively, it may be considered as a *modification*, an *overruling* or a *setting aside* of the latter.[112] The first case is sometimes not seen as a situation of normative conflict at all, but is taken to involve the *simultaneous* application of the special and the general standard.[113] Thus, only the latter is thought to involve the application of a genuine *lex specialis*. This

[102] H. Thirlway, "The law and procedure of the International Court of Justice 1960–1989 (Part Two)", *British Year Book of International Law 1990*, vol. 61, p. 1, at pp. 104–106.

[103] Verdross and Simma, *Universelles Völkerrecht…* (see footnote 98 above), pp. 413–414; Thirlway, "The law and procedure of the International Court of Justice 1960–1989 (Part One)" (see footnote 98 above), pp. 143–144.

[104] In French doctrine, this result is sometimes achieved by distinguishing between *acte* and *norme*, or a formal source and the (substantive) rule encompassed by it, so that, while there may be no hierarchy between the former, there must be rules for resolving overlaps and conflicts between the latter. See, for example, Daillier and Pellet, *Droit international public* (footnote 74 above), pp. 114–116; G Abi-Saab, "Cours général de droit international public", *Recueil des cours de l'Académie de droit international de La Haye, 1987-VII*, vol. 207, p. 188.

[105] Jennings and Watts, *Oppenheim's International Law* (see footnote 37 above), p. 26, footnote 2.

[106] Villiger (see footnote 77 above), p. 161. Likewise, H. Lauterpacht, *International Law: Collected Papers of Sir Hersch Lauterpacht*, vol. I, *The General Works*, E. Lauterpacht (ed.), Cambridge, Cambridge University Press, 1970, pp. 86–88.

[107] S. Sur, *L'interprétation en droit international public*, Paris, LGDJ, 1974, p. 164. Czapliński and Danilenko speak of "priority of application": Czapliński & Danilenko (see footnote 74 above), p. 8.

[108] See, for example, the discussion by Rousseau of the *Polish Postal Service in Danzig* case (*Advisory Opinion,* 16 May 1925, *P.C.I.J., Series B*, No. 11), in which the Treaty of Versailles was to be complemented by bilateral talks between Danzig and Poland, as well as the discussion of *Jurisdiction of the European Commission of the Danube between Galatz and Braila* (*Advisory Opinion*, 8 December 1927, *P.C.I.J., Series B*, No. 14), p. 177: Rousseau, "De la compatibilité des normes juridiques contradictoires…" (footnote 36 above), pp. 177–178.

[109] *Pace* strict positivists such as Kelsen. See H. Kelsen, *Introduction to the Problems of Legal Theory* (trad. B. L. Paulson and S. L. Paulson, introduction by S. L. Paulson), Oxford, Clarendon Press, 1992 [1934], pp. 81–84.

[110] McDougal, Lasswell & Miller (see footnote 74 above), pp. 82–83.

[111] This is how Scelle describes the functioning of *lex specialis* in international law: Scelle (see footnote 70 above), p. 642.

[112] Jenks distinguishes between "conflict" and "divergence": Jenks (see footnote 8 above), pp. 425–427. Likewise, Pauwelyn, *Conflict of Norms…* (see footnote 21 above), p. 6.

[113] This appears to be the way Pauwelyn treats the matter. While he accepts that it may not be easy to appreciate whether a case belongs to one or the other of the two categories, he holds to the analytical distinction and deals with the *lex specialis* only "as a rule to resolve conflict in the applicable law" (Pauwelyn, *Conflict of Norms…* (see footnote 21 above), p. 386).

seems to be the position within the WTO Dispute Settlement Body. While there appears to be a strong emphasis on interpreting WTO obligations so that there would be no conflict between them, the *lex specialis* principle is assumed to apply if "harmonious interpretation" turns out to be impossible, that is, a general standard is overridden by a conflicting special one.[114]

89. Something like this may have been the assumption within the Commission during the drafting of article 55 of the draft articles on responsibility of States for internationally wrongful acts. In its commentary, the Commission explained that:

> For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other.[115]

90. The Commission supported its view by reference to the *Neumeister* case from the European Court of Human Rights. In that case, the Court had observed that the provision on compensation in the event of unlawful arrest set out in article 5, paragraph 5, of the European Convention on Human Rights was not *lex specialis* in relation to the general rule on compensation in article 50. The former did not set aside the latter. Instead, the two provisions worked concurrently. The latter was to be "taken into account" when applying the former.[116] More recently, however, the Court has frequently characterized similar cases as *lex specialis*. Thus, the cases referred to in paragraph 71 above—juxtaposing the "effective remedy" rule of article 13 of the Convention with the right to have one's detention speedily dealt with by a court under article 5, paragraph 4—have been dealt with by reference to *lex specialis*:

> According to the Court's established case-law Article 5 § 4 of the Convention constitutes a *lex specialis* in relation to the more general requirements of Article 13. In the present case the facts underlying the applicant's complaint under Article 13 of the Convention are the same as those examined under Article 5 § 4. Accordingly, the Court need not examine the allegation of a violation of Article 13 in view of its finding of a violation of Article 5 § 4.[117]

91. In these as well as in many other cases, the European Court of Human Rights has thought the *lex specialis* applicable even in the absence of direct conflict between two provisions and where it might be said that both apply concurrently.[118] This is the proper approach. There are two reasons why it is useful to consider the case of "application" in connection with the case where *lex specialis* sets up an exception or involves a "setting-aside". First, it follows from the definition of *lex specialis* adopted above that this case is also included: the norm of application is more specific because it contains the general rule itself as one element in the definition of its scope of application. Second, and more important, though the distinction is analytically sound, it is in practice seldom clear-cut. It may often be difficult to say whether a rule "applies" a standard, "modifies" it or "derogates from" it. An "application" or "modification" also involves a degree of "derogation" and "setting aside". To decide which expression is appropriate requires an interpretation of both rules, and such interpretation, as follows from articles 31 and 32 of the 1969 Vienna Convention, may also reach beyond a scrutiny of the expressions used in those rules. This ambivalence was evident in the *Gabčíkovo-Nagymaros Project* case. Here the International Court of Justice referred to *lex specialis* in the following way:

> It is of cardinal importance that the Court has found that the 1977 Treaty is still in force and consequently governs the relationship between the Parties. That relationship is also determined by the rules of other relevant conventions to which the two States are party, by the rules of general international law and, in this particular case, by the rules of State responsibility; but it is governed, above all, by the applicable rules of the 1977 Treaty as a *lex specialis*.[119]

92. In this case, the Court left open what the relationship between the *lex specialis*—the 1977 Treaty—and the rest of the law might have been. Whether or not that general law might have provided for a similar or a different directive was immaterial. It sufficed to apply the treaty. In the language adopted here: the informally superior position of the 1977 Treaty led to its *setting aside* every other treaty and the general law without there ever having been a determination of any "conflict". In this as well as in innumerable other cases there is no need (indeed, no possibility) to decide whether the *lex specialis* is used as an "interpretative maxim" or a "conflict resolution technique", whether it merely "applies" some more general standard or derogates from it.[120] Indeed, even to ask this question may be beside the point. In accordance with the informal hierarchy discussed above, the relevant special law applies, and that is all—unless another party raises the question of *jus cogens* or a prior obligation that might enjoy precedence, for example under articles 30 or 41 of the 1969 Vienna Convention.

93. Sometimes a *lex specialis* relationship has been identified between two norms that, far from being in conflict with each other, point in the same direction, while the relationship "special"/"general" is associated with that of "means"/"ends". As noted above, the European Court of Human Rights has characterized the relationship between article 10 of the European Convention on Human Rights, on freedom of expression, and article 11, dealing with freedom of assembly and movement, by conceiving the latter as *lex specialis* in relation to the former:

> The Court notes that the issue of freedom of expression cannot in the present case be separated from that of freedom of assembly. The protection of personal opinions, secured by Article 10 of the Convention,

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[114] *Turkey—Restrictions on Imports of Textile and Clothing Products* (see footnote 88 above), paras. 9.92–9.96. On the presumption against conflict in WTO law generally, see Pauwelyn, *Conflict of Norms…* (footnote 21 above), pp. 240–244.

[115] Para. (4) of the commentary to article 55 of the draft articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 140.

[116] *Neumeister v. Austria (art. 50)*, judgment of 7 May 1974, European Court of Human Rights, Series A, No. 17, p. 13, para. 30.

[117] *Nikolova v. Bulgaria* [GC] (see footnote 84 above), p. 225, para. 69.

[118] See also, in this regard, H. Aufricht, "Supersession of treaties in international law", *Cornell Law Review,* vol. 37, No. 2 (winter 1952), p. 698 (special law being "supplementary" while the general law remains "controlling").

[119] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 76, para. 132. For the Treaty concerning the Construction and Operation of the Gabčíkovo–Nagymaros System of Locks, signed at Budapest on 16 September 1977, see United Nations, *Treaty Series*, vol. 1109, No. 17134, p. 211.

[120] For discussion, see Jenks (footnote 8 above), pp. 408–420.

is one of the objectives of freedom of peaceful assembly as enshrined in Article 11 of the Convention … Thus, observing that the applicant's grievances relate mainly to alleged refusals of the "TRNC" authorities to grant him permits to cross over the "green line" and meet with Greek Cypriots, the Court considers that Article 11 of the Convention takes precedence as the *lex specialis* for assemblies, so that it is unnecessary to examine the issue under Article 10 separately. The Court will, however, have regard to Article 10 when examining and interpreting Article 11.[121]

94. Not only is there no "conflict" between articles 10 and 11, but both point in the same direction: their relationship is one of means/ends. Yet why would "expression" be the purpose of "assemblies"; might not meaningful "assemblies" (as an expression of democracy and self-government, for example) sometimes be understood rather as the purpose towards which a right of expression is only a means? The relationship between general and particular may often be complex and two-sided, so that, even as the particular sets aside the general, the latter—as the Court has noted—will continue to provide interpretative direction to the former.

95. This example shows that fixing a definite relationship between two standards, one of which should be seen either as an application of or an exception to the other, may often be quite impossible. It might, for example, be said that the "inherent right of self-defence" in Article 51 of the Charter of the United Nations is *lex specialis* in relation to the principle of non-use of force in Article 2, paragraph 4. The two rules have a very similar (though not identical) scope of application (they apply to inter-State use of armed force). Because Article 51 is more specific than Article 2, paragraph 4, it is applicable when its conditions are fulfilled. In this sense, Article 51 may sometimes "replace" or "set aside" the prohibition in Article 2, paragraph 4. But Article 51 may also be seen as an "application" of Article 2, paragraph 4, inasmuch as self-defence covers action against a State that has *violated* Article 2, paragraph 4. In this case, Article 51 strengthens and supports Article 2, paragraph 4, and provides instructions on what to do in some cases (those involving "armed attack") in the event of a breach of Article 2, paragraph 4. Both rules are now rationalized under the same purpose—the protection of the territorial integrity and political independence of States—of which they appear as particular applications. Article 51 now appears not so much an exception as a supplement to Article 2, paragraph 4.

96. And what to say of the place of *lex specialis* in the *Legality of the Threat or Use of Nuclear Weapons* case (1996)? Here the International Court of Justice observed that both human rights law (specifically the International Covenant on Civil and Political Rights) and the laws of armed conflict applied "in times of war". Nevertheless, when it came to determining what constituted an "arbitrary deprivation of life" under article 6, paragraph 1 of the Covenant, this fell "to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict".[122] In this respect, the two fields of law applied concurrently, or within each other. From another perspective, however, the law of armed conflict—and in particular its more relaxed standard of killing—set aside whatever standard might have been provided under the practice of the Covenant.

97. It follows that whether a rule is seen as an "application" of, "modification" of or "exception" to another rule depends on how we view those rules in the environment in which they are applied, including what we see as their object and purpose. Because separating "application" from "setting aside" would be artificial and would distort the context in which the question of *lex specialis* emerges, it is proposed to include all of these questions in the *lex specialis* study.

(a) Lex specialis *as an application or elaboration of* lex generalis

98. A rule may thus be *lex specialis* in regard to another rule as an application, updating or development thereof, or, which amounts to the same, as a supplement to it, providing instructions on what a general rule requires in some particular case. A regional instrument may thus be *lex specialis* in regard to a universal one, and an agreement on technical implementation *lex specialis* in regard to a general "framework" instrument.[123] Despite the way the particular rule now "applies" the general rule, it also sets aside the latter in a way that is not devoid of normative consequences.

99. For example, many provisions in the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer are special law in relation to the 1985 Vienna Convention for the Protection of the Ozone Layer.[124] When States apply the emission reduction schedule in article 2 of the Protocol, they give concrete meaning to the general principles in the Convention. Though it may be said that in this case they apply *both* the Protocol *and* the Convention, there is a sense in which the Protocol has now set aside the Convention. In the event of a dispute as to what the relevant obligations are, the starting point and focus of interpretation will now be the wording of the Protocol, and no longer of the Convention. The special rule in the Protocol has become an independent

[121] *Djavit An v. Turkey* (see footnote 86 above), p. 251, para. 39.

[122] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports 1996*, p. 226, at p. 240, para. 25.

[123] Examples of such relationships are included in Jenks (see footnote 8 above), pp. 408–420, and Sadat-Akhavi (see footnote 21 above), pp. 189–191 *passim*. See also the award of the Arbitral Tribunal in the *Southern Bluefin Tuna* case, where the Tribunal noted the frequent parallelism between treaties and that "the conclusion of an implementing convention does not necessarily vacate the obligations imposed by the framework convention upon parties to the implementing convention" (*Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan* (see footnote 26 above), p. 40, para. 52). The Tribunal did not state whether this was a special application of the *lex specialis* or a setting aside of the *lex specialis* because Japan had argued that it fully replaced the obligations of the framework convention by those of the implementing convention.

[124] Vienna Convention for the Protection of the Ozone Layer, 22 March 1985; Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987; Adjustments to the Montreal Protocol on Substances that Deplete the Ozone Layer, 29 June 1990, annex I to the report of the Second Meeting of the Parties (UNEP/OzL.Pro.2/3) and depositary notification C.N.133.1991.TREATIES–3/2 of 27 August 1991 (rectification of the Spanish authentic text of the adjustments and amendment) (see also ILM, vol. 30, No. 2 (March 1991), p. 539); and Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, 29 June 1990, annex II to the report of the Second Meeting of the Parties (UNEP/OzL.Pro.2/3) and depositary notification C.N.133.1991.TREATIES–3/2 of 27 August 1991 (rectification of the Spanish authentic text of the adjustments and amendment) (see also ILM, vol. 30, No. 2 (March 1991), p. 541).

and authoritative representation of what the Convention *means* in terms of the obligations it provides. And yet, the Convention continues to express the principles and purposes that also affect the interpretation and application of the Protocol. In other words, in "easy" cases, the Protocol is applied without controversy about how this should be done, while in "hard" cases a dispute about the Protocol's interpretation and application arises and will need to be resolved by recourse to, *inter alia*, the standards of the Convention.

100. Similar thinking applies even if the special law is intended to replace the general law completely. As the Iran–United States Claims Tribunal stated in *Amoco International Finance Corporation v. Iran*:

> As a *lex specialis* in the relations between the two countries, the Treaty supersedes the *lex generalis*, namely customary international law. This does not mean, however, that the latter is irrelevant in the instant Case. On the contrary, the rules of customary law may be useful in order to fill in possible *lacunae* of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions.[125]

101. This is no different from the above-mentioned *Neumeister* case, where the European Court of Human Rights refused to hold article 5, paragraph 5, of the European Convention on Human Rights as *lex specialis* in regard to article 50 because of its *a priori* view that *lex specialis* must involve a conflict. The Court distinguished the two provisions by the fact that article 5, paragraph 5, was a rule of "substance", while article 50 dealt with the competence of the Court. The latter was nonetheless to be "taken into consideration" when applying the former.[126] Though the Court here refrained from invoking *lex specialis*, in its later jurisprudence it has done this.[127]

102. In both cases—that is, either as an application of or as a derogation from the general law—the point of the *lex specialis* rule is to indicate which rule should be applied. In both cases, the special, as it were, steps in to become applicable instead of the general. Such replacement, however, always remains only partial. The more general rule remains in the background, providing interpretative direction to the special one. Thus, in the recent *Oil Platforms* case,[128] the general law concerning the use of force was applied to give meaning to a wide standard of "necessity" in the relevant *lex specialis*, the 1955 Treaty of Amity between Iran and the United States. It was not that a particularly important *lex generalis* would have set aside *lex specialis,* but that the latter received its meaning from the former.[129]

(b) Lex specialis *as an exception to the general rule*

103. As pointed out above, most general international law is dispositive and can be derogated from by way of exception. But an "exception", too, works only in a relative sense, so that whatever is being "set aside" will continue to have an effect on the interpretation and application of the exception. It is often stated that the laws of war are *lex specialis* in relation to rules laying out the peace-time norms relating to the same subjects.[130] In *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice discussed the relationship between the International Covenant on Civil and Political Rights and the laws applicable in armed conflict. Article 6, paragraph 1, of the Covenant establishes the right not to be deprived of one's life arbitrarily. This right, the Court pointed out, applies also in hostilities. However:

> The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.[131]

104. The example of the laws of war focuses on a case where the rule itself identifies the conditions in which it is to apply, namely the presence of an "armed conflict". Owing to that condition, the rule appears more "special" than if no such condition had been identified. To regard this as a situation of *lex specialis* draws attention to an important aspect of the operation of the principle. Even as it works so as to justify recourse to an exception, what is being set aside does not vanish altogether.[132] The Court was careful to point out that human rights law *continued to apply* within armed conflict. The exception—humanitarian law—only affected one (albeit important) aspect of it, namely the relative assessment of "arbitrariness". Humanitarian law as *lex specialis* did not suggest that human rights were abolished in war. It did not function in a formal or absolute way but as an aspect of the pragmatics of

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[125] *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran* et al., Iran–United States Claims Tribunal, case No. 56, 14 July 1987, 15 IRAN–U.S. C.T.R., p. 189, at p. 222. For the Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, see footnote 94 above.

[126] *Neumeister v. Austria (art. 50)* (see footnote 116 above), p. 13, para. 30.

[127] Somewhat parallel was the situation of the United Nations Tribunal in Libya, which, in 1955, faced a challenge to its jurisdiction under articles VII and X of its founding General Assembly resolution (388 (V) of 15 December 1950). It was stated by Libya that, as the question of confiscation had been dealt with under the former article and not in the latter, which provided for the Tribunal's jurisdiction, such jurisdiction did not cover it. Libya formulated this point as follows: "[I] t is a universal legal principle, when it comes to interpretation, that, in the event of a conflict between a general text and a special text, the latter shall prevail." The Tribunal rejected this objection, stating that article VII merely "specified" the fact that the Tribunal would have jurisdiction—which it exercised generally under article X—also in regard to confiscated properties. See *Décisions rendues les 3 juillet 1954 et 27 juin 1955 dans l'affaire relative aux institutions, sociétés et associations visées à l'article 5 de l'Accord conclu, en date du 28 juin 1951, entre les Gouvernements britannique et italien, concernant la disposition de certains biens italiens en Libye*, UNRIAA, vol. XII (Sales No. 63.V.3), p. 373, at p. 388. For the agreement between the United Kingdom and Italy, signed at London on 28 June 1951, see United Nations, *Treaty Series*, vol. 118, No. 1600, p. 115.

[128] *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, *I.C.J. Reports 2003*, p. 161.

[129] As suggested by E. Jouannet in "Le juge international face aux problèmes d'incohérence et d'instabilité du droit international. Quelques réflexions à propos de l'arrêt CIJ du 6 novembre 2003, Affaire des Plates-formes pétrolières", RGDIP, vol. 108 (2004), p. 917, at pp. 933, 936.

[130] For example, Jenks (see footnote 8 above), p. 446; W. Karl, "Treaties, conflicts between", in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 4, Amsterdam, Elsevier, 2000, p. 937.

[131] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 122 above), p. 240, para. 25.

[132] Though the marginal role left for human rights law in the Advisory Opinion is perceptively criticized in V. Gowlland-Debbas, "The right to life and genocide: the Court and an international public policy", in L. Boisson de Chazournes and P. Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons,* Cambridge, Cambridge University Press, 1999, p. 315, at pp. 321–326.

the Court's reasoning. However desirable it might be to discard the difference between peace and armed conflict, the exception that war continues to be to the normality of peace could not be simply overlooked when determining what standards should be used to judge behaviour in those (exceptional) circumstances. *Legality of the Threat or Use of Nuclear Weapons* was a "hard case" to the extent that a choice had to be made by the Court between different sets of rules, none of which could fully extinguish the others. *Lex specialis* hardly did more than to indicate that, while it might have been desirable to apply only human rights, such a solution would have been too idealistic, bearing in mind the speciality and persistence of armed conflict. So the Court created a systemic view of the law in which the two sets of rules related to each other as today's reality and tomorrow's promise, with a view to the overriding need to ensure the "survival of a State".[133]

105. The important point to retain here is that, when *lex specialis* is invoked as an exception to the general law, what is being suggested is that the special nature of the facts justifies a deviation from what otherwise would be the "normal" course of action. This highlights again the operation of *lex specialis* as an aspect of making pragmatic judgements about relative "generality" and "speciality", about what is "normal" and what "exceptional". Sometimes these distinctions are made in an instrument itself. Thus, article 4 of the International Covenant on Civil and Political Rights provides for a right to derogate from certain clauses in the Covenant "[i]n time of public emergency which threatens the life of the nation". When that factual condition is fulfilled, a situation emerges that is not unlike the "armed conflict" that justifies the application of laws of war, as referred to by the International Court of Justice in its *Legality of the Threat or Use of Nuclear Weapons* advisory opinion. And, as in the latter, in times of public emergency, either a modicum of legality will continue to apply or what takes its place is in fact a wholly unconstitutional legal vacuum.

106. Often the factual condition that makes a case "special" is not laid out in a treaty, however, but must be ascertained through the normal means by which the presence of a tacit agreement, estoppel, *effectivités*, historic title, *rebus sic stantibus*, or, say, local custom (*Right of Passage over Indian Territory* case) is identified. That assessment is dependent on and makes constant reference to evaluative judgements of what is central and what marginal to a case, what aspects of it should be singled out and what aspects may be glossed over. Do *effectivités* or "historical consolidation", for instance, give grounds for a kind of exception that is prior to formal "title", or *vice versa*? Sometimes (as in the *Sovereignty over Pulau Ligitan and Pulau Sipadan* case) *effectivités* may in fact ground title; sometimes a pre-existing title may turn any *effectivités* into an illegality (*Land and Maritime Boundary between Cameroon and Nigeria* case). No *a priori* solution seems available.[134]

107. Arguments based on *effectivités*, like those based on estoppel (*Temple of Preah Vihear*) and historical title (*Fisheries*), for example, resemble *lex specialis*.[135] They, too, seek to make the law responsive to particular situations. They, too, create informal hierarchies that seek to distinguish the special case from its general (and formal) background by pointing to a relevant fact. What they leave open, like the advisory opinion in *Legality of the Threat or Use of Nuclear Weapons*, is on what basis the relevant facts are singled out—what justifies the choice of the interpretative framework. To what extent does the factual description "armed conflict" influence the sense of the expression "arbitrary deprivation of life" in article 6 of the International Covenant on Civil and Political Rights? Here there is no single formula.[136] A weighing of different considerations must take place, and, if that weighing is to be something other than the expression of a preference, it must seek reference in what may be argued to be the systemic objectives of the law to provide its interpretative basis and *milieu*.

3. Prohibited *lex specialis*

108. Most general international law may be derogated from by *lex specialis*. But sometimes either a deviation is prohibited expressly or such a prohibition may be derived from the nature of the general law. The case of *jus cogens* will be dealt with in chapter IV below. In the recent dispute relating to the OSPAR Convention, for example, the Arbitral Tribunal held it self-evident that its task was to apply, alongside the OSPAR Convention itself, also international custom and general principles of law to the extent they were not overridden by the Convention as *lex specialis*, adding, however, that "[e]ven then, it must defer to a relevant *jus cogens* with which the Parties' *lex specialis* may be inconsistent".[137] But aside from *jus cogens*, there may be other types of general law that may not permit derogation. In regard to conflicts between human rights norms, for instance, the one that is more favourable to the protected interest is usually held to be overriding.[138] At any rate, derogation to the detriment of the beneficiaries would seem precluded.

109. Whether derogation by way of *lex specialis* is permitted will remain a matter of interpreting the general law. Concerns that may seem pertinent include at least the

[133] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 122 above), p. 266, para. 105 (2) E.

[134] See *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, *I.C.J. Reports 2002*, p. 625, at p. 682, para. 134, and p. 684, para. 145 (*effectivités* as basis of Malaysia's title), and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, *I.C.J. Reports 2002*, p. 303, at p. 415, para. 223 and pp. 341–344, paras. 52, 54–55 (*effectivités* illegal). See also *Frontier Dispute*, Judgment, *I.C.J. Reports 1986*, p. 554, at p. 564, para. 18 ("[i]n fact, the concept of title may also, and more generally, comprehend both any evidence that may establish the existence of a right, and the actual source of that right").

[135] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962, *I.C.J. Reports 1962*, p. 6, at p. 23; *Fisheries* case, Judgment of 18 December 1951, *I.C.J. Reports 1951*, p. 116, at pp. 130–131.

[136] As stressed by, for example, McDougal, Lasswell and Miller (see footnote 74 above), p. 206.

[137] *Dispute concerning Access to Information under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland*, final award, 2 July 2003, UNRIAA, vol. XXIII (Sales No. E/F.04.V.15), p. 59, at p. 87, para. 84; ILR, vol. 126, p. 334, at p. 364.

[138] Karl (see footnote 130 above), p. 939; Sadat-Akhavi (see footnote 21 above), pp. 213–231. See also the separate opinions of Judges van Eysinga and Schücking in the *Oscar Chinn* case, Judgment of 12 December 1934, *P.C.I.J., Series A/B*, No. 63, pp. 132–135, 149.

following: the normative status of the general law (is it *jus cogens*?); who the beneficiaries of the obligations are (prohibition on deviating from law benefiting third parties, including individuals or non-State entities); and whether non-derogation may be otherwise inferred from the terms of the general rule (for instance its "integral" or "interdependent" nature, its *erga omnes* character, or subsequent practice creating an expectation of non-derogation).[139] Sometimes derogation—but equally application or modification—may be forbidden if it might "disrupt the balance established under the general treaty between the rights and obligations of States parties thereto".[140] Apart from treaties of a public law nature (however that category is defined), this would apply to constituent instruments of international organizations.[141]

110. In practice, these considerations may sometimes raise a question about what is "derogation", in contrast to "application", "updating" or "modification". Views on this may differ in a way reflecting divergent understandings of the general law. Does a technical application threaten a fragile package deal, for example? Such problems cannot be resolved by looking at the special law alone but only in forming a view of the nature and reasonable purposes of the general law.

4. The relational character of the general/special distinction

111. One of the difficulties in the *lex specialis* rule follows from the absence of clarity about the distinction between "general" and "special". For every general rule is particular, too, in the sense that it deals with some particular substance, that is, includes a certain description of fact as a *general* condition of its application. For example, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction lays down general law on the use of landmines. Yet this is also a "special" aspect of the general rules of humanitarian law. On the other hand, all special law is general as it is a characteristic of rules that they apply to a class "generally". Every rule may be expressed in the following format: "for every *p,* it is true that the rule *q* applies". No rule applies to a single case. Even where the occasions for the application of a rule are few, in order for the standard to be a *rule* (instead of an *order* to somebody) it must be generally defined. This is reflected in the distinction made by many domestic legal systems between laws and acts, or *loi* and *acte*, *Gesetz* and *Massnahme*.

112. Generality and speciality are thus relational. A rule is never "general" or "special" in the abstract, but always in relation to some other rule. This relationality functions in two registers. A rule may be general or special in regard to its *subject matter* (fact description) or in regard to the *number of actors* whose behaviour is regulated by it.[142] Thus, the use of anti-personnel mines is a *special subject* within the *general subject* of humanitarian law. The distinction between general and local custom, again, provides an example of the register of number of actors covered. The registers may overlap. Thus, there may be a rule that is general in subject matter (such as a good-neighbourliness treaty) but valid only for a special relationship between a limited number of States (two).

(a) *Speciality in regard to parties*

113. In considering *lex specialis* as a conflict resolution technique, it is necessary to distinguish between cases where differing obligations are valid and applicable between the *same States* (A/B + A/B) and cases where the fulfilment of an obligation in one relationship (A/B) makes it impossible to fulfil an obligation in another relationship (A/C). These cases are usually discussed in terms of successive treaties (art. 30 of the 1969 Vienna Convention), and, although that set of issues will be the topic of chapter III of this report, it may still be useful to say how, if at all, *lex specialis* functions in these relationships.

114. In the first case (A/B + A/B) *lex specialis* does have a narrow field of application, A and B being entitled to amend their prior treaty or deviate from most general law as they wish. However, it cannot be automatically ruled out that, when two States conclude a generally worded treaty, for example, they thereby wish to abolish a prior, more specific treaty. In such cases, *lex specialis* may have some value as an indication of party will:[143] the *lex posterior* will not abrogate a prior treaty obligation if the speciality of that prior obligation may be taken as an indication that the parties did not envisage this outcome. The case where a limited number of parties to a multilateral treaty establish a special regime among themselves is, again, regulated as "modification" under article 41 of the 1969 Vienna Convention and cannot be discussed here in any detail.

115. The hard case is one where a State (A) has undertaken conflicting obligations in regard to two (or more) different States (B and C) and the question arises as to which of the obligations shall prevail. Here *lex specialis* appears largely irrelevant. Each bilateral (treaty) relationship is governed by *pacta sunt servanda,* with effects towards third parties excluded. Such conflict remains unregulated by article 30 of the 1969 Vienna Convention.[144] The State

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[139] For the distinction between normal ("reciprocal") and "integral" and "interdependent" obligations, see the third report on the law of treaties by Gerald Fitzmaurice, Special Rapporteur, *Yearbook ... 1958*, vol. II, document A/CN.4/115, pp. 40–41, para. 76, commentary to draft article 17. For the treatment of the distinction at the last stages of the Commission's work on State responsibility, see the third report on State responsibility by James Crawford, Special Rapporteur, *Yearbook … 2000*, vol. II (Part One), document A/CN.4/507 and Add.1–4, pp. 33–36, paras. 99–108. See further chapter IV below.

[140] Sadat-Akhavi (see footnote 21 above), p. 131.

[141] See, for example, I. Seidl-Hohenveldern, "Hierarchy of treaties", in J. Klabbers and R. Lefeber, *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag,* The Hague, Martinus Nijhoff, 1998, p. 7, at pp. 15–16; Karl (footnote 130 above), p. 940.

[142] Villiger (see footnote 77 above), p. 36; Kontou (see footnote 66 above), pp. 19–20.

[143] As observed by Rousseau, "De la compatibilité des normes juridiques contradictoires…" (see footnote 36 above), p. 177, and Zuleeg (see footnote 74 above), p. 256. See further McNair (footnote 58 above), pp. 219–220. This corresponds to article 30, paragraph 4, of the 1969 Vienna Convention. See also Mus (footnote 21 above), pp. 217–219.

[144] Lauterpacht originally proposed that the later treaty should be held void unless it possessed "a degree of generality which imparts to [it] the character of legislative enactment[ ]" (first report on the law of treaties by Hersch Lauterpacht, Special Rapporteur, *Yearbook ... 1953*, vol. II, document A/CN.4/63, pp. 156–159). Later Special Rapporteurs (Fitzmaurice and Waldock), however, thought that this set the innocent party to the latter treaty at an unjustified disadvantage.

that is party to the conflicting instruments is in practice called upon to choose which treaty it will perform and which it will breach, with the consequence of State responsibility for the latter.[145]

(b) *Speciality in regard to "subject matter"*

116. As pointed out above, whether a rule is "special" or "general" requires a relational assessment: special *in what sense*? General *in what regard*? Given that only those that are in some respect similar can be compared—and indeed can enter into conflict—it must be assumed, as Fitzmaurice does, that *lex specialis* "can only apply where both the specific and general provision concerned deal with the same substantive matter".[146] Moreover, the commentary to article 55 of the draft articles on responsibility of States for internationally wrongful acts requires that, for *lex specialis* to apply, the rules must deal with the same subject matter.[147]

117. However, as noted in chapter I, section B, above, the criterion of the "same subject matter" as a condition for applying a conflict rule is too unspecific to be useful. Different situations may be characterized differently depending on what regulatory purpose one has in mind. In a sense, most activities in the international world relate to the "environment"—so is every issue an "environmental" issue to be dealt with by environmental rules? But most forms of international behaviour also have some bearing on "human rights" or "security". These denominations are not about what rules should apply but how to characterize the relevant features of a state of affairs.

118. The example given above was that of maritime carriage of hazardous substances. Depending on what the interpreter sees as the relevant considerations, the case comes under one or another set of rules as *lex specialis*: is the point of the law to advance trade, flag or coastal State jurisdiction, or environmental protection? None of these perspectives enjoys intrinsic priority over the others. This is why, in a hard case, a justifiable decision would have to take all of these into account by articulating some systemic relationship among them. None can simply be brushed aside, for the same reason that the International Court of Justice, in *Legality of the Threat or Use of Nuclear Weapons*, did not brush aside human rights law or any of the other branches of law (environmental law, humanitarian law, the law on the use of force) that had been invoked. They were all in some regard *lex specialis*. This does not mean that its decision—that it "cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake"[148]—would have been beyond reproach. Perhaps the systemic unity that the Court canvassed and that peaked in the ultimate value of the "very survival of a State" could be submitted to critique. The point is not whether this decision was correct but that, in arriving at it, none of the laws were "automatically" set aside. They all contributed to bringing relevant considerations into the advisory opinion, whose authority lies precisely in the plausibility of what it then came to suggest as the law's determining purpose.

5. Conclusion for *lex specialis*: the omnipresence of "general law"

119. *Lex specialis derogat legi generali* refers to a standard technique of legal reasoning, operative in international law as in other fields of law understood as systems. Its power is entirely dependent on the normative considerations for which it provides articulation: sensitivity to context, capacity to reflect State will, concreteness, clarity, definiteness. Its functioning cannot be assessed independently of the role of considerations of the latter type in the specific context of legal reasoning. How does a particular agreement relate to the general law around it? Does it implement or support the latter, or does it perhaps deviate from it? Is the deviation tolerable or not? *No general, context-independent answers can be given to such questions*. In this sense, the *lex specialis* maxim cannot be meaningfully codified.

120. The role of *lex specialis* cannot be dissociated from assessments about the nature and purposes of the general law that it proposes to modify, replace, update or deviate from. This highlights the systemic nature of the reasoning of which arguments based on "special law" are an inextricable part. No rule, treaty or custom, however special its subject matter or limited the number of States concerned by it, applies in a vacuum. Its normative environment includes—as will be elaborated in more detail in chapter V below—not only whatever general law there may be on that very topic, but also principles that determine the relevant legal subjects, their basic rights and duties, and the means by which those rights and duties may be supplemented, modified or extinguished. Principles such as "sovereignty", "non-intervention", "self-determination", "sovereign equality", "non-use of force", *audiatur et altera pars*, "no one may profit from his own wrong" and so on, as well as interpretative maxims such as *lex specialis* and *lex posterior*, together with a host of other techniques of legal reasoning, are all part of this framework.

121. The relationship between general law and particular rules is ubiquitous. One can always ask of a particular rule of international law how it relates to its normative environment. This may not always be visible. States sometimes create particular rights and obligations where there appears to be no general law on the matter at all. In such cases, these rights and obligations do not seem, on the face of it, to have the character of *lex specialis*. They are not contrasted with anything more "general". The normative area "around" such rules appears to remain a zone of no-law, just as the matter they now cover used to be before the new regulations entered into force.

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[145] Zuleeg calls this the "principle of political freedom": Zuleeg (see footnote 74 above), pp. 267–268. See also Mus (footnote 21 above), pp. 227–231. The genesis and critique of article 30 of the 1969 Vienna Convention is well expressed in Sur, *L'interprétation en droit international public* (see footnote 107 above), pp. 167–171, and Sadat-Akhavi (see footnote 21 above), pp. 59–84. The most comprehensive discussion of the matter is in G. Binder, *Treaty Conflict and Political Contradiction: The Dialectic of Duplicity,* New York, Praeger, 1988.

[146] Fitzmaurice, "The law and procedure of the International Court of Justice 1951–4…" (see footnote 59 above), p. 237.

[147] Paras. (4) and (5) of the commentary to article 55 of the draft articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 140–141.

[148] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 122 above), p. 266, para. 105 (2) E (operative part).

122. The foregoing reflections suggest, however, that, whatever logical, conceptual or political problems there are around the old problem of "gaps" in international law,[149] there is at least one sense in which the idea of a zone of no-law as regards *lex specialis* is a conceptual *impossibility*. If a legal subject invokes a right based on "special law", then the validity of that claim can only be decided by reference to the whole background of a legal system that indicates how "special laws" are enacted, what is "special" about them, and how they are implemented, modified and terminated. It is impossible to make legal claims only in a limited sense, to opt for a part of the law while leaving the rest out; for legal reason works in a closed and circular system in which every recognition or non-recognition of a legal claim can only be decided by recognizing the correctness of other legal claims. This can be illustrated in the matter of so-called "self-contained regimes".

C. Self-contained (special) regimes

1. What are self-contained regimes?

123. The commentary to article 55 (*lex specialis*) of the Commission's draft articles on responsibility of States for internationally wrongful acts makes a distinction between "'weaker' forms [of *lex specialis*] such as specific treaty provisions on a single point" and "'strong' forms of *lex specialis*, including what are often referred to as self-contained regimes". Though the commentary refrains from defining what that "strong form" is, it gives two examples: the judgment by the Permanent Court of International Justice in the *S.S. "Wimbledon"* case (1923) and that of the International Court of Justice in *United States Diplomatic and Consular Staff in Tehran* (1980).[150]

124. This approach is not free of ambiguity. The Commission recognized and defined self-contained regimes as a subcategory (*i.e.* a "strong form") of *lex specialis* within the law of State responsibility. As such, it appears to cover the case where a special set of secondary rules claims priority over the secondary rules in the general law of State responsibility. Such a definition closely follows the use of the term by the International Court of Justice in the *United States Diplomatic and Consular Staff in Tehran* case, where the Court identified diplomatic law as a self-contained regime precisely by reference to the way it had set up its own "internal" system for reacting to breaches:

> The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse.[151]

125. In other words, no reciprocal breach of diplomatic immunity is permissible; the receiving State may only resort to remedies in diplomatic law, which, the Court presumed, were "entirely efficacious". In *Military and Paramilitary Activities in and against Nicaragua*, the Court viewed human rights law somewhat analogously: the relevant treaties had their own regime of accountability that made other forms of reaction inappropriate.[152]

126. The judgment by the Permanent Court of International Justice in the *S.S. "Wimbledon"* case, however, uses a broader notion of a self-contained regime. At issue here was the status of the Kiel Canal, which was covered both by the general law on internal waterways and by the special rules on the Canal laid down in the Treaty of Versailles of 1919. Here is how the Court characterized the law applicable:

> Although the Kiel Canal, having been constructed by Germany in German territory, was, until 1919, an internal waterway of the State holding both banks, the Treaty [of Versailles] has taken care not to assimilate it to the other internal navigable waterways of the German Empire. A special section has been created at the end of Part XII … and in this special section rules exclusively designed for the Kiel Canal have been inserted; these rules differ on more than one point from those to which other internal navigable waterways of the Empire are subjected … This difference appears more especially from the fact that the Kiel Canal is open to the war vessels and transit traffic of all nations at peace with Germany, whereas free access to the other German navigable waterways … is limited to the Allied and Associated Powers alone … The provisions relating to the Kiel Canal … are therefore self-contained … The idea which underlies [them] is not to be sought by drawing an analogy from [provisions on other waterways] but rather by arguing *a contrario*, a method of argument which excludes them.[153]

127. Now here the notion of a "self-contained regime" is not limited to a special set of secondary rules. The "special" nature of the Kiel Canal regime appears instead to follow rather from the speciality of the relevant primary rules—especially obligations on Germany—laid down in the appropriate sections of the Treaty of Versailles than that of any special rules concerning their breach. Though the Court here used the expression "self-contained", it is hard to say whether it meant any more than that, where there were conventional rules on a problem, those rules would have priority over any external ones. This is clearly the sense of the expression it employed in a 1925 opinion, where it held that, in order to interpret certain expressions in a treaty, it was unnecessary to refer to external sources: "Everything therefore seems to indicate that, in regard to this point, the Convention is self-contained and that … the natural meaning of the words [should be employed]."[154]

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[149] The present discussion is not intended to take sides in the debate about the permissibility or desirability of "*non liquet*", as discussed between Hersch Lauterpacht and Julius Stone and elaborated in the writings of Lucien Siorat, Gerald Fitzmaurice and Ulrich Fastenrath, among others.

[150] Para. (5) of the commentary to article 55 of the draft articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 140–141. *S.S. "Wimbledon"*, Judgment of 17 August 1923, *P.C.I.J., Series A,* No. 1, p. 14; *United States Diplomatic and Consular Staff in Tehran*, Judgment, *I.C.J. Reports 1980*, p. 3.

[151] *United States Diplomatic and Consular Staff in Tehran* (see footnote 150 above), p. 40, para. 86.

[152] The Court noted that the use of force was not "the appropriate method" to ensure respect for human rights, for "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 in the conventions themselves" (*Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgment of 27 June 1986 (see footnote 51 above), pp. 134–135, paras. 267–268).

[153] *S.S. "Wimbledon"* (see footnote 150 above), pp. 23–24.

[154] *Exchange of Greek and Turkish Populations, Advisory Opinion of 21 February 1925, P.C.I.J., Series B*, No. 10, p. 20. For the Convention concerning the Exchange of Greek and Turkish Populations, signed at Lausanne on 30 January 1923, see League of Nations, *Treaty Series*, vol. XXXII, No. 807, p. 75.

This is, of course, a very common judicial technique and corresponds to the principle, stated above, concerning the pragmatic priority of treaty rules over general law.[155]

128. Thus, provisionally, it is possible to distinguish two uses of the notion of "self-contained regime". In a narrow sense, the term is used to denote a special set of secondary rules under the law of State responsibility that claims primacy over the general rules concerning consequences of a violation. In a broader sense, the term is used to refer to interrelated wholes of primary and secondary rules, sometimes also referred to as "systems" or "subsystems" of rules, that cover some particular problem differently from the way it would be covered under general law. That set of rules may either be a very limited one—for example, the regime of judicial cooperation between the International Criminal Court and States parties to the Rome Statute of the International Criminal Court[156]—or it may be rather wide, such as, for instance, the technique of interpreting the European Convention on Human Rights as "an instrument of European public order (*ordre public*) for the protection of individual human beings".[157] In this wider sense, self-containedness fuses with international law's contractual bias: where a matter is regulated by a treaty, there is normally no reason to have recourse to other sources.

129. But an occasional use of the notion of "self-contained regime" extends it even further than the *S.S. "Wimbledon"* case. Sometimes whole fields of functional specialization, of diplomatic and academic expertise, are described as self-contained (whether or not that word is used) in the sense that special rules and techniques of interpretation and administration are thought to apply.[158] For instance, fields such as "human rights law", "WTO law", "European law/European Union law", "humanitarian law" and "space law", among others, are often identified as "special" in the sense that rules of general international law are assumed to be modified or even excluded in their administration. One often speaks of "principles of international environmental law" or "principles of international human rights law" with the assumption that in some way those principles differ from what the general law provides for in analogous situations.

130. For instance, the principle of "dynamic" or teleological interpretation is much more deeply embedded in human rights law than in general international law.[159] In the view of the European Court of Human Rights, as is well known, in applying a "normative treaty" one should look for its object and purpose, not to the interpretation that would provide the most limited understanding of the obligations of States parties.[160] Making the contrast with general law even sharper, the Court has stated that

> [u]nlike international treaties of the classic kind, the [European] Convention [on Human Rights] comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations…[161]

131. In comparing itself to the International Court of Justice, the European Court has found "a fundamental difference in the role and purpose of the respective tribunals [which] provides a compelling basis for distinguishing Convention practice from that of the International Court".[162] That this is not an idiosyncratic aspect of the European Convention on Human Rights is suggested by the parallel attitudes within the Inter-American Court of Human Rights and the Human Rights Committee.[163]

132. A self-contained regime in this third sense has effect predominantly by providing interpretative guidance and direction that in some way deviates from the rules of general law. It covers a very wide set of differently interrelated rule systems, and the degree to which general law is assumed to be affected varies extensively. What, indeed, may be the normative sense of the division of international law into 17 different "topics" or "branches" in a report to the Commission by the United Nations Secretariat?[164] Even as it may be argued that such a classification is merely "relative" and serves principally didactic purposes, it is still common to link the branches or

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[155] This is frequently seen in territorial disputes. If a treaty determines a territorial boundary, then there is no need to discuss *uti possidetis*, inter-temporal law or the relevant *effectivités*. See, for example, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, *I.C.J. Reports 1994*, p. 6, at pp. 38–39, paras. 75–76.

[156] For this suggestion, see G. Sluiter, "The surrender of war criminals to the International Criminal Court", *Loyola of Los Angeles International and Comparative Law Review*, vol. 25 (2003), p. 605, at p. 629.

[157] *Cyprus v. Turkey* [GC], No. 25781/94, ECHR 2001-IV, p. 25, para. 78.

[158] This is implied in many of the essays in Barnhoorn and Wellens (eds.) (see footnote 12 above).

[159] For the role of "dynamic" or "teleological" interpretation in human rights law, see P. Wachsmann, "Les méthodes d'interprétation des conventions internationales relatives à la protection des droits de l'homme", in Société française pour le droit international, *La protection des droits de l'homme et l'évolution du droit international, Colloque de Strasbourg,* Paris, Pedone, 1998, p. 157, at pp. 188–193. See also L. Caflisch and A. A. Cançado Trindade, "Les conventions américaine et européenne des droits de l'homme et le droit international général", RGDIP, vol. 108 (2004), p. 5, at pp. 11–22.

[160] *Wemhoff v. Germany*, judgment of 27 June 1968, European Court of Human Rights, Series A, No. 7, p. 23, para. 8.

[161] *Ireland v. the United Kingdom*, judgment of 18 January 1978, European Court of Human Rights, Series A, No. 25, p. 90, para. 239. Likewise, *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75),* advisory opinion OC-2/82 of 24 September 1982, Inter-American Court of Human Rights, Series A, No. 2, pp. 20–23, paras. 29–33, and *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights),* advisory opinion OC-3/83 of 8 September 1983, Inter-American Court of Human Rights, Series A, No. 3, pp. 76–77, para. 50.

[162] *Loizidou v. Turkey,* preliminary objections, 23 March 1995 (see footnote 56 above), pp. 26–27, paras. 70–72, and p. 29, paras. 84–85.

[163] Invoking the practice of the European Court of Human Rights, the Inter-American Court of Human Rights has identified as part of the "*corpus juris* of international human rights law" the principle that "human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions" (*The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law,* advisory opinion OC-16/99 of 1 October 1999, Inter-American Court of Human Rights, Series A, No. 16, pp. 256–257, paras. 114–115). In its controversial general comment No. 24, the United Nations Human Rights Committee stated that the provisions of the 1969 Vienna Convention were "inappropriate to address the problem of reservations to human rights treaties. Such treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place…" (general comment on issues relating to reservations made upon ratification or accession to the [International] Covenant [on Civil and Political Rights] or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), vol. I, annex V, para. 17)).

[164] Survey of international law: working paper prepared by the Secretary-General, *Yearbook ... 1971*, vol. II (Part Two), document A/CN.4/245, p. 1.

subsystems thus identified with special legal principles concerning the administration of the relevant rules.[165]

133. None of this is to say that the effect of a self-contained regime in this third sense would be clear or straightforward. Indeed, writers such as Brownlie and Pellet have been quite critical of placing too much emphasis on the speciality of something like "human rights law".[166] Likewise, the question of whether "international environmental law" designates a special branch of international law within which other interpretative principles apply than apply generally, or merely an aggregate of treaty and customary rules dealing with the environment, may perhaps seem altogether too abstract to be of much relevance.[167] The standard designation of the laws of armed conflict, for instance, as *lex specialis* and a self-contained regime—or even "a 'deviant' body of rules of public international law"[168]—leaves wide open the issue of to what extent the general rules of, say, the law of treaties are affected.[169] But however doubtful international law "generalists" may be of the normative nature of such designations, specialists in such fields regularly hold them to be important. Functionally oriented as such regimes are, they also serve to identify and articulate interests that help to direct the administration of the relevant rules.[170]

134. This may be illustrated by the debate over the role of general international law in trade law. There is no doubt that the WTO dispute settlement system is a self-contained regime in the sense that article 23 of the Understanding on Rules and Procedures Governing the Settlement of Disputes excludes unilateral determinations of breach or countermeasures outside the "specific subsystem" of the WTO regime.[171] It is sometimes argued that general international law should not be applied in the administration of WTO treaties as they differ fundamentally in their general orientation from regular public international law: where the latter is based on State sovereignty, the former derives its justification from the theory of comparative advantage. Principles of interpretation inspired by the latter may often be in complete contrast with those inspired by the former.[172] It is true that, by now, WTO dispute settlement organs have used international customary law and general principles very widely to interpret WTO treaties.[173] Few lawyers would persist in holding the treaties covered by WTO, whatever their nature, as fully closed to public international law.[174] The issue remains, however, that trade rationality may occasionally—perhaps often—be at odds with the rationality of protecting the sovereign, and that, when a choice has to be made, the general objectives and "principles" of trade law—however that is understood—will seem more plausible to trade institutions and experts than traditional interpretative techniques.

135. The three notions of "self-contained regime" are not clearly distinguished from each other. A special system of secondary rules—the main case covered by article 55 of the draft articles on responsibility of States for internationally wrongful acts—is usually the creation of a single treaty or very closely related set of treaties. An example might be the "non-compliance system" under the 1985 Vienna Convention for the Protection of the Ozone Layer and the related 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, which has priority over the standard dispute settlement clause in the 1969 Vienna Convention.[175] A special regime on some (territorial, functional) problem area—for example, the *S.S. "Wimbledon"* case—may cover several instruments and practices, united by their orientation towards a single problem: establishment of a free trade area, say, or a universal trade regime such as the one administered under WTO. It goes without saying that a treaty regime may be special in both the first and the second sense, that is as a self-contained regime of remedies (State responsibility) and a set of special rules on the adoption, modification, administration or termination of the relevant obligations.

136. The widest notion covers a whole area of functional specialization or teleological orientation at a universal scale: the laws of armed conflict, for instance, identified as *lex specialis* by the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons*, or environmental law, often thought to be accompanied by special principles, such as the principle of precaution, "polluter pays" and "sustainable development", that seek to direct the administration of environmental matters.[176]

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[165] See, for example, the discussion in P. Malanczuk, "Space law as a branch of international law", in Barnhoorn and Wellens (eds.) (footnote 12 above), p. 143, at pp. 144–146.

[166] See I. Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, pp. 529–530 (a criticism of the speciality of human rights law); see also A. Pellet, "Droits-de-l'hommisme et droit international", Gilberto Amado memorial lecture, 18 July 2000.

[167] This issue is at the heart of T. Kuokkanen, *International Law and the Environment: Variations on a Theme*, The Hague, Kluwer Law International, 2002 (tracing a history of international lawyers' treatment of environmental problems from the fairly straightforward application of traditional rules to the complex management of resource regimes).

[168] H. H. G. Post, "Some curiosities in the sources of the law of armed conflict conceived in a general international legal perspective", in Barnhoorn and Wellens (eds.) (see footnote 12 above), p. 96.

[169] The potential conflict between the need to uphold the binding force of peace treaties and the principle laid down in article 52 of the 1969 Vienna Convention (invalidity in the event of coercion of a State by the threat or use of force), for example, may not be soluble at all within the confines of the Convention.

[170] In a sociological sense, they may even be said to express different social rationalities: a clash between them would appear as a clash of rationalities—for example, environmental rationality against trade rationality, human rights rationality against the rationality of diplomatic intercourse. Thus described, fragmentation of international law would articulate a rather fundamental aspect of globalized social reality itself: the replacement of territoriality as the principle of social differentiation by (non-territorial) functionality. See further Koskenniemi and Leino, "Fragmentation of international law? …" (footnote 14 above), and A. Fischer-Lescano and G. Teubner, *Regime-Kollisionen*, forthcoming.

[171] The term "specific subsystem" is used in Marceau, "WTO dispute settlement and human rights" (see footnote 43 above), pp. 755, 766–779.

[172] J. L. Dunoff, "The WTO in transition: of constituents, competence and coherence", *George Washington International Law Review*, vol. 33, Nos. 3 and 4 (2001), pp. 991–992.

[173] See, generally, J. Cameron and K. R. Gray, "Principles of international law in the WTO Dispute Settlement Body", *International and Comparative Law Quarterly*, vol. 50 (2001), p. 248, and É. Canal-Forgues, "Sur l'interprétation dans le droit de l'OMC", RGDIP, vol. 105 (2001), p. 5.

[174] See further section C.3 (*b*) (ii) below.

[175] See article 8 of the Montreal Protocol on Substances that Deplete the Ozone Layer and comments in M. Koskenniemi, "Breach of treaty or non-compliance? Reflections on the enforcement of the Montreal Protocol", *Yearbook of International Environmental Law*, vol. 3 (1992), p. 123.

[176] See, for example, Brownlie, *Principles of Public International Law* (footnote 166 above), pp. 274–281. See also *Legality of the Threat or Use of Nuclear Weapons* (footnote 122 above), p. 226 *passim*.

We can see the significance of such speciality in situations such as the *EC—Hormones* case, where the European Community argued within WTO that the precautionary principle included in the 1992 Declaration of Rio on the Environment and Development (Rio Declaration)[177] should influence the assessment of the justifiability of the European Community prohibition on the importation of certain meat and meat products. The WTO Appellate Body, however, stated that, while it might have "crystallized into a general principle of customary international environmental law", it was not clear that it had become a part of general customary law.[178] Cantoning the principle as one of "customary environmental law" left open, of course, the question of under what circumstances it might have become applicable under "international trade law".

137. It often seems that "much of the action in international law [has] shifted to specialized regimes".[179] At least as concerns State responsibility, this has been the price to pay for a uniform regime. To succeed in devising a single set of secondary rules (and this was the focus of some disagreement among the Special Rapporteurs), they needed to be of so general a nature that when States then adopt primary rules on some subject they are naturally tempted also to adopt secondary rules tailored precisely to the breach of those primary rules. The turn from formal dispute settlement to "softer", non-adversarial forms of accountability under environmental treaties ("non-compliance mechanisms") may serve as an example. Such variation need not be overly problematic. As Crawford has observed, there never was any assumption in the Commission that its system of responsibility would be "one size fits all". Whether States would wish to follow the general law or opt out from it was both a "political question and (in relation to existing regimes) a question of interpretation".[180] But if, instead of enhancing the effectiveness of the relevant obligations, the regime serves to dilute existing standards—a problem famously identified years ago by Prosper Weil[181]—then the need for residual application, or a "fall-back" onto the general law of State responsibility, may seem called for.

2. Self-contained regimes and the work of the International Law Commission on State responsibility

138. Special Rapporteur Roberto Ago came to the question in connection with his discussion of the "source" and "content" of the international obligation breached.[182] Does the identity of a norm that has been breached affect the type of responsibility that follows? As is well-known, Ago discussed this question predominantly in terms of the gradation of State responsibility through the distinction between international "crimes" and "simple breaches".[183] There is no need to embark upon that question here. Nevertheless, it is useful to note that, apart from that distinction, Ago did not see a need for classifying different consequences by reference to the source or the content of the obligation breached. What he aimed at, and achieved, was a single, generally applicable set of rules about wrongfulness that could cover the breach of any primary rules. As a counterpart to that generality, he accepted that States were at liberty to provide for special consequences for the breach of particular types of primary rules:

> In the text of a particular treaty concluded between them, some States may well provide for a special régime of responsibility for the breach of obligations for which the treaty makes specific provision…[184]

139. The matter of how these special treaty regimes would relate to the general rules was not pursued by Ago but was taken up at great length by Special Rapporteur Riphagen in 1982, in connection with his discussion of what he called the "general problem underlying the drafting of part 2 of the draft articles". What for Ago had been a matter of taking note of the self-evident competence of States to establish, by treaty, special systems of State responsibility appeared to become quite central, and rather problematic, for the drafting of part 2. In Riphagen's words:

> international law as it stands today is not modelled on one system only, but on a variety of interrelated subsystems, within each of which the so-called "primary rules" and the so-called "secondary rules" are closely intertwined—indeed, inseparable.[185]

140. As Riphagen saw it, the presence of such "subsystems" (which he also sometimes termed "regimes"), that is, interrelated systems of primary and secondary rules as well as procedures for realizing responsibility,[186] was a very common occurrence: when States elaborated primary rules, the question of what to do if these were violated emerged almost automatically; and in such cases, the States would often provide for some special rules on the content, degree and forms of State responsibility. Though the main case seemed to be the one where a special regime was provided by treaty, Riphagen, in apparent contrast to Ago, also assumed that the content of a particular primary rule might justify supplementing it with special secondary rules. The attempt to construct such linkages became quite central for Riphagen, who, for this purpose, discussed aggression and other breaches of international peace and security, as well as countermeasures in connection with a wide definition of objective regimes. Apart from the question of international "crimes", the discussion did not proceed towards the identification of other specific types of relationships between particular primary rules and the consequences of their violation.[187]

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[177] Adopted in Rio de Janeiro on 14 June 1992, *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, vol. I: *Resolutions Adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigenda), resolution 1, annex I, p. 2.

[178] *EC Measures Concerning Meat and Meat Products (Hormones)* (see footnote 57 above), paras. 123–125. For the "precautionary principle" in environmental law, see Daillier and Pellet, *Droit international public* (footnote 74 above), pp. 1307–1310.

[179] D. Bodansky and J. R. Crook, "Symposium: The ILC's State responsibility articles: introduction and overview", AJIL, vol. 96, No. 4 (2002), p. 773, at p. 774.

[180] J. Crawford, "The ILC's articles on responsibility of States for internationally wrongful acts: a retrospect", *ibid*., p. 874, at p. 880.

[181] P. Weil, "Towards relative normativity in international law?", *ibid*., vol. 77 (1983), p. 413.

[182] See especially the fifth report on State responsibility by Roberto Ago, Special Rapporteur, *Yearbook ... 1976*, vol. II (Part One), document A/CN.4/291 and Add.1–2, pp. 6–7, paras. 12–15.

[183] *Ibid.*, p. 26, para. 80.

[184] *Ibid.*, p. 6, para. 14. See also draft article 17 proposed by Special Rapporteur Ago in his fifth report, *ibid.*, p. 24, para. 71.

[185] Third report on State responsibility by Willem Riphagen, Special Rapporteur, *Yearbook ... 1982*, vol. II (Part One), document A/CN.4/354 and Add.1–2, p. 28, para. 35.

[186] *Ibid.*, para. 38.

[187] Fourth report on State responsibility by Willem Riphagen, Special Rapporteur, *Yearbook ... 1983*, vol. II (Part One), document A/CN.4/366 and Add.1, pp. 8–24, paras. 31–130.

141. Riphagen's approach was inspired by a "functional analysis" of three different types of rules of international law: those seeking to keep States separate, those that reflected what he called a "common substratum" and those that sought to organize parallel exercises of State sovereignty.[188] Whatever its sociological merits, the analysis failed to convince the Commission, which did not integrate his "systems" or "subsystems" into the draft articles. His attempt to depart from Ago by classifying the consequences of the breach of obligations by the source or content of those obligations (general custom—conventional international law—judicial, quasi-judicial and other institutional decisions) likewise never ended up in the draft.[189] This did not mean that the Commission wished to exclude the possibility of tailoring the consequences of a breach to the nature of the primary rule violated, only that it felt it sufficient to deal with this by a savings clause, the formulations of which finally ended up in what became article 55.

142. It was, in other words, accepted that the articles were of a residual nature, and that special regimes of responsibility could be adopted by States. What was the relationship of such regimes to the general law? Even though Riphagen used the term "self-contained", and foresaw a "theoretical" possibility that the relevant set of "conduct rules, procedural rules and status provisions [might form] a closed legal circuit",[190] in fact he never wanted to say they were completely isolated:

> This does not necessarily mean that the existence of the subsystem excludes permanently the application of any general rules of customary international law relating to the legal consequences of wrongful acts. … [T]he subsystem itself as a whole may fail, in which case a fall-back on another subsystem may be unavoidable.[191]

143. This seems evident. Two observations are needed, however. First, though Riphagen only speaks of the "failure" of a subsystem, it must be assumed that the same consequence may also follow from the simple silence of the subsystem. Second, although Riphagen only speaks of a fall-back on other "subsystems", it is hard to see why he would wish to exclude fall-back on the general rules of State responsibility—as indeed he specifically says elsewhere:

> Every one of the many different régimes (or subsystems) of State responsibility … is in present-day international law subject to the universal system of the United Nations Charter, including its elaboration in unanimously adopted declarations…[192]

144. Riphagen did not elaborate on the nature or scope of this "universal system"—apart from noting that it also included *jus cogens*. That question was in due course completely absorbed by the question of "crimes".[193]

145. Despite the terminology used by Riphagen, the substance of his arguments is relatively uncontroversial and does little other than recapitulate points made in the first part of this study concerning the relationship between special and general law and the pragmatic need to prioritize the former over the latter. The draft articles, Riphagen noted, "cannot exhaustively deal with the legal consequences of any and every breach of any and every legal obligation".[194] Thus, although he had described the question of subsystems as a "general problem underlying the drafting of part 2", Riphagen felt it could still be resolved in a relatively simple and uncontroversial way by a general savings clause.[195] The result was then that the provisions of the draft itself became "no more than rebuttable presumptions as to the legal consequences of internationally wrongful acts".[196]

146. At this stage, Riphagen noted the possibility that there might be violations of rules under two subsystems providing for parallel or differing consequences (*e.g.* countermeasures might be allowed under one subsystem but prohibited under another). While the *lex specialis* rule might resolve some such problems, it could not automatically resolve a possible conflict where the object and purpose of the subsystems might differ—an example might concern the application of principles of environmental law within the administration of a trade instrument. For this purpose Riphagen suggested that "it would still seem necessary to draw up a catalogue of possible legal consequences in a certain order of gravity, and to indicate the principal circumstances precluding one or more legal consequences in a general way".[197] This led him to a discussion of the hierarchy of legal consequences—a discussion that peaked in, and was in the end exhausted by, a discussion of international crimes.[198] In the end, the only hierarchy proposed by Riphagen was two limitations to the savings clause: a self-contained regime could deviate neither from rules of *jus cogens,* nor from "the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security".[199]

147. Like Riphagen, his successor, Arangio-Ruiz, accepted the "presence of those treaty-based systems or combinations of systems which tend to address, within their own contractual or special framework, the legal

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[188] Third report on State responsibility by Willem Riphagen, Special Rapporteur (A/CN.4/354 and Add.1–2) (see footnote 185 above), pp. 28–30, paras. 39–53.

[189] For the proposal, see *ibid.*, pp. 40–44, paras. 106–128.

[190] Willem Riphagen, *Yearbook ... 1982*, vol. I, summary record of the 1731st meeting of the Commission, p. 202, para. 16.

[191] Third report on State responsibility by Willem Riphagen, Special Rapporteur (A/CN.4/354 and Add.1–2) (see footnote 185 above), p. 30, para. 54.

[192] *Ibid.*, p. 39, para. 104.

[193] *Ibid.*, p. 39, paras. 104–105.

[194] *Ibid.*, p. 31, para. 55.

[195] The original form of that clause in 1982 was as follows: "The provisions of this part apply to every breach by a State of an international obligation, except to the extent that the legal consequences of such a breach are prescribed by the rule or rules of international law establishing the obligation or by other applicable rules of international law" (*ibid.*, p. 47, para. 147, art. 3). The effect of this was to provide for the application of the Commission's draft "*unless otherwise provided for*" (*ibid*., para. (5) of the commentary). See also *ibid.*, p. 39, para. 103. The Commission agreed. In 1983, it adopted the following savings clause: "…the provisions of this part govern the legal consequences of any internationally wrongful act of a State, except where and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question" (*Yearbook ... 1983*, vol. II, (Part Two), p. 42, para. 133, art. 2).

[196] Third report on State responsibility by Willem Riphagen, Special Rapporteur (A/CN.4/354 and Add.1–2) (see footnote 185 above), p. 31, para. 57.

[197] *Ibid.*, p. 34, para. 77.

[198] For Willem Riphagen, "crimes" denoted one special subsystem of international law that provided a special set of consequences (*ibid.*, pp. 44–46, paras. 130–143).

[199] Willem Riphagen, with regard to draft article 2 proposed by the Special Rapporteur in his fifth report, *Yearbook ... 1984*, vol. I, summary record of the 1858th meeting of the Commission, p. 261, paras. 4, 6–9.

regime governing a considerable number of relationships among the States parties, including in particular the consequences of any breaches of the obligations of States parties under the system".[200] Within such a broad, systemic view, he noted that "some legal scholars" had identified a category of "self-contained regimes" that affected "the *faculté* of States parties to resort to the remedial measures which are open to them under general international law".[201] Arangio-Ruiz made express the difference between the broader view that spoke in terms of systems or subsystems of rules in general and the narrower view that he identified with Bruno Simma's influential 1985 article, focusing on subsystems intended

> to exclude more or less totally the application of the general legal consequences of wrongful acts, in particular the application of the countermeasures normally at the disposal of an injured party.[202]

148. Arangio-Ruiz himself appeared initially to adhere to the wider notion, noting as examples of self-contained regimes the "system" set up by the treaties establishing the European Communities, the regime created by the human rights treaties, and diplomatic law, as stated by the International Court of Justice in the *United States Diplomatic and Consular Staff in Tehran* case. Developing his argument, however, he focused on the narrower problem, namely whether the remedial measures—especially countermeasures—in such regimes "affect[ed] to any degree the possibility for legal recourse by States parties to the measures provided for, or otherwise lawful, under general international law".[203] Consequently, most of Arangio-Ruiz's treatment of self-contained regimes—in particular his discussion of the relevant State practice—sought an answer to the question of whether such regimes were fully isolated from general law ("formed closed legal circuits") or, in other words, excluded future recourse to the remedies in the general law of State responsibility. His answer to that question was an emphatic no. Because he defined self-contained regimes as sets of rules that were hermetically isolated from general law, he found no such regimes in practice: "none of the supposedly self-contained regimes seems to materialize *in concreto.*"[204]

149. Arangio-Ruiz did not oppose the establishment of special treaty-based regimes. They were needed "to achieve, by means of *ad hoc* machinery, a more effective, organized monitoring of violations and responses thereto". But he rejected the conclusion that this would bar them from ever resorting to general law.[205] Fall-back to general remedies was needed at least in the event that a State failed to receive effective reparation or an unlawful act persisted while the procedures in the special regime were in progress.[206] He admitted that derogations or "fall-backs" should only take place in "extreme cases". A special regime was, after all, a multilateral bargain from which each party received some benefits for submitting to a common procedure. Nonetheless, his main point concerned the openness of allegedly "closed" regimes. The priority of the special regime followed from the general rules of international law and treaty interpretation, but it did not entail a presumption of abandonment of the guarantees of general law—this is how Arangio-Ruiz read the clause concerning the residual nature of the draft articles in the (then) article 2. It would fail to correspond to the intent of the States wishing to strengthen (instead of to derogate from) the ordinary rules on State responsibility.[207]

150. Special Rapporteur James Crawford came to self-contained regimes in 2000 in connection with draft articles 37 to 39, which dealt with the relationship between the Commission's draft and the law outside it. Article 37 contained a general clause on the residual role of the draft: special rules would be allowed. Crawford refrained from responding in general terms to the question of whether such special rules were also exclusive. This was "always a question of interpretation in each case".[208] As an example of the case where a self-contained regime was "exclusive", Crawford referred to the WTO remedies system. As a case where the special regime only modified some aspect of the general law, he referred to article 41 of the European Convention on Human Rights. Crawford left open, however, whether "exclusivity" here meant exclusive and *final* replacement of the general law or merely its substitution at an initial stage, with the possibility of "fall-back" if the self-contained regime had, as Riphagen had put it, "failed". The two examples survive in the commentary to the draft articles.

151. In this connection, article 37 was moved from part 2 into part 4 (general provisions), where it became article 55, was titled *lex specialis,* and came to cover the whole draft: both the conditions of existence of a wrongful act and the content and implementation of State responsibility.[209] As pointed out at the beginning of this report, the Commission did not mean by this that every deviation under article 55 would have the nature of a "self-contained regime". It distinguished between what it called a "strong" and a "weak" form of *lex specialis* and labelled only the former "self-contained". Why it used the terminology of "strong"/"weak" is far from clear, however, and possibly a source of confusion. The operative distinction in the commentary is not between provisions that are normatively "stronger" and those that are normatively "weaker", but rather between "specific treaty provisions on a single point" (regular *lex specialis*—the Commission's "weak" form) and whatever could be

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[200] Third report on State responsibility by Gaetano Arangio-Ruiz, Special Rapporteur, *Yearbook ... 1991*, vol. II (Part One), document A/CN.4/440 and Add.1, p. 25, para. 84.

[201] *Ibid*.

[202] *Ibid.*, footnote 167, quoting B. Simma, "Self-contained regimes", *Netherlands Yearbook of International Law*, vol. 16 (1985), pp. 117.

[203] Third report on State responsibility by Gaetano Arangio-Ruiz, Special Rapporteur (A/CN.4/440 and Add.1) (see footnote 200 above), p. 26, paras. 85–86. Likewise the fourth report on State responsibility by Gaetano Arangio-Ruiz, Special Rapporteur, *Yearbook ... 1992*, vol. II (Part One), document A/CN.4/444 and Add.1–3, p. 35, para. 97.

[204] Fourth report on State responsibility by Gaetano Arangio-Ruiz, Special Rapporteur (A/CN.4/444 and Add.1–3) (see footnote 203 above), p. 40, para. 112.

[205] *Ibid.*, p. 40, paras. 112 and 114.

[206] *Ibid.*, pp. 40–41, para. 115.

[207] *Ibid.*, p. 42, paras. 123–124.

[208] Third report on State responsibility by James Crawford, Special Rapporteur, *Yearbook … 2000*, vol. II (Part One), document A/CN.4/507 and Add.1–4, p. 110, para. 420.

[209] Article 55 (*Lex specialis*) reads: "These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law" (*Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 140).

extracted from the *S.S. "Wimbledon"* and *United States Diplomatic and Consular Staff in Tehran* cases (the Commission's "strong" form). Because the Commission only defined "self-contained regimes" by reference to the examples of these two cases, it thereby imported, as we have seen, two different meanings into the draft: (*a*) the view of a self-contained regime as a special set of consequences for wrongfulness (*United States Diplomatic and Consular Staff in Tehran*); and (*b*) the view of a self-contained regime as a set of primary and secondary rules governing the administration of a problem (*S.S. "Wimbledon"*). Neither of these is necessarily any "stronger" (at least in the sense of more binding or less amenable to derogation) than a "specific treaty provision[ ] on a single point".

152. The following conclusions may be drawn from the Commission's treatment of "self-contained regimes" in the context of State responsibility:

(*a*) *Definition*. The concept of "self-contained regimes" was constantly used by the Special Rapporteurs in a narrow and a wide sense, and both were imported into the Commission's commentary on article 55. The following qualify as a self-contained regime: (*i*) a special set of secondary rules that determine the consequences of a breach of certain primary rules (including the procedures of such determination); and (*ii*) any interrelated cluster (set, regime, subsystem) of rules on a limited problem, together with rules for the creation, interpretation, application, modification or termination—in a word, administration—of those rules. In addition, academic commentary and practice make constant reference to a third notion—"branches of international law"—that are also assumed to function in the manner of self-contained regimes, claiming to be regulated by their own principles;

(*b*) *Establishment*. States are entitled to set up self-contained regimes that have priority over the general rules in the draft articles. The only limits to this entitlement are the same as those that apply to *lex specialis*. This means, among other things, that "States cannot, even as between themselves, provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to peremptory norms of general international law … the special rules in question [must] have at least the same legal rank as those expressed in the articles";[210]

(*c*) *Relationship between a self-contained regime and general law under normal circumstances*. The relationship between a self-contained regime and the general law on State responsibility should be determined principally by interpreting the instrument(s) that established the regime. However, no self-contained regime is a "closed legal circuit". While a special/treaty regime has (as *lex specialis*) priority in its sphere of application, that sphere should normally be interpreted in the way that exceptions are, that is, in a limited way. In any case, the rules of the general law on State responsibility—like the rest of general international law—supplement it to the extent that no special derogation is provided in or can be inferred from the instrument(s) constituting the regime;

(*d*) *Failure of a self-contained regime*. The question of residual application of the general rules in situations not expressly covered by a "self-contained regime", or possible "fall-back" to the general rules of State responsibility in case of the failure of that regime, is not expressly covered in the draft or in the commentary. However, it is dealt with by Special Rapporteurs Riphagen and Arangio-Ruiz, both of whom hold it self-evident that, once a self-contained regime fails, recourse to general law must be allowed. What such failure might consist of has not been explicitly addressed by the Commission. However, an analogy could be drawn from the conditions under which the exhaustion of local remedies rule need not be followed. These would be cases where the remedy would be manifestly unavailable or ineffective or where it would be otherwise unreasonable to expect recourse to it;

(*e*) *Inappropriateness of the term "self-contained"*. None of the Special Rapporteurs and none of the cases discussed by them implies the idea of special systems or regimes that would be fully isolated from general international law. To this extent, the notion of a "self-contained regime" is simply misleading. Although the degree to which a regime of responsibility, a set of rules on a problem or a branch of international law needs to be supplemented by general law varies, there is no support for the view that anywhere would general law be fully excluded. As will become apparent below, such exclusion may not even be conceptually possible. Hence, it is suggested that the term "self-contained regime" be replaced by "special regime".

3. The relationship between self-contained regimes outside State responsibility and general international law

153. In regard to fragmentation, the main questions of interest concern the relationship between the self-contained (special) regime in each of its three meanings, as discussed above, and general law: (*a*) the conditions for the establishment of a special regime; (*b*) the scope of application of the regime *vis-à-vis* general international law under normal circumstances; and (*c*) the conditions for "fall-back" to general rules owing to the regime's failure.

(a) *Establishment of self-contained (special) regimes*

154. As to the first question, there is little doubt that most international law—and not only the law of State responsibility—is dispositive, and that contracting out by establishing a regime is possible, limited only to the extent that such limitation may be derived from the *jus cogens* nature or otherwise compelling character of general law. Aside from peremptory norms, at least the following limitations should be considered:

(*a*) The regime may not deviate from the law benefiting third parties, including individuals and non-State entities;

(*b*) The regime may not deviate from general law if the obligations of general law are of an "integral" or

[210] Para. (2) of the commentary to article 55 of the draft articles on responsibility of States for internationally wrongful acts, *ibid*.

"interdependent" nature or have an *erga omnes* character or if practice has created a legitimate expectation of non-derogation;[211]

(*c*) The regime may not deviate from treaties that have a public law nature or which are constituent instruments of international organizations.[212]

155. However, different considerations may apply to the establishment of self-contained (special) regimes in each of the three senses of that expression.

156. Setting up a special regime of State responsibility—that is, special consequences for breach—is normally possible only by a treaty that identifies the primary rules to which it applies, the nature, content and form of the (special) responsibility, and the institutions that are to apply it. Though it is not conceptually inconceivable that such a regime might emerge tacitly, or by way of custom (*e.g.* a regime of collective countermeasures by non-injured States, as foreseen under article 54 of the draft articles on responsibility of States for internationally wrongful acts[213]), this would seem exceptional.

157. The establishment of a special regime in the wider sense (*S.S. "Wimbledon"*, any interlinked sets of rules, both primary and secondary) would also normally take place by means of one or several treaties (*e.g.* the WTO "covered treaties"). However, it may also occur that a set of treaty provisions develops over time, without conscious decision by States parties, perhaps through the activity of an implementing organ, into a regime with its own rules of administration, modification and termination. It took until 1963 before the European Court of Justice defined the (then) European Economic Community as a "new legal order of international law".[214] The development of European law into a self-contained regime—including the principles of direct effect, supremacy and the doctrine of fundamental rights—has to a very large extent taken place through the interpretative activity of the European Court of Justice, and not always with the full support of all member States. As we have seen, the same is largely (though in a much narrower sense) true of human rights law as well. Though the States parties have, of course, established implementing organs, and thereby taken the first step towards self-containedness, the extent of the autonomy of these regimes has largely been determined by those organs. The standard example here is the development of a doctrine on the separability of reservations to the European Convention on Human Rights.[215]

158. The widest of special regimes—denominations such as "international criminal law", "humanitarian law", "trade law", "environmental law" and so on—emerge from the informal activity of lawyers, diplomats and pressure groups, more through shifts in legal culture and in response to practical needs of specialization than as conscious acts of regime creation. Such notions mirror the functional diversification of international society or, more prosaically, the activities of particular caucuses seeking to articulate or strengthen preferences and orientations that seem not to have received sufficient attention under the general law. The application of special "principles" by specialized implementation organs is a visible feature of such regimes.

(b) *The relationship between the self-contained (special) regime and general international law under normal circumstances*

159. The relationship between the special regime and the general law—that is to say, the degree to which a regime is self-contained in the first place—will be predominantly a matter of interpreting the treaties that form the regime. To what extent does a general law serve to fill gaps or to assist in the interpretation or application—that is, in the administration—of the regime? Once it is clear that no regime is completely isolated from general law, the question emerges as to their relationship *inter se*.

160. It is possible to illustrate these linkages in practice by reference to the operation of the supervisory bodies in human rights and trade law, two regimes specifically mentioned in the Commission's commentary to article 55 of the draft articles on responsibility of States for internationally wrongful acts.

(i) Example: human rights regimes

161. Human rights organs, such as the European Court of Human Rights and the Inter-American Court of Human Rights, regularly refer to rules and principles of general international law concerning not only treaty interpretation but matters such as statehood, jurisdiction and immunity, as well as a wide variety of principles of procedural propriety.[216] The Inter-American Court has used its wide advisory jurisdiction to interpret not only other human rights instruments (such as the European Convention on Human Rights or the 1966 International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights) but also instruments such as the Vienna Convention on Consular Relations of 1963.[217] In an opinion from 1988 it expressly referred to the international law principle of continuity of the State, according to which State responsibility persists despite changes of government.[218] In a series of recent cases, the European Court of Human Rights has clarified the relationship between the rights in the European Convention on Human Rights and State immunities, recognizing the validity of the latter over, for instance, the right of access to courts

[211] See the discussion on *erga omnes* obligations in chapter IV below.

[212] See chapter II, section B, on *lex specialis,* above.

[213] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 137.

[214] Case 26/62, *NV Algemene Transport—en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, judgment of 5 February 1963, *European Court Reports*, English special edition 1963, p. 1, at p. 12.

[215] See *Belilos v. Switzerland* (footnote 55 above), p. 24, para. 50, and p. 28, para. 60.

[216] On this, see especially the review by Caflisch and Cançado Trindade (footnote 159 above).

[217] See *"Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, advisory opinion OC-1/82 of 24 September 1982, Inter-American Court of Human Rights, Series A, No. 1.

[218] *Velásquez Rodríguez v. Honduras*, judgment (merits), 29 July 1988, Inter-American Court of Human Rights, Series C, No. 4, para. 184; see also *Inter-American Yearbook on Human Rights* (1988), p. 914, at p. 990, para. 184.

under article 6, paragraph 1, of the Convention. In particular, it has pointed out that

> [t]he Convention … cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account … The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.[219]

162. There was no *a priori* assumption that the rules of the Convention would override those of general law. On the contrary, the Court assumed the priority of the general law on immunity, making the point that

> measures taken by a High Contracting Party which reflect recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1. Just as the right of access to court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.[220]

163. That the Convention should not be treated as if it existed in a legal vacuum has also been affirmed by the Court in regard to the rules of State jurisdiction and State responsibility. In the *Banković* case (1999), it made this point:

> [T]he Court reiterates that the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty. The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part.[221]

164. In other words, the European Convention on Human Rights is not, and has not been conceived as, a self-contained regime in the sense that recourse to general law would have been prevented. On the contrary, the Court makes constant use of general international law, with the presumption that the Convention rights should be read in harmony with that general law and without an *a priori* assumption that Convention rights would be overriding.

(ii) Example: World Trade Organization law

165. Though perhaps more controversial, the matter is not significantly different in the WTO system. Although, as we have seen, it has sometimes been suggested that WTO "covered treaties" form a closed system, this position has been rejected by the WTO Appellate Body in terms that resemble the language used by the European Court of Human Rights, noting that WTO agreements should not be read "in clinical isolation from public international law".[222] Since then, the Appellate Body has frequently sought "additional interpretative guidance, as appropriate, from the general principles of international law".[223] More recently a WTO Panel has had occasion to specify this, as follows:

> We take note that Article 3.2 of the [Understanding on Rules and Procedures Governing the Settlement of Disputes] requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary rules of interpretation of public international law. However, the relationship of the WTO Agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between the WTO members. Such international law applies to the extent that the WTO treaty agreements do not "contract out" from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.[224]

166. Nonetheless, academic opinion is divided as to how far this actually goes, with focus especially on the use by WTO organs of law from other special regimes, especially environmental law, or provisions of non-WTO treaties. But whatever view one takes of the *competence* of WTO panels and the Appellate Body, that position is neither identical to nor determinative of how to view the question of whether "WTO law" (or, more precisely, "WTO covered agreements") is also *substantively* self-contained.[225]

167. The starting point for analysis is usually articles 3, paragraph 2, and 19, paragraph 2, of the Understanding on Rules and Procedures Governing the Settlement of Disputes, according to which WTO dispute settlement is intended to preserve the rights and obligations of members under the agreements covered.[226] This has sometimes been interpreted to mean that non-WTO law cannot be used in any way to affect whatever "rights and obligations" are provided under WTO law.[227] An extreme interpretation might view this as a complete setting aside of all non-WTO law. However, this is countered by the further language of article 3, paragraph 2, of the Understanding, according to which panels and the Appellate Body are to apply the "customary rules of interpretation of public

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[219] *McElhinney v. Ireland* [GC], No. 31253/96, ECHR 2001-XI (extracts), para. 36. Similarly, *Al-Adsani v. the United Kingdom* [GC], No. 35763/97, *ibid*., para. 55.

[220] *Fogarty v. the United Kingdom* [GC], No. 37112/97, *ibid*. (extracts), para. 36.

[221] *Banković and Others v. Belgium and Others (dec.)* [GC], No. 52207/99, ECHR 2001-XII, p. 351, para. 57 (references omitted).

[222] *United States—Standards for Reformulated and Conventional Gasoline* (see footnote 48 above), p. 17.

[223] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Appellate Body report, WT/DS58/AB/R, adopted 6 November 1998, para. 158.

[224] *Korea—Measures Affecting Government Procurement* (see footnote 44 above), para. 7.96.

[225] This point is made with emphasis in Pauwelyn, *Conflict of Norms…* (see footnote 21 above), pp. 460–463.

[226] Article 3, paragraph 2, provides:

"Recommendations and rulings of the [dispute settlement body] cannot add to or diminish the rights and obligations provided in the covered agreements."

Article 19, paragraph 2, provides that:

"…in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."

[227] Thus Joel Trachtman has argued that "WTO dispute resolution panels and the Appellate Body are limited to the application of substantive WTO law and are not authorized to apply general substantive international law or other conventional international law" (Trachtman, "The domain of WTO dispute resolution" (see footnote 47 above), p. 347–348). Trachtman allows, of course, the application of the rules of interpretation in the 1969 Vienna Convention, as well as any other rules specifically incorporated. These, he understands, would mainly deal with procedural, not substantive law.

international law"—a provision that incorporates not only the 1969 Vienna Convention but also, through articles 31 and 32 thereof, any other rules of treaty interpretation, including, for example, article 31, paragraph 3 (*c*), under which an interpretation should take into account "[a]ny relevant rules of international law applicable in the relations between the parties".[228]

168. The 1969 Vienna Convention rules on treaty interpretation—articles 31 and 32—are recognized as customary law and widely applied in the WTO system.[229] But the Appellate Body has frequently discussed and applied other public international law standards as well. There has been considerable debate on the relationship between the WTO "covered treaties" and environmental agreements.[230] The Panel in *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (the *"Shrimp–Turtle* case", 1998) defined the notion of "exhaustible natural resources" in article XX (*g*) of the General Agreement on Tariffs and Trade (GATT) so as to include only "finite resources such as minerals, rather than biological or renewable resources". The Appellate Body did not share this view. The notion needed to be interpreted in view of recent developments: "the generic term 'natural resources' in Article XX (*g*) is not 'static' in its content or reference but is rather 'by definition evolutionary'". In order to seek such an updated meaning, it referred, among other instruments, to the 1992 Rio Declaration[231] and Agenda 21,[232] the Convention on Biological Diversity of 1992, and the United Nations Convention on the Law of the Sea, and thereby reached the interpretation that all natural resources, both living and non-living, were included.[233]

169. Though many views have been taken on the question of applicable law within the WTO, two major positions seem to have emerged. One holds WTO to be part of international law, operating within the general system of international law rules and principles. This position may be rationalized, for example, by presuming that, when States adopted the Marrakesh agreements, they were doing so in accordance with and under the rules and principles of international law and that there was no reason to assume—absent express agreements to the contrary—that these rules and principles would not continue to govern the administration of those agreements. The other position focuses on the provisions in the Understanding on Rules and Procedures Governing the Settlement of Disputes requiring that panels and the Appellate Body neither add to nor diminish the obligations under the "covered treaties". In practice, however, the two positions may not be altogether difficult to reconcile with almost any practice under WTO. The latter view may accept even a wide use of international customary law and other treaties by viewing them as incorporated into WTO either specifically (through art. 3, para. 2, of the Understanding) or implicitly by reference to the context in which the WTO agreements were made. In any case, both positions can accommodate a very wide-ranging practice (somewhat like the "monist" and "dualist" positions within domestic law), including statements such as that by the Panel in the 2000 *Korea—Measures Affecting Government Procurement*[234] case. There seems, therefore, little reason in principle to depart from the view that general international law supplements WTO law, unless it has been specifically excluded, and that so do other treaties, which should, preferably, be read in harmony with the treaties covered by WTO.[235]

170. This does not exclude the emergence of a specific "WTO ethos" in the interpretation of WTO agreements, just as it is possible to discern a "human rights ethos" in the work of the human rights treaty bodies. Nor does it prevent the setting aside of normal State responsibility rules in the governance of WTO treaties. Indeed, this was the *raison d'être* of the WTO system, and it receives normative force from the *lex specialis* rules of general law itself. Even as it is clear that the competence of WTO bodies is limited to consideration of claims under the agreements covered (and not, for example, under environmental or human rights treaties), when elucidating the content of the relevant rights and obligations WTO bodies must situate those rights and obligations within the overall context of general international law (including the relevant environmental and human rights treaties).

171. Nor is this any idiosyncrasy of WTO; it extends to practices under regional trade agreements. For example, in *Feldman v. Mexico*, an Arbitration Tribunal under the North American Free Trade Agreement needed to determine the meaning of the expression "expropriation" under article 1110 of the Agreement. The Tribunal found that the article was "of such generality as to be difficult to apply in specific cases". Accordingly, it read it against

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[228] See chapter V below.

[229] In noting this, the WTO Appellate Body has used the International Court of Justice as its authority for determining the customary law nature of the rules on interpretation in the 1969 Vienna Convention. See *United States—Standards for Reformulated and Conventional Gasoline* (footnote 48 above), pp. 19–20. The customary law nature of article 32 is affirmed in *Japan—Taxes on Alcoholic Beverages*, WTO Appellate Body report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 10. For further discussion, see Lindroos and Mehling, "Dispelling the Chimera of 'self-contained regimes'…" (footnote 43 above).

[230] See J. Cameron and J. Robinson, "The use of trade provisions in international environmental agreements and their compatibility with the GATT", *Yearbook of International Environmental Law*, vol. 2 (1991), p. 3. For a good overview of the case law until the *United States—Import Prohibition of Certain Shrimp and Shrimp Products* case (see footnote 223 above), see M. J. Trebilcock and R. Howse, *The Regulation of International Trade*, 2nd ed., London, Routledge, 1999, pp. 397–420. See further G. Marceau, "Conflicts of norms and conflicts of jurisdictions: the relationship between the WTO Agreement and MEAs and other treaties", *Journal of World Trade*, vol. 35 (2001), pp. 1081–1131.

[231] *Report of the United Nations Conference on Environment and Development…* (see footnote 177 above).

[232] Adopted in Rio de Janeiro, 14 June 1992, *ibid.*, resolution 1, annex II, p. 9.

[233] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Panel report, WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body report WT/DS58/AB/R, para 3.237; *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Appellate Body report (see footnote 223 above), paras. 127–131. Moreover, it viewed their exhaustibility by reference to the fact that all seven sea turtle species were listed in appendix I to the Convention on International Trade in Endangered Species of Wild Flora and Fauna, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Appellate Body report, paras. 132–133.

[234] *Korea—Measures Affecting Government Procurement* (see footnote 44 above).

[235] A recent work taking the latter position is Pauwelyn, *Conflict of Norms…* (see footnote 21 above).

the "principles of customary international law" in order to clarify whether it applied to State action against grey market cigarette exports.[236]

(iii) Conclusions on the relationship between self-contained (special) regimes and general international law under normal circumstances

172. None of the treaty regimes in existence today is self-contained in the sense that the application of general international law would be generally excluded. On the contrary, treaty bodies in human rights and trade law, for example, make constant use of general international law in the administration of their special regimes. Though States have the *faculté* to set aside much general law by means of special systems of responsibility or rule administration, what conclusions should be drawn from this depends somewhat on the normative coverage, or "thickness", of the regime. The scope of a special State responsibility regime is normally defined by the relevant treaty. No assumption is entailed that general law would not apply outside of these special provisions. In the case of an interlocked set of rules on regime creation, administration, amendment and termination, general law may have been excluded in a more extensive way. The very set of rules may be governed by special principles of interpretation, reflecting the object and purpose of the regime. This may affect, in particular, the competence of the interpreting organs tasked with advancing the purposes of the regime.

173. Finally, the widest of self-contained regimes—"environmental law", "space law", etc.—interact with other such denominations or clusters, indicating special principles that should be taken into account. It is typical of this third sense that it has neither clear boundaries nor a strictly determined normative force. It brings to legal decision-making considerations and elements that claim relevance and need to be balanced against other considerations. No firm exclusion is implied, the significance of this being that it points to factors and practices that may have more or less relevance depending on how the problem at issue is described (is it a "trade law" problem; it is a problem in "humanitarian law" or in "human rights law"?).

174. As Bruno Simma has suggested in his leading article on the question of self-contained regimes, the main question of interest here is: "*Under what circumstances, if any, can there be a fall-back on the general legal consequences of internationally wrongful acts?*"[237] As pointed out above, the Special Rapporteurs never considered self-contained regimes or subsystems as "closed legal circuits" in the sense that they would completely and finally exclude the application of general law. A minimal conclusion that one can draw from practice and the literature is that articles 31 and 32 of the 1969 Vienna Convention are always applicable, unless specifically set aside by other principles of interpretation. This has been affirmed by practically all existing bodies applying international law.[238] Because these articles—and in particular article 31, paragraph 3 (*c*)—already situate treaty interpretation within the general context of the rights and obligations of the parties, the question of the application of general international law (that is, general customary law and general principles of law) may seem to become somewhat academic. That they are always applicable is very strongly suggested by practice and doctrine alike, but especially by the writings of public international law generalists.[239] The position recently taken by Antonio Cassese is representative. Discussing the special procedures inscribed in human rights treaties to supervise the administration of the relevant treaties and react to breaches, he points out:

> It would be contrary to the spirit of the whole body of international law on human rights to suggest that the monitoring system envisaged in the [International] Covenant [on Civil and Political Rights] and the Protocol should bar States parties from "leaving" the self-contained regime contemplated in the Covenant and falling back on the customary law system of resort to peaceful counter-measures.[240]

175. The same position is taken in numerous academic writings in regard to human rights treaties. Pauwelyn summarizes the position succinctly:

> [I]n their treaty relations States can "contract out" of one, more or, in theory, all rules of international law (other than those of *jus cogens*), but they cannot contract out of the *system* of international law.[241]

176. There are, as Pauwelyn notes, policy reasons for this. But there is also a logical point to make. States cannot contract out from the *pacta sunt servanda* principle, unless the speciality of the regime is thought to lie in its creating no obligations at all (and even then it would seem hard to see where the binding force of such an agreement would lie). Overall, the claim (almost never heard) that

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[236] *Feldman v. United Mexican States*, International Centre for Settlement of Investment Disputes (ICSID) case No. ARB(AF)/99/1, award of 16 December 2002, *ICSID Review–Foreign Investment Law Journal*, vol. 18, No. 2 (October 2003), p. 488, at p. 523, para. 98; ILR, vol. 126, pp. 58–65.

[237] Simma, "Self-contained regimes" (see footnote 202 above), p. 118.

[238] For some recent affirmations, see *Sovereignty over Pulau Ligitan and Pulau Sipadan* (footnote 134 above), pp. 645–646, para. 37 (with a list of references to the Court's previous affirmations of the same). For similar recent affirmations by other tribunals, see, for example: *Japan—Taxes on Alcoholic Beverages* (footnote 229 above), pp. 10–12 (sect. D); *Restrictions to the Death Penalty (Arts. 4 (2) and 4 (4) American Convention on Human Rights)* (footnote 161 above), p. 76; *Ethyl Corp. v. The Government of Canada,* 28 November 1997, Arbitral Tribunal under the North American Free Trade Agreement, ILR, vol. 122 (2002), pp. 278–279, paras. 50–52 (noting that the United States had also accepted their status as custom); *Waste Management, Inc. v. United Mexican States*, ICSID case No. ARB(AF)/98/2, 2 June 2000, *ICSID Review–Foreign Investment Law Journal*, vol. 15 (2000), p. 214, at p. 243, footnote 2 (dissenting opinion of Keith Highet) (see also ILR, vol. 121 (2002), p. 51, footnote 2). The European Court of Human Rights also stated, early on, that it was "prepared to consider … that it should be guided by Articles 31 to 33 of the [1969] Vienna Convention" (*Golder v. the United Kingdom*, 21 February 1975, European Court of Human Rights, Series A, No. 18, p. 14, para. 29). It affirmed this recently ("the Convention must be interpreted in the light of the rules set out in the 1969 Vienna Convention") in *Banković and Others v. Belgium and Others* (see footnote 221 above), pp. 350–351, para. 55. For the rather wider formulation of the Iran–United States Claims Tribunal ("the task of the Tribunal is to interpret the relevant provisions of the Algiers Accords on the basis of the Vienna Convention on the Law of Treaties") see *Sedco, Inc. v. National Iranian Oil Company*, Iran–United States Claims Tribunal, case No. 129, 9 IRAN–U.S. C.T.R., p. 249, at p. 257 (with references to earlier formulations of the same). For the Algiers Accords, and in particular the Declaration concerning the Settlement of Claims of 19 January 1981, see ILM, vol. 20 (1981), p. 230.

[239] For a review of positions, see the fourth report on State responsibility by Gaetano Arangio-Ruiz, Special Rapporteur (A/CN.4/444 and Add.1–3) (footnote 203 above), pp. 36–38, paras. 99–106.

[240] A. Cassese, *International Law*, 2nd ed., Oxford, Oxford University Press, 2005, p. 276.

[241] Pauwelyn, *Conflict of Norms…* (see footnote 21 above), p. 37.

self-contained regimes are completely cocooned outside international law resembles the views held by late-nineteenth-century lawyers about the (dualist) relationship between national and international law.[242]

177. Under this view, general international law would be applicable only if specifically incorporated as part of a special regime. Whatever the validity of this view under national law, it is very hard to see how it could be applied to relations between international legal "regimes" and general international law. In the first place, the regime undoubtedly receives—or possibly fails to receive—binding force under general international law. The conditions of validity and invalidity of regime-establishment acts are assessed by general law. But this also means that most of the 1969 Vienna Convention—at least its customary law parts, including above all articles 31 and 32—automatically, and without incorporation, *is* a part of the regime: indeed, it is only by virtue of this Convention that the regime may be identified as such and delimited against the rest of international law. Thus, in a recent case, the International Court of Justice held that a provision in a *compromis* where it was authorized to apply the "rules and principles of international law" was superfluous if principles of treaty interpretation were meant:

> the Court would in any event have been entitled to apply the general rules of international treaty interpretation for the purpose of interpreting the [relevant] Treaty.[243]

178. In fact, there is no evidence of *any* rule regime that would claim to be valid or operative independently of the 1969 Vienna Convention.

179. In the second place, and unlike national law, international law regimes are always partial in the sense that they regulate only some aspects of State behaviour, while presuming the presence of a large number of other rules in order to function at all. They are always situated in a "systemic" environment. That, after all, is the *very meaning of the generality* of certain customary law rules or general principles of law. As the French–Mexican Claims Commission pointed out in the *Georges Pinson* case:

> *Toute convention internationale doit être reputée s'en référer tacitement au droit international commun, pour toutes les questions qu'elle ne résout pas elle-même en termes exprès et d'une façon differente.*[244]

180. Or, as stated more recently by the OSPAR Convention Arbitral Tribunal:

> the first duty of the Tribunal is to apply the OSPAR Convention. An international Tribunal … will also apply customary international law and general principles unless and to the extent that the parties have created a *lex specialis*.[245]

181. This is also reflected in the wide-ranging jurisprudence concerning State contracts. Initially, there may have been a sense that these existed in a legal vacuum. However, since the *Saudi Arabia v. ARAMCO* award (1958), it has become standard practice to refer to international law as the governing legal order. There, the Tribunal stated:

> It is obvious that no contract can exist *in vacuo*, *i.e.*, without being based on a legal system. The conclusion of a contract is not left to the unfettered discretion of the Parties. It is necessarily related to some positive law which gives legal effects to the reciprocal and concordant manifestations of intent made by the Parties.[246]

182. Even as the proper legal order for such contracts may remain a matter of some controversy, most lawyers would accept the statement of the sole arbitrator in *TOPCO/CALASIATIC* (1977) that this is "a particular and new branch of international law: the international law of contracts".[247] The consequences of this were also stated by the Iran–United States Claims Tribunal:

> As a *lex specialis* in the relations between the two countries, the Treaty supersedes the *lex generalis*, namely customary international law … however … the rules of customary law may be useful in order to fill in possible *lacunae* of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions.[248]

183. These rules and principles include at least those concerning statehood, jurisdiction, State representation, State succession, the creation and transfer of sovereignty, privileges and immunities of diplomats, territorial status (*e.g.* freedom of the high seas), rules on nationality, and the concept of "crimes against humanity", not to mention all the various rules that not only become applicable but are hierarchically superior to regime rules by virtue of Article 103 of the Charter of the United Nations. In their review of the practice of the European Court of Human Rights and the Inter-American Court of Human Rights, a member of the former and the President of the latter highlighted in detail the use of the international law of State responsibility, immunity, jurisdiction and the "general principles of law recognized by civilized nations" (not always distinguished from general principles of *international law*) by their treaty bodies. They concluded that

> *les systèmes en cause font partie intégrante du droit international général et conventionnel. Cela signifie que l'idée du fractionnement du droit international … n'a guère de pertinence pour les systèmes internationaux de protection des droits de l'homme.*[249]

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[242] In fact, this analogy is made in J. P. Trachtman, "Institutional linkage: transcending 'trade and…'", AJIL, vol. 96, No. 1 (January 2002), p. 77, at pp. 89–91.

[243] *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, *I.C.J. Reports 1999*, p. 1045, at p. 1102, para. 93.

[244] "Every international convention must be deemed tacitly to refer to general principles of international law for all the questions which it does not itself resolve in express terms and in a different way": *Georges Pinson (France) v. United Mexican States*, French–Mexican Claims Commission, award No. 1, 19 October 1928, UNRIAA, vol. V (Sales No. 1952.V.3), p. 327, at p. 422.

[245] *Dispute concerning Access to Information under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland* (see footnote 137 above), UNRIAA, vol. XXIII, p. 87, para. 84; ILR, vol. 126, p. 364.

[246] *Saudi Arabia v. Arabian American Oil Company (ARAMCO)*, award of 23 August 1958, ILR vol. 27, p. 117, at p. 165.

[247] *Texaco Overseas Petroleum Company/California Asiatic Oil Company v. Government of the Libyan Arab Republic*, ILM, vol. 17 (1978), p. 13, para. 32. For an overview of the development and present status of the "international law of investment", see, for example, A. F. Lowenfeld, *International Economic Law*, Oxford, Oxford University Press, 2002, pp. 387–493.

[248] *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran* (see footnote 125 above), p. 222, para. 112. Many thanks are due to Carlos López Hurtado for this and some other references and arguments.

[249] "[T]he systems in question are an integral part of general and conventional international law. This means that the notion of fragmentation of international law … is entirely irrelevant for international systems of human rights protection": Caflisch and Cançado Trindade (see footnote 159 above), pp. 60–61.

184. To press a perhaps self-evident point, there is no special "WTO rule" on statehood, or a "human rights notion" of transit passage, just as there is no special rule about State immunities within the European Court of Human Rights or a WTO-specific notion of "exhaustible resources". Moreover, the general rules operate unless their operation has been expressly excluded. This was the view of the Chamber of the International Court of Justice concerning the applicability of the local remedies rule in the *Elettronica Sicula S.p.A (ELSI)* case. It had 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.[250]

185. It is in the nature of general law to apply generally, *i.e.* inasmuch as it has not been specifically excluded. It cannot plausibly be claimed that these parts of the law—"important principles" as the Court put it—have validity only insofar as they have been "incorporated" into the relevant regimes. There has never been any act of incorporation. But more relevantly, it is hard to see how regime builders might have agreed *not* to incorporate (that is, opt out from) such general principles. The debate about new States' competence to pick and choose the customary law they wish to apply ended after decolonization without there having been much "rejection" of old custom. Few actors would care to establish relations with a special regime that claimed a blanket rejection of all general international law. Why, in such a case, would anyone (including the regime's establishing members) take the regime's engagements seriously?

(*c*) *Fall-back onto general rules owing to the failure of self-contained regimes*

186. The third case—the "failure" of a self-contained regime—is one that most commentators would agree brings the general law into operation. However, it is far from clear what may count as "failure". In assessing this, the nature of the regime must clearly be taken into account.[251] For most special regimes, their *raison d'être* is to strengthen the law on some particular subject matter, to provide more effective protection for certain interests or to create more context-sensitive (and in this sense more "just") regulation of a matter than what is offered under the general law. Reporting and individual applications to human rights treaty bodies, and the non-compliance mechanisms under environmental treaties, clearly seek to attain precisely this. The same is true of the rapid and effective WTO dispute settlement system.

187. Sometimes the risk may emerge that a special regime in fact waters down the relevant obligations. This may be caused, for instance, by the accumulation of an excessive backlog in the treatment of individual applications, a non-professional or biased discussion of national reports, or any other intentional or unintentional malfunction in the institutions of the regime. A dispute-settlement mechanism under the regime may function so slowly or so inefficiently that damage continues to be caused, without a reasonable prospect of a just settlement in sight. At some such point the regime will have "failed"—and at that point the possibility must become open for the beneficiaries of the relevant rights to turn to the institutions and mechanisms of general international law.

188. No general criteria can be set up to determine what counts as "regime failure". The failure might be either substantive or procedural. A substantive failure takes place if the regime completely fails to attain the purpose for which it was created: members of a free trade regime persist in their protectionist practices; pollution of a watercourse continues unabated, despite pledges by riparian States parties to a local environmental treaty. Inasmuch as the failure can be articulated as a "material breach" under article 60 of the 1969 Vienna Convention, then the avenues indicated in that article should be open to the members of the regime. It cannot be excluded, either, that the facts relating to regime failure may be invoked as a "fundamental change of circumstances" under article 62 of the 1969 Vienna Convention.

189. The other alternative is a procedural failure: the institutions of the regime fail to function in the way they should. For instance, they have provided for reparation, but that reparation is not forthcoming.[252] When it is a question of how far the States parties to a special regime must continue to have resort to the special procedures, analogous considerations would seem relevant, as in the context of the requirement of exhaustion of local remedies in the law of diplomatic protection. In this regard, the main principles are enunciated in draft articles 14 and 15 of the Commission's current draft on diplomatic protection. According to article 15, 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".[253]

190. This would seem to apply when the State suffering the damage is itself a member of the regime. For those outside the regime, of course, general law continues to prevail. But what might be the situation in cases where the injury is not suffered by a formal member of the regime,

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[250] *Elettronica Sicula S.p.A. (ELSI)*, Judgment, *I.C.J. Reports 1989*, p. 15, at p. 42, para. 50.

[251] See, for example, the fourth report on State responsibility by Gaetano Arangio-Ruiz, Special Rapporteur (A/CN.4/444 and Add.1–3) (footnote 203 above), pp. 40–41, paras. 115–116; see also Simma, "Self-contained regimes" (footnote 202 above), pp. 111–131; D. Alland, *Justice privée et ordre juridique international: Étude théorique des contre-mesures en droit international public*, Paris, Pedone, 1994, pp. 278–291; C. S. Homsi, "'Self-contained regimes'—no cop-out for North Korea!", *Suffolk Transnational Law Review*, vol. 24, No. 1 (winter 2000), pp. 99–123; and the various essays in Barnhoorn and Wellens (eds.) (footnote 12 above). The idea that a special regime, such as the WTO legal order, "falls back" on general international law while the degree of "contracting out" remains a matter of interpretation is also usefully discussed in Pauwelyn, *Conflict of Norms…* (see footnote 21 above), pp. 205–236.

[252] This is the example mentioned in the fourth report on State responsibility by Gaetano Arangio-Ruiz, Special Rapporteur (A/CN.4/444 and Add.1–3) (see footnote 203 above), pp. 40–41, para. 115 (*a*).

[253] *Yearbook … 2006*, vol. II (Part Two), p. 46, draft article 15.

but the regime nonetheless fails to bring about the objective set? For instance, the non-compliance mechanism under article 8 of the Montreal Protocol on Substances that Deplete the Ozone Layer is failing to bring any of the parties in routine breach of their emission reduction obligations under article 2 of the Protocol into order. A number of States parties to the 1966 International Covenant on Civil and Political Rights continue to engage in massive human rights violations, irrespective of the Human Rights Committee's opinions and conclusions. When may the other parties take countermeasures against a State in breach of its obligations under articles 49 or 54 of the draft articles on responsibility of States for internationally wrongful acts?[254] There are no clear answers to these questions, but it seems evident that at some point there must be a "fall-back" on general rules of State responsibility, including countermeasures and general mechanisms of dispute settlement (*e.g.* recourse to the International Court of Justice under a compulsory jurisdiction declaration made by two members of a special regime).[255]

4. Conclusions on self-contained regimes

191. The rationale for special regimes is the same as that for *lex specialis*. They take better account of the particularities of the subject matter to which they relate; they regulate it more effectively than general law and follow closely the preferences of their members. Where the application of the general law concerning reactions to breaches (especially countermeasures) might be inappropriate or counterproductive, a self-contained regime, such as, for instance, the system of *persona non grata* under diplomatic law, may be better suited to deal with such breaches. However, as the Commission observes, it is equally clear that, if the general law has the character of *jus cogens*, then no derogation is permitted. In fact, the assumption seems to be that, in order to justify derogation, the special rules "have at least the same legal rank as those expressed in the articles".[256]

192. But no regime is self-contained. Even in the case of well-developed regimes, general law has at least two types of function. First, it provides the normative background that comes in to fulfil aspects of the regime's operation not specifically provided by the regime. In the event of the dissolution of a State that is party to a dispute within the WTO dispute settlement system, for instance, general rules of State succession will determine the fate of any claims reciprocally made by and against the dissolved State. This report has illustrated some of the ways in which this supplementing takes place. Second, the rules of general law also come into operation if the special regime fails to function properly. Such failure might be substantive or procedural, and at least some of the avenues open to regime members in such cases are outlined in the 1969 Vienna Convention itself. The rules on State responsibility might also be relevant in such situations.

193. Third, the term "self-contained regime" is a misnomer. No legal regime is isolated from general international law. It is doubtful whether such isolation is even possible: a regime can receive (or fail to receive) legally binding force ("validity") only by reference to (valid and binding) rules or principles *outside itself*. In previous debates within the Commission over "self-contained regimes", "regimes" and "subsystems", there never was any assumption that they would be hermetically isolated from general law. It is useful to note that article 42 of the 1969 Vienna Convention contains a "Munchausen provision" that is directly relevant here, for it expressly situates every legal regime within its framework. According to this article:

Validity and continuance in force of treaties

1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

194. This, it could be said, is the "minimum level" at which the 1969 Vienna Convention regulates everything that happens in the world of regime building and regime administration. Through it, as well as through the reasoning above, every special regime links up with general international law in three ways:

(*a*) The conditions of validity of a special regime, including the validity of its establishment, are determined by principles of general international law;

(*b*) Because a special regime is "special", it does not provide all the conditions for its operation. General law provides resources for this purpose. This is not a matter of general law having been incorporated into the special regime but follows from the "generality" of that general law—or in other words, from international law's systemic nature. General international law influences the operation of a special regime above all in three distinct ways:

(i) General international law (that is, general custom and general principles of law) fills gaps in the special regime and provides interpretative direction for its operation;

(ii) Most of the 1969 Vienna Convention (including, above all, articles 31 and 32) is valid as customary law and applicable in the sense referred to in (*i*) above;

(iii) General international law contains principles of hierarchy that control the operation of the special regime, above all in determining peremptory norms of international law but also in providing resources for determining, in the event of a conflict, which regime should be given priority or, at least, what consequences follow from the breach of the requirements of one regime by deferring to another (usually State responsibility);

(*c*) Finally, general international law provides the consequences of the "failure" of a special regime. When a special regime "fails" cannot always be determined from within that regime, however. Inability to attain an

[254] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 129, 137.

[255] See further Simma, "Self-contained regimes" (footnote 202 above), pp. 118–135, and Alland (footnote 251 above), pp. 290–291. This would also seem to apply to the failure of the special regime of the European Union. See also L. Boisson de Chazournes, *Les contremesures dans les relations internationales économiques*, Paris, Pedone, 1992, p. 185.

[256] Para. (2) of the commentary to article 55 of the draft articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 140.

authoritative determination of failure may be precisely one aspect of such failure—*e.g.* when a special dispute settlement system ceases to function.

D. Regionalism

1. What is "regionalism"?

195. "Regionalism" does not figure predominantly in international law treatises and, when it does, it rarely takes the shape of a "rule" or a "principle". Neither does it denote any substantive area of the law, on a par with "human rights" or "trade law". When the question of regionalism is raised, it is usually done in order to discuss the question of the universality of international law, its historical development or the varying influences behind its substantive parts. Only rarely does it appear in an openly normative shape, as a kind of regional *lex specialis* that is intended either as an application or modification of a general rule or, perhaps in particular, as a deviation from such a rule.

196. Regionalism is a well-established theme of foreign policy debates. Discussions about the best approaches to regulating matters of, say, economic policy or collective security habitually refer to the advantages of institutional frameworks that are narrower than the universal. As the United Nations was being debated between the Great Powers at the end of the Second World War, the choice between regionalism and universalism weighed heavily on the planning of the post-war collective security system. Churchill, for example, originally preferred a set of regional systems—"a Council of Europe and a Council of Asia under the common roof of the world organization".[257] As debates turned in favour of a single system under the supervision of the Security Council, concern was expressed in San Francisco over the way this opened the door to intervention by outside powers in the management of regional security (especially in Latin America).[258]

197. Sometimes particular orientations of legal method—for example an "Anglo-American approach"—or policies adopted by or typical of particular groups of States—say, "Third World approaches"—also raise questions of regionalism. Debates over human rights and cultural relativism, too, occasionally highlight these tensions. In such debates, the focus is on the question of whether some rules or principles, including notions of human rights, should automatically be applied in a universal fashion. What is the scope for regional variation in a system intended as universal?

198. The varying uses of the expression "regionalism" as part of legal and political rhetoric call for an analysis of the actual impact of that notion on the question of fragmentation of international law now being studied within the Commission. For that purpose, it is suggested that there are at least three distinct meanings for "regionalism" that refer specifically to international law and that should be taken into account.

2. "Regionalism" as a set of approaches and methods for examining international law

199. A first—and the most general—use of the term refers to particular orientations of legal thought and culture. It is, for example, sometimes said that there is an "Anglo-American" or a "continental" tradition of international law, although frequently the distinctiveness of such traditions is denied.[259] More recently, it has been habitual to claim that there are distinct "Soviet" doctrines or "Third World approaches" to international law.[260] To some extent, the notion of different legal cultures has been enshrined in, for example, the statute of the International Law Commission itself, as article 8 of the statute requires "that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured". The composition of many other international law bodies is also expected to conform to this pattern, reflected in the standard—though usually informal—practice in United Nations elections of following the principle of "equitable geographical distribution". The United Nations General Assembly has occasionally highlighted the importance of this principle, for example in 2001, when it "[*e*]*ncourage*[*d*] States parties to the United Nations human rights instruments to establish quota distribution systems by geographical region for the election of the members of the treaty bodies".[261]

200. No doubt, there have always existed regional and local approaches to, or even "cultures" of, international law, and much of the relevant literature traces their influence on general international law. Thus, for instance, there is much talk again today about the role of a "European tradition" of international law.[262] Historical studies also canvass the "American tradition of international law"[263] and debate the role of Africa or Asia in the development of international law.[264] Since the nineteenth century, the

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[257] W. G. Grewe, "The history of the United Nations", in B. Simma (ed.), *The Charter of the United Nations: A Commentary*, Oxford, Oxford University Press, 1994, p. 7.

[258] See, for example, R. B. Russell and J. E. Muther, *A History of the United Nations Charter: The Role of the United States 1940–1945,* Washington, D.C., Brookings, 1958, pp. 688–712. See also S. C. Schlesinger, *Act of Creation: The Founding of the United Nations*, Boulder, Westview, 2003, pp. 175–192.

[259] See, especially, H. Lauterpacht, "The so-called Anglo-American and continental schools of thought in international law", *British Year Book of International Law 1931*, vol. 12, p. 31. See also, for example, E. D. Dickinson, "L'interprétation et l'application du droit international dans les pays anglo-américains", *Recueil des cours de l'Académie de droit international de La Haye, 1932-II*, vol. 40, p. 305.

[260] A. Anghie and B. S. Chimni, "Third World approaches to international law and individual responsibility in internal conflicts", in S. R. Ratner and A.-M. Slaughter, *The Methods of International Law,* Washington, D.C., American Society of International Law, 2004, p. 185. On "Soviet" and "Russian" doctrines, see K. Grzybowski, *Soviet Public International Law: Doctrines and Diplomatic Practice*, Leiden, Sijthoff, 1970; T. Långström, *Transformation in Russia and International Law*, Leiden, Martinus Nijhoff, 2003.

[261] General Assembly resolution 56/146 of 19 December 2001, para. 1.

[262] See especially the series of symposia on the "European tradition in international law" in EJIL since 1990.

[263] See, for example, M. W. Janis, *The American Tradition of International Law: Great Expectations 1789–1914*, Oxford, Clarendon Press, 2004.

[264] See T. O. Elias, *Africa and the Development of International Law*, Leiden, Sijthoff, 1972; R. P. Anand, "The role of Asian States in the development of international law", in R.-J. Dupuy (ed.), *The Future of International Law in a Multicultural World*, The Hague, Martinus Nijhoff, 1983, p. 105. Many articles in the *Journal of the History of International Law*, published since 1999, have been geared towards examining regional influences and developments in a historical way.

special nature and influence of Latin America on international law has often been stressed.[265]

201. It is no doubt possible to trace the sociological, cultural and political influence that particular regions have had on international law. However, these studies do not really address the issue of fragmentation. They do not claim that some rules should be read or used in a special way because of their having emerged as a result of "regional" inspiration. On the contrary, these regional influences appear significant precisely because they have lost their originally geographically limited character and have come to contribute to the development of universal international law. They remain historical and cultural sources or more or less continuous political influences behind international law.

202. There is a very strong presumption among international lawyers that, notwithstanding such influences, the law itself should be read in a universal fashion. As Sir Robert Jennings pointed out in 1987:

> the first and essential general principle of public international law is its quality of universality; that is to say, that it be recognized as a valid and applicable law in *all* countries, whatever their cultural, economic, socio-political, or religious histories and traditions.[266]

203. And yet, as Jennings himself notes,

> this is not to say, of course, that there is no room for regional variations, perhaps even in matters of principle. … Universality does not mean uniformity. It does mean, however, that such a regional international law, however variant, is a part of the system as a whole and not a separate system, and it ultimately derives its validity from the system as a whole.[267]

204. If regionalism itself thus is not automatically of normative import, its significance is highlighted as it mixes with functional differentiation. That is to say, where previously the moving forces behind international law may have been geographical regions, today those forces are often particular interests that are globally diversified: trade interests, globalization lobbies, environmentalist or human rights groups and so on. The language of the "Third World" already reflected this change. Although the States in this group are sometimes identified in geographic terms—*e.g.* as "the South"—this is not intended to refer to a special geographical property (such as climate, for example) that they share but to a certain homogeneity based on a convergence of interests, values or political objectives. Functional differentiation—the emergence of special types of law that seek to respond to special types of ("functional") concern, such as "human rights law" or "environmental law", etc.—is certainly at the (sociological) root of the phenomenon of fragmentation and diversification of international law. This, however, is covered in other parts of this report and need not be specifically discussed here.

3. "Regionalism" as a technique for international law-making

205. A second sense of the term "regionalism" is that of a privileged forum for international law-making. It is often assumed that international law is or should be developed in a regional context because the relative homogeneity of the interests or outlooks of actors will ensure a more efficient or equitable implementation of the relevant norms. The presence of a coherent cultural community better ensures that the regulations enjoy legitimacy and that they are understood and applied in a coherent way. This is probably the reason why human rights regimes and free trade regimes have always commenced in a regional context, despite the universalist claims of ideas about human rights or commodity markets.

206. This is an aspect of the general argument in favour of contextualization and has already been discussed in the section on *lex specialis* above: closeness to context better reflects the interests and consent of the relevant parties. As a matter of legal policy, it may often be more efficient to proceed by way of a regional approach.[268] Both human rights and economic integration constitute examples of this type of reasoning. More broadly, regionalism emerges sometimes in connection with sociological theories about international law, especially views that emphasize a natural tendency of development from States to larger units of international government.

207. In the sociological ("objectivist") theory of international law presented by Georges Scelle, for example, regionalism appears as an incident of what he called the "federal phenomenon", a process leading from the individual State to larger normative units gradually and in successive stages as a result of expanding circles of "solidarity". This may happen, he wrote, as a result of natural affinities between neighbouring States (common history, language, religion, *etc.*) but also through the need for division of labour (as in regional economic integration) or in view of a common threat (as through the development of systems of regional security).[269] More recently, theories of interdependence and international regimes in international relations studies, as well as the sociology of globalization, point to the advantages of governance through units wider than States, including regional units.

208. Such studies have given rise to varying political assessments. Hedley Bull, for instance, points to the attractions of Third World regionalism: it has the

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[265] See *Asylum Case (Colombia/Peru)*, Judgment, *I.C.J. Reports 1950*, p. 266, at pp. 293–294 (dissenting opinion of Judge Álvarez). For an overview of the nineteenth-century debates, see H. Gros Espiell, "La doctrine du droit international en Amérique Latine avant la première conférence panaméricaine", *Journal of the History of International Law*, vol. 3 (2001), p. 1. See also L. Obregón, *Completing Civilization: Nineteenth Century Criollo Interventions in International Law*, unedited doctoral thesis, Harvard University, 2002. The main advocate of this idea in the twentieth century was undoubtedly Alejandro Álvarez. See, for example, his "Latin America and international law", AJIL, vol. 3, No. 2 (April 1909), p. 269.

[266] R. Y. Jennings, "Universal international law in a multicultural world", in M. Bos and I. Brownlie (eds.), *Liber Amicorum for the Rt. Hon. Lord Wilberforce*, Oxford, Clarendon Press, 1987, p. 39, at pp. 40–41; also published in *Collected Writings of Sir Robert Jennings*, vol. 1, The Hague, Kluwer Law International, 1998, p. 341.

[267] Jennings, "Universal international law in a multicultural world", in *Liber Amicorum…* (see footnote 266 above), p. 41; see also *Collected Writings…*, p. 342.

[268] For one rather thorough overview of regional cooperation between African, American, former socialist and Western European States, together with a discussion of the regional commissions of the United Nations and regional development banks, see Bernhardt (ed.), *Encyclopedia of Public International Law,* vol. 4 (footnote 130 above), pp. 100–161.

[269] Scelle (see footnote 70 above), p. 253.

advantages of functionality and solidarity for weak States and it may be used to avoid the danger of great Power domination that may result from participating in global or otherwise wider spheres of cooperation.[270] Other theorists, for their part, have taken exactly the opposite view and have seen regionalism as an instrument of hegemony. In this view, regionalism would often signify the creation of large spaces or hegemonic "blocs"—the Monroe doctrine might perhaps serve as an example—by a great Power in order to ensure supremacy or to redress the balance of power disturbed by the activities of another Power elsewhere in the world.[271]

209. There is of course an enormous amount of writing on the nature, advantages and disadvantages of regionalism as an instrument of the politics of cooperation and hegemony.[272] It is, however, doubtful whether such sociological views and historical speculations—whatever their merits—have much to contribute to an examination of the fragmentation of international law. They, too, tend to see regional cooperation from a functional perspective, as a particular case of the more general need for States either to collaborate for the attainment of common aims or to enlist partners so as to create, maintain or oppose hegemony. As an incident of theories about the logic of cooperation and rational choice, regionalism loses its specificity as a problem and should be dealt with rather in connection with the functional diversification of international society in general, in particular the problem of special regimes covered in the previous section of this report.

210. Nevertheless, one aspect deserves mention here: regionalism in regard to trade law. Despite the strong pull for a global trade regime within the GATT/WTO system, the conclusion of regional trade agreements (RTAs) has not diminished—on the contrary. During the last stages of the Uruguay Round, in 1990–1994, for example, the GATT secretariat was notified of 33 RTAs, while in the period between January 2004 and February 2005 the total was no less than 43 RTAs, "making it the most prolific RTA period in recorded history".[273] Technically speaking, while such agreements obviously liberate trade between their partners, they also limit trade with the outside world. The specific justification for RTAs is found in article XXIV of GATT, and, although there has been endemic controversy about the scope of this provision, the (understandable) view within the WTO system, as articulated by the WTO Appellate Body, has been to interpret it restrictively.[274] Nevertheless, in view of the difficulties and controversies in developing a universal trade system, there appears presently to be no end in sight to the conclusion of RTAs.

4. "Regionalism" as the pursuit of geographical exceptions to universal international law rules

211. But regionalism may have a stronger sense if it is meant to connote a rule or a principle with a regional sphere of validity, or a regional *limitation* to the sphere of validity of a universal rule or principle. In the former (positive) sense, the rule or principle would be binding only on States identified as members of a particular region.[275] In the latter (negative) sense, regionalism would exempt States within a certain geographical area from the binding force of an otherwise universal rule or principle.

212. There are many problems in such suggestions, not least of which is the identification of the relevant "region" and especially the imposition of that identification on a State not sharing it. For *normative* regionalism must be clearly distinguished from the regular case of a multilateral treaty between States in a region or a set of converging practices among States that amount to a regional custom. In the latter two cases the conventional or customary rule becomes binding on the relevant States on the basis of their consent to it. The fact that the States come from the same region is only a factual ingredient of their relationship and of no greater consequence to the binding force or interpretation of that rule than their ethnic composition or economic system.[276] Instead of illustrating the independently normative power of regional linkages, these cases come under the discussion of *lex specialis* above.[277]

213. A separate, much more difficult case is the one where it is alleged that a regional rule (either on the basis of treaty practice or custom) is binding on a State even when the State has not specifically adopted or accepted it. This is the claim dealt with (albeit inconclusively) by the International Court of Justice in the *Asylum* (1950) and *Haya de la Torre* (1951) cases. Here, Colombia argued *inter alia* that there had emerged an "American" or a "Latin American" law concerning the matter of

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[270] H. Bull, *The Anarchical Society: A Study of Order in World Politics*, London, Macmillan, 1977, pp. 305–306. For a consideration of the advantages and disadvantages of regional security "complexes", situated in a mid-level between States and global security systems, see, for example, B. Buzan, *People, States and Fear: An Agenda for International Security Studies in the Post-Cold War Era*, 2nd ed., New York, Harvester, 1991, pp. 186–229. For the mutually reinforcing but also challenging forces of economic globalization and regionalization, see, for example, C. Oman, "Globalization, regionalization and inequality", in A. Hurrell and N. Woods (eds.), *Inequality, Globalization, and World Politics*, Oxford, Oxford University Press, 1999, p. 36.

[271] See, in particular, C. Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, Cologne, Greven, 1950. To the same effect, see W. G. Grewe, *The Epochs of International Law*, Berlin, Walter de Gruyter, 2000, pp. 458 *et seq.*

[272] See, for example, R. A. Falk and S. H. Mendlowitz (eds.), *Regional Politics and World Order,* San Francisco, Freeman, 1973; W. Lang, *Der internationale Regionalismus: Integration und Desintegration von Staatenbeziehungen in weltweiter Verflechtung*, Springer, Vienna, 1982; and the essays collected in J. S. Nye, *International Regionalism: Readings*, Boston, Little, Brown and Company, 1968.

[273] F. Weiss, "Coalitions of the willing: the case for multilateralism *vs.* regional and bi-lateral arrangements in world trade", in C. Calliess, G. Nolte and P.-T. Stoll (eds.), *Coalitions of the Willing: Avant-garde or Threat?*, Cologne, Carl Heymanns, 2007, p. 65 (forthcoming). See also chapter III, section D.1 (*a*), below.

[274] See *Turkey—Restrictions on Imports of Textile and Clothing Products* (footnote 88 above), para. 9.92.

[275] This is the understanding in, for example, D. Schindler, "Regional international law", in Bernhardt (ed.), *Encyclopedia of International Law*, vol. 4 (see footnote 130 above), pp. 161–165.

[276] This does not of course mean that it would be of no consequence at all. In the *Haya de la Torre* case, for instance, the International Court of Justice felt entitled to interpret article 2 of the Convention Fixing the Rules to be Observed for the Granting of Asylum "in conformity with the Latin-American tradition in regard to asylum" (*Haya de la Torre Case*, Judgment of 13 June 1951, *I.C.J. Reports 1951*, p. 71, at p. 81).

[277] Many regional organizations are like this. Their "regional" character does not distinguish them from other multilateral organizations. This means, for instance, that not all States of the relevant region always participate in them and that their competence does not even, in such a case, extend to the non-participating ones. See Schindler (footnote 275 above), p. 161.

diplomatic asylum.[278] According to Judge Álvarez, this had been based on the "wish" of Latin American States "since their independence" to "modify [international] law so as to bring it into harmony with the interests and aspirations of their continent".[279] Here, both the purpose of and the justification for regionalism are clearly outlined: the purpose is to *deviate* from the general law, while the justification for this is derived in part from consent ("wish") and in part from a sociological argument about regional appropriateness. The normative force of this law was as clear to Colombia as it was to Álvarez. A regional law was applicable, in the Colombian view, even to States of the region that did not accept it.[280] Álvarez, too, argued not only that it was "binding upon all the States of the New World", as well as on all other States, "in matters affecting America",[281] but also that it was "binding upon all the States of the New World" though it "need not be accepted by all [of them]".[282]

214. The question of regionalism has often arisen in connection with rules alleged to have a specifically South American origin or sphere of applicability, such as the famous Calvo, Drago and Tobar doctrines.[283] Nevertheless, none of these doctrines has ever received general endorsement, and their importance today seems doubtful. In the *Asylum* case, the Court itself did not specifically pronounce on the conceptual possibility of there being specifically regional rules of international law in the above, strong sense (*i.e.* rules binding automatically on States of a region and binding others in their relationship with those States).[284] It merely stated that the cases cited by Colombia in favour of the existence of a regional rule of diplomatic asylum may have been prompted by considerations of convenience or political expediency. No evidence had been produced that they would have arisen out of a feeling of legal obligation.[285] The more important point, however, is perhaps that the Court treated the Colombian claim as a claim about customary law and dismissed it in view of Colombia's failure to produce the required evidence. There was, in other words, no express discussion of "regionalism" in the judgment, much less an endorsement of regionalism in the "strong" sense outlined above.

215. In fact, there is very little support for the suggestion that regionalism would have a normative basis in anything apart from regional customary behaviour, accompanied, of course, by the required *opinio juris* on the part of the relevant States. In such a case, States outside the region would not be automatically bound by the relevant regional custom unless there were a specific indication that they might have accepted this either expressly or tacitly (or perhaps by way of absence of protest). This would also render any specific normative (in contrast to historical, sociological or technico-legislative) debate about regionalism superfluous. However, two specific issues might still need to be singled out.

216. One is the question of the universalism *versus* regionalism opposition in human rights law. Although this goes deep into the philosophical question of cultural relativism—and as such falls outside the scope of the Commission's project on fragmentation—one approach to it might be noted. This is to think of "regionalist challenges" not in terms of exceptions to universal norms but, as Andrew Hurrell has put it, "principally in terms of implementation".[286] This would mean understanding regional variation in terms not of exceptions but of the varying, context-sensitive implementation and application of shared standards. If so, then this matter, too, would fall under the more general question of the relationship between general and special law, no different from the general problem of the applicability and limits of *lex specialis*.

217. Another instance concerns the question of the relationship between universalism and regionalism within the collective United Nations security system or, in other words, the relationship between Chapters VII and VIII of the Charter of the United Nations. Here, open questions have included the definition of what may count as regional "arrangements" or "agencies", as well as when may action be "appropriate" under Article 52, paragraph 1. The most important question, however, appears to concern the priority of competence between regional

[278] See, in particular, *Asylum Case (Colombia–Peru)*, "Réplique du gouvernement de la République de Colombie (20 IV 50): Observations sur l'existence du droit international américain", *I.C.J. Pleadings 1950*, vol. I, pp. 330–334, paras. 25–32.

[279] *Asylum Case (Colombia–Peru)*, Judgment of 20 November 1950 (see footnote 265 above), p. 293 (dissenting opinion of Judge Álvarez). Likewise, Judge Read, in his dissenting opinion, pointed to the existence of a "body of conventional and customary law, complementary to universal international law, and governing inter-State relations in the Pan American world" (*ibid*., p. 316).

[280] *Haya de la Torre Case*, "Mémoire présenté au nom du Gouvernement de la République de Colombie (7 II 51)", *I.C.J. Pleadings 1951*, pp. 25–27.

[281] "Universal international law thus finds itself today within the framework of continental and regional law; and all such legal systems adopt new trends in accordance with those indicated in the preamble and Chapter I of the United Nations Charter; such trends reflect entirely American, international spirit" (*Asylum Case (Colombia–Peru)*, Judgment of 20 November 1950 (see footnote 265 above), p. 294 (dissenting opinion of Judge Álvarez)).

[282] *Ibid*.

[283] Under one version of the Calvo doctrine, international liability with respect to contracts entered into with alien private contractors by the State party is excluded. Another formulation describes it as a stipulation in a contract in which "an alien agrees not to call upon his State of nationality in any issues arising out of the contract". This used to be inserted (or suggested) as a clause in investment contracts, but it has also been argued as a specific rule of South American regional law. See, for example, O'Connell, *International Law* (footnote 78 above), vol. II, pp. 1059–1066, and E. Jiménez de Aréchaga, "International responsibility", in M. Sørensen (ed.), *Manual of Public International Law*, London, Macmillan, 1968, pp. 590–593. For its (contested) relevance today, see C. K. Dalrymple, "Politics and foreign direct investment: the Multilateral Investment Guarantee Agency and the Calvo clause", *Cornell International Law Journal*, vol. 29, No. 1 (1996), p. 161, and D. Manning-Cabrol, "The imminent death of the Calvo clause and the rebirth of the Calvo principle: equality of foreign and national investors", *Law and Policy in International Business*, vol. 26 (1995), p. 1169. The Drago doctrine sought to exempt State loans from general rules of State responsibility: O'Connell, *International Law* (see footnote 78 above), vol. II, pp. 1003–1004. The Tobar doctrine, again, has to do with the alleged duty of non-recognition of governments that have arisen to power by non-constitutional means: *ibid.*, vol. I, p. 137.

[284] Though it did hint in this direction by referring to "one of the most firmly established traditions of Latin America, namely, non-intervention" (*Asylum Case (Colombia–Peru)*, Judgment of 20 November 1950 (see footnote 265 above), p. 285).

[285] *Ibid.*, pp. 276–277.

[286] A. Hurrell, "Power, principles and prudence: protecting human rights in a deeply divided world", in T. Dunne and N. J. Wheeler (eds.), *Human Rights in Global Politics*, Cambridge, Cambridge University Press, 1999, p. 277, at pp. 294–297.

agencies or arrangements and the Security Council to take enforcement action.[287] Under Article 52, paragraph 2, the members of regional agencies or arrangements must make every effort to settle their disputes before submitting them to the Security Council. Whatever the disagreements over the right marching order here, it seems evident that action by a regional agency or arrangement cannot be considered an "exception" to the competence of the Security Council, which at all times may be seized of an issue if it feels it appropriate to do so because, for example, regional action has not been or is not likely to be "appropriate" or effective. In this regard, Chapter VIII should be seen as a set of functional provisions that seek the most appropriate level for dealing with particular matters, with due regard to issues of "subsidiarity".[288]

5. European integration

218. Finally, a brief mention should be made of the European Union. As is well known, the European Union began as a customs union with the conclusion, in 1957, of the Treaty establishing the European Economic Community. Since then, the founding treaties have been amended several times, so that the instrument presently in force—the Treaty on European Union (done at Maastricht in 1992 and amended in Amsterdam in 1997 and Nice in 2001)—goes way beyond an economic arrangement. The Union's activities are said to consist of three "pillars", one dealing with the most heavily supranational rules on "Community" activities and the other two with the more "intergovernmental" fields of common foreign and security policy and cooperation in justice and internal affairs. European integration has profoundly transformed the nature of the legal relations between European Union members. As the European Court of Justice famously pointed out, the founding treaties are more than international agreements—they are a kind of "constitutional charter" of the European Union.[289] They have set up a special kind of legal order between the member States, and thus they are interpreted and applied in a manner that does not necessarily correspond to the way "ordinary" agreements are interpreted and applied.

219. There is no reason to dwell on the special nature of the legal relations between European Union members. One phenomenon that does contribute to fragmentation is the way the Union as an international actor is present in a number of different roles on the international scene. First, the European Community, acting under the "first pillar" of European Union competences, is a subject of international law and for practical purposes may be treated by the outside world as an intergovernmental organization, with whatever modification its specific nature brings to that characterization.[290] At the same time, especially when dealing with foreign policy matters, as well as cooperation in justice and home affairs, the European Community acts alongside its member States. The distinction between matters of exclusive European Community competence and shared competences between the European Union and member States is an intricate part of European Community law that is often very difficult to grasp. This is particularly so in regard to "mixed agreements", to which both the Community and the member States are parties but under which their respective competences develop as a function of the development of (internal) European Community law.[291] It has, of course, been stressed on the part of the European Union that none of this will have any effect on the rights of third States—and indeed, no such effect could ensue from legal developments that, from the perspective of the latter, are strictly *inter alios acta*. Nevertheless, the question of divided competences remains a matter of some concern from the perspective of the coherence of treaty rights and obligations, including responsibility for any breach that may occur. One particular aspect of European Community action—the so-called "disconnection clauses"—bears a direct linkage to the 1969 Vienna Convention and will therefore be discussed separately in chapter III below.

E. Conclusion on conflicts between special law and general law

220. All legal systems are composed of rules and principles with greater and lesser generality and speciality in regard to their subject matter and sphere of applicability. Sometimes they will point in different directions, and if they do it is the task of legal reasoning to establish meaningful relationships between them so as to determine whether they could be applied in a mutually supportive way or whether one rule or principle should have definite priority over the other. This is what in chapter V below will be called "systemic integration".

221. In addition to special primary rules, many rule systems also contain special secondary rules having to do with responsibility or settlement of disputes. Although these institutions are sometimes called "self-contained", they are never "clinically isolated" from the rest of the law. In fact, as we have seen, they owe their validity to, derive their limits from and are constantly complemented by legal rules and principles neither established by them nor incorporated into them by any specific act. Nor has the sociological phenomenon of "regionalism" meant the emergence of isolated legal systems on a regional basis. What role specialized or regional rule complexes enjoy is a factual and historical matter that can only be ascertained on a case-by-case basis, again by bearing in mind the "systemic" nature of the law of which they all form part.

222. This section has highlighted the pragmatic role of the "speciality" and the "generality" of normative standards in the process of legal reasoning. It has stressed the *relational* character of these attributes and the way in which their specific operation is always dependent on the context in which they are applied. *To make or defend a*

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[287] For a useful overview, see W. Hummer and M. Schweitzer, "Article 52", in Simma (ed.), *The Charter of the United Nations…* (footnote 257 above), pp. 683–722.

[288] *Ibid.*, pp. 709–710.

[289] Case 294/83, *Parti écologiste "Les Verts" v. European Parliament*, judgment of 23 April 1986, *European Court Reports 1986*, p. 1339, at p. 1365, para. 23.

[290] See J. Klabbers, "Presumptive personality: the European Union in international law", in M. Koskenniemi (ed.), *International Law Aspects of the European Union*, The Hague, Kluwer Law International, 1998, p. 231.

[291] For a useful analysis, see J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, The Hague, Kluwer Law International, 2001.

claim of "speciality" is only possible in "general" terms. In this regard, the fragmentation of the substance of international law—the object of this study—does not pose any very serious danger to legal practice. It is as normal a part of legal reasoning to link rules and rule systems with each other as it is to separate them and to establish relationships of priority and hierarchy among them. The emergence of new "branches" of law or novel types of treaties or clusters of treaties is a feature of the social complexity of a globalizing world. If lawyers feel unable to deal with this complexity, this is not a reflection of problems in their "tool box" but in their imagination about how to use it.

Chapter III

Conflicts between successive norms

223. The relationship between special law and general law is often transected by another relationship, namely that between prior and subsequent law, and it may in such cases be hard to say whether this modifies the operation of the *lex specialis* principle in any of its many permutations. Generally speaking, it may often be the case that, when States enact a subsequent general law, this is intended to set aside the prior law, even if the prior law were in some sense more "special". Again, it seems inadvisable to lay down any general rule in regard to how to manage the two types of relationship.

224. The most basic case is the adoption of a treaty in an area that was previously covered by customary law: "it is well understood that, in practice, rules of [general] international law can, by agreement, be derogated from in particular cases or as between particular parties".[292] However, as explained in chapter II above, this does not automatically mean the full extinction of that prior customary law.[293] It will normally remain valid for those States that have not become parties to the (codifying) treaty and may occasionally be applicable also between treaty partners if, for one reason or another, the treaty remains inapplicable or covers the subject matter only partially.[294] Nor does the fact that agreements often set aside prior customary law translate into any automatic presumption in favour of later law. In fact it would be wrong to assume that there is a stark opposition between custom and treaty. On the one hand, treaties may be part of the process of the creation of customary law.[295] On the other hand, customary behaviour undoubtedly affects the interpretation and application of treaties and may, in some cases, modify treaty law.[296] Because, as explained above, there is no general hierarchy of sources in international law, the relationship between a particular treaty and a particular customary norm will always remain to be decided on a case-by-case basis.[297]

225. Nevertheless, alongside the *lex specialis* maxim, the principle that "later law supersedes earlier law", or *lex posterior derogat legi priori*, has been often listed as a principle of interpretation or conflict resolution in international law.[298] The maxim has its roots in Roman law and is recognized by various early writers (*e.g.* Grotius and de Vattel).[299] It has sometimes been regarded as a "general principle of law recognized by civilized nations" under Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice[300] and sometimes as a customary law principle of interpretation.[301] Occasionally it has been envisaged as a technique that the legal mind is drawn to in its search for domestic analogies in legal procedure.[302] Yet often, as with *lex specialis*, caution has been voiced against any assumption that it could be applied in an automatic way. Schwarzenberger describes it as a non-normative "maxim" that points to one result achieved through

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[292] *North Sea Continental Shelf* (see footnote 95 above), p. 42, para. 72. See also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (footnote 97 above), p. 38, para. 24.

[293] See, especially, H. Thirlway, *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law,* Leiden, Sijthoff, 1972, pp. 95–108. See also Zemanek, "The legal foundations of the international system…" (footnote 31 above), pp. 220–221.

[294] In the words of the International Court of Justice, "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" (*Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgment of 27 June 1986 (see footnote 51 above), p. 96, para. 179). This situation is also presupposed by article 43 of the 1969 Vienna Convention, which provides that denouncing a treaty has no effect on an obligation that is binding on the State "independently of the treaty". Again, however, it is dangerous to generalize. The situation cannot be excluded *a priori* where it is the intention of the parties to a convention specifically to abrogate the prior custom in their relations *inter se*.

[295] *North Sea Continental Shelf* (see footnote 95 above), p. 41, para. 71.

[296] This case is presumed in a minimal way by article 31, paragraph 3 (*b*), which obliges the interpreter to have regard to the subsequent practice of treaty parties. Another case is that of intertemporal law (see chap. V, sect. D.3, below), in which subsequent custom affects the interpretation of the open-ended or "mobile" terms of the treaty. See further M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law*, Cambridge, Cambridge University Press, 1999, pp. 172–180; Villiger (footnote 77 above), pp. 295–297.

[297] This means, among other things, that, although treaty and custom may often link to each other as "special" and "general", this may not always be so. A particular (or bilateral) custom may of course be *in that respect* more particular than a multilateral treaty. See M. Akehurst, "The hierarchy of the sources of international law", *British Year Book of International Law 1974–1975*, vol. 47, No. 1, p. 273, at p. 275.

[298] Q. Wright, "Conflicts between international law and treaties", AJIL, vol. 11, No. 3 (July 1917), p. 579; Rousseau, "De la compatibilité des normes juridiques contradictoires…" (see footnote 36 above), p. 150; Jenks (see footnote 8 above), pp. 445–446; Akehurst (see footnote 297 above), p. 273; Czapliński and Danilenko (see footnote 74 above), pp. 19–22; Sinclair (see footnote 63 above), p. 98; Karl (see footnote 130 above), pp. 937–938; Aust, *Modern Treaty Law…* (see footnote 74 above), p. 201; Pauwelyn, *Conflict of Norms…* (see footnote 21 above), pp. 335–363; Daillier and Pellet, *Droit international public* (see footnote 74 above), p. 270; Wolfrum and Matz, *Conflicts in International Environmental Law* (see footnote 22 above), pp. 152–158.

[299] Papinian, Dig. 50, 17, 80; Paul, Dig. 32, 66, 5 and Dig. 1, 4, 1, *The Digest of Justinian*, vol. IV (see footnote 58 above); Grotius (see footnote 64 above), book II, chap. XVI, sect. XXIX, p. 428; de Vattel (see footnote 67 above), book II, chap. XVII, para. 315.

[300] See, for example, Aufricht (footnote 118 above), p. 655.

[301] Fitzmaurice and Elias, *Contemporary Issues…* (see footnote 74 above), p. 322.

[302] The domestic analogy is expressly drawn in, for example, S. Bastid, *Les traités dans la vie internationale: Conclusion et effets,* Paris, Économica, 1985, p. 161. Likewise, Czapliński and Danilenko (see footnote 74 above), p. 21.

the normal interpretation of two treaties, in particular that the subsequent (or prior) treaty is held to prevail over its rival because that is what the parties had intended.[303]

226. As with *lex specialis*, it is easy to accept the pragmatic rationale of *lex posterior*, irrespective of its formal status. Preferring today over yesterday, it reflects more concretely present circumstances and the present will of the relevant actors. And yet, of course, it cannot claim absolute priority. Notwithstanding any issue of *jus cogens*, it may often seem unacceptable to allow later commitments to override earlier ones—especially if those later commitments are to different parties or have different beneficiaries than the early commitments.[304] Here, as elsewhere, the tendency to pragmatism, *ad hoc* decisions and harmonization prevails.[305]

227. Perhaps this is why abstract or doctrinal treatments of successive treaties tend to regard it as a "particularly obscure aspect of the law of treaties".[306] The problems are not diminished by the scarcity of judicial or arbitral practice and the tendency to resolve treaty conflicts by diplomatic negotiation.[307] The obscurities relate both to the normative import of the principle—how powerful is it?—and to its consequences—what happens when it purports to override another rule? Sometimes it may be frankly overridden by its opposite, *lex prior*. As will be seen below, these obscurities did not disappear with the adoption of article 30 of the 1969 Vienna Convention. Trying to clarify the matter is important, as conflicts between earlier and later treaties gain importance with the constant increase in multilateral treaty law, which is often of a quasi-legislative character, for example in the environmental sphere.[308]

A. General law on conflicts between earlier and later treaties

228. Today, the question of conflicts between earlier and later treaties is covered by articles 30 and 41 of the 1969 Vienna Convention. However, as will be seen later, the Convention leaves many questions open and frequently only refers to the general law. In any case, the rules now enshrined in the Convention largely codify the general law approaches that existed prior to its conclusion and that continue to provide both the rationale for those conventional provisions and the perspective from which they are applied. It is therefore useful to deal with the general law of conflict between earlier and subsequent treaties separately. Here, two basic situations should be distinguished: the one in which the parties to the two treaties are identical and the one where there are non-identical parties.

1. Conflict between treaties with identical parties

229. When two States have concluded two treaties on the same subject matter, but have said nothing of their mutual relationship, it is usual to first try to read the two treaties as compatible (the principle of harmonization).[309] This may often be undertaken by a simple examination of party intent, drawn from the various available readings of the treaty texts.[310]

230. If no such harmonizing intent may be gleaned from the texts, the *lex posterior* maxim may be turned to as a presumption of intent to derogate from the earlier agreement.[311] This may be the case, for example, when the treaties deal with wholly different topics and were negotiated by officials from different administrations.[312] Yet of course, the presumption is rebuttable, so that, if interpretation really indicates that the parties did not wish to derogate from the earlier agreement, then that intent should prevail over the maxim. In the treatment of the matter by the Commission in the context of its debates on the law of treaties, for example, it was clear that, in the absence of a conflict clause, the issue of priority was to be resolved by interpreting the will of the parties: had they intended that the latter treaty should supplement or derogate from the earlier?[313]

231. The same considerations also apply to the relationship between multilateral treaties with identical parties. That is to say, there is an effort at harmonization through interpretation, unless it appears that the parties wanted to replace the earlier treaty by the later. Article 59 of the 1969 Vienna Convention expressly provides that:

> A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:
>
> (*a*) It appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
>
> (*b*) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

232. However, though the case of two treaties with identical parties is in principle easy, there might still be complications. For instance, there is the question of which of the agreements is the earlier one. Many authors, including the Expert Consultant at the United Nations Conference on the Law of Treaties, Sir Humphrey Waldock,

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[303] Schwarzenberger (see footnote 80 above), p. 473.

[304] The concurrent pragmatic validity of both the *lex posterior* and the *lex prior* maxims may follow from the way the two derive from different domestic analogies. Where *lex posterior* projects international rules as analogous to domestic legislation (later laws regularly overruling earlier ones), the *lex prior* suggests an analogy to domestic contracts (as expressly suggested by Lauterpacht). See also Borgen (footnote 10 above), pp. 620–639.

[305] Rousseau, "De la compatibilité des normes juridiques contradictoires…" (see footnote 36 above), p. 153.

[306] Sinclair (see footnote 63 above), p. 93.

[307] Binder (see footnote 145 above), p. 17; Borgen (see footnote 10 above), pp. 591–600, 609–620.

[308] See, especially, Wolfrum and Matz, *Conflicts in International Environmental Law* (footnote 22 above), pp. 1–13; Matz, *Wege zur Koordinierung völkerrechtlicher Verträge…* (footnote 22 above), pp. 53–73; Fitzmaurice and Elias, *Contemporary Issues…* (footnote 74 above), pp. 321–348.

[309] Czapliński and Danilenko (see footnote 74 above), p. 13; Schwarzenberger (see footnote 80 above), p. 474; Aust, *Modern Treaty Law…* (see footnote 74 above), p. 174; Pauwelyn, *Conflict of Norms…* (see footnote 21 above), pp. 240–244. See also Jenks (footnote 8 above), pp. 427–429.

[310] See also Borgen (footnote 10 above), p. 583.

[311] Rousseau, "De la compatibilité des normes juridiques contradictoires…" (see footnote 36 above), pp. 188–190; Aufricht (see footnote 118 above), p. 657; Mus (see footnote 21 above), p. 220; Aust, *Modern Treaty Law…* (see footnote 74 above), p. 174.

[312] Borgen (see footnote 10 above), p. 583.

[313] See the discussion in Mus (footnote 21 above), pp. 217–218; Fitzmaurice and Elias, *Contemporary Issues…* (footnote 74 above), pp. 321–322.

have argued that the critical date in determining the timeline (earlier/subsequent) is that of the date of the adoption of the treaty and not, for example, its ratification or entry into force, at least unless nothing else appears from the context.[314] Minority opinions support either the date of entry into force or discerning the intention of the parties.[315] A further complication is caused by the possibility that the matter is resolved differently in regard to different States. For instance, State A might have concluded treaty X before treaty Y, while State B, for its part, might have become party to Y only after having ratified X.[316]

233. Also, there is the question of the relationship between *lex posterior* and *lex specialis*. Jenks has pointed out that neither of these principles "can be regarded as of absolute validity. There are a number of principles and rules which must be weighed and reconciled in the light of the circumstances of the particular case."[317] In the *Mavrommatis Palestine Concessions* case (1924), the Permanent Court of International Justice applied both *lex specialis* and *lex posterior* together, without establishing a hierarchy between them. On the issue of the relationship between the Mandate for Palestine of 1922 and Protocol XII to the Treaty of Lausanne of 1923, the Court merely stated that "in cases of doubt, the Protocol, being a special and more recent agreement, should prevail".[318] The question boils down to an assessment of which aspect—"speciality" or "temporality"—seems more important in this connection. Sometimes it may not be necessary to take a stand on this at all, and tribunals have occasionally ignored both principles.[319]

2. Conflict between treaties with non-identical parties

234. This is the really problematic aspect of this matter, not least because it often involves matters of great importance—the breaking of political or military alliances, the conclusion of separate peace treaties, *etc*.[320] Rousseau, for example, begins his 1932 discussion of treaty conflict by noting that there was no more pressing legal question at that time. He was thinking about the relationship between the Covenant of the League of Nations and the 1928 General Treaty for Renunciation of War as an Instrument of National Policy (the Kellogg–Briand Pact or Pact of Paris), the neutrality agreements of League of Nations members, and the then recent decision by the Permanent Court of International Justice in the controversial *Austro-German Customs Union* case, where the Court had, by a narrow margin, concluded that the projected union was incompatible with Austria's obligations under the 1922 Geneva Protocol No. 1.[321] The textbook example discussed by classical lawyers (Gentili, Grotius, de Vattel) was that of a war between two parties in a three-party alliance—which of the two belligerents should the third assist? During the Cold War, members of the two blocs occasionally accused each other of such violations.[322]

235. More recently, the question of the relationship between earlier and later treaties has arisen in the context of what Sir Humphrey Waldock called "chains of multilateral treaties dealing with the same subject-matter".[323] The very wide scope of legislative activity by global and regional organizations has led to the emergence of clusters of treaty law on particular topics, with complex relationships between particular treaties within the clusters and beyond such clusters (or "regimes"). Only with difficulty could these relationships be treated in terms of clear-cut rules. This is why "modern international law … does not approach the problem from the point of view of the validity of treaties".[324] Instead, as we will see, the matter has been addressed from the perspective of relative "priority" between treaties, with the sanction of responsibility for any obligation breached.

(a) *Lex prior*

236. Nevertheless, it has sometimes been suggested that, even without going into the question of *jus cogens,* either the earlier or the later treaty might enjoy some kind of general superiority. The superiority of the *earlier* treaty was often suggested by early natural lawyers. If a treaty was understood to have alienated the power of the State to dispose of something, then the later, inconsistent treaty became automatically void owing to lack of competence. In the matter of military alliances, Grotius, Pufendorf and de Vattel all preferred to give precedence to the most ancient ally. This seems natural in a system in which no obligation is "merely" a matter of reciprocal will; rather, it is sanctioned by an overriding objective legal system.[325]

237. More recently, the *a priori* superiority of an earlier treaty was hinted at by the International Court of Justice in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* case (1951), as it stated that:

> It is … a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the convention.[326]

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[314] Mus (see footnote 21 above), pp. 220–222; Aust, *Modern Treaty Law…* (see footnote 74 above), p. 183; Sadat-Akhavi (see footnote 21 above), pp. 75–78, and for special cases pp. 78–82.

[315] For the former, see M. Sorensen, "Le problème dit du droit intertemporel dans l'ordre international", *Annuaire de l'Institut de droit international*, vol. 55 (Session of Rome, 1973), p. 54. For the latter, see Czapliński and Danilenko (footnote 74 above), p. 19.

[316] Vierdag (see footnote 20 above), p. 102; Sadat-Akhavi (see footnote 21 above), pp. 75–82.

[317] Jenks (see footnote 8 above), p. 407; Sinclair (see footnote 63 above), p. 96.

[318] *Mavrommatis Palestine Concessions* (see footnote 87 above), p. 31.

[319] See, for example, discussion of the *Gorham* claim (1930) before the United States–Mexican General Claims Commission in Schwarzenberger (footnote 80 above), pp. 479–480. See also UNRIAA, vol. IV (Sales No. 1951.V.1), p. 640.

[320] This is the perspective in Binder (see footnote 145 above).

[321] Rousseau, "De la compatibilité des normes juridiques contradictoires…" (see footnote 36 above), pp. 133–134, 178–187. See also *Customs Régime between Germany and Austria* (footnote 39 above), p. 36.

[322] See, in particular, Binder (footnote 145 above), pp. 24–25, 40–42. See also the examples in Bastid (footnote 302 above), pp. 162, 164.

[323] Third report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur, *Yearbook … 1964*, vol. II, document A/CN.4/167 and Add.1–3, p. 43, para. (32) of the commentary to draft article 65.

[324] Czapliński and Danilenko (see footnote 74 above), p. 20.

[325] See Binder (footnote 145 above), pp. 40–42.

[326] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, *I.C.J. Reports 1951*, p. 15, at p. 21.

238. It is somewhat difficult to interpret the meaning of this passage. To the extent that it deals with the permissibility of *inter se* agreements, the matter will be discussed in section D below. In general terms, it seems to indicate nothing more than the self-evident notion captured by *pacta sunt servanda*. It certainly implies nothing about the validity of either the Convention on the Prevention and Punishment of the Crime of Genocide or incompatible "particular agreements". Two considerations may perhaps be offered here. First, the statement may simply be a reminder to parties that breach will be followed by State responsibility. Second, especially in the context in which it was made, it may be intended to underline the exceptional importance of the subject matter of the Convention and the seriousness of the duty to comply.[327] In that case, the argument would go some way towards suggesting the *jus cogens* or otherwise "objective" nature of the Convention.

239. The cases often mentioned in support of *lex prior* come from the beginning of the twentieth century and from the Central American Court of Justice. Costa Rica and El Salvador complained that, by concluding a treaty with the United States relating to the Panama Canal, Nicaragua had breached treaties it had earlier made with them on the same subject. The Court noted the incompatibility of the treaties and the fact that Nicaragua had violated its obligations but refrained from declaring the later treaty between Nicaragua and the United States void because the United States was not a party to the cases before it and it could not pronounce on its rights.[328]

240. Another case of apparent application of *lex prior* might relate to objective territorial regimes. This is suggested by, for example, the Permanent Court of International Justice's treatment of the *Austro-German Customs Union* case (1931), in which the Court determined—by an 8–7 vote—that the planned customs union treaty would have been incompatible with Austria's obligation under the Treaties of Versailles and Saint-Germain of 1919, as well as a related Protocol of 1922, "to abstain from any act which might directly or indirectly or by any means whatever compromise her independence".[329] Nevertheless, the Court did not spell out the consequences that might have followed from the conclusion of the planned customs union. Another case sometimes cited in this connection is the *Oscar Chinn* case (1934), in which two of the dissenting judges (van Eysinga and Schücking) suggested that the Peace Treaty of Saint-Germain of 1919 or the 1922 Protocol might be void to the extent that some of their provisions deviated from the General Act of the Conference of Berlin of 1885, as the latter had set up something like an objective regime.[330] This was a minority opinion, however. The question of the validity of the 1919 Treaty and the 1922 Protocol had not been raised by the parties, and by remaining silent on the issue the Court seemed to accept that the Berlin Act could be subjected to *inter se* modification.[331]

241. The *lex prior* principle is supported in particular by analogy with domestic contract law ("illegality of a contract to break a contract").[332] Hersch Lauterpacht, in his first report on the law of treaties, started from this position. Nevertheless, he accepted that it might in some cases lead to absurd results, especially when the later law would pertain to general application.[333] But if *lex prior* has general application in contract law, *lex posterior* has general application in public law and legislative enactments. So the relationship between the two laws reflects the way one views the nature of treaties. Both analogies, however, have their problems. As will be stressed frequently in the course of this report, the fact that the 1969 Vienna Convention treats all treaties alike obscures the many differences that actual treaties have.[334]

242. There may also be cases where a subsequent treaty affects the provisions of an earlier treaty by increasing the rights or benefits of a party thereto, typically through a most-favoured-nation clause. In the case of such clauses, subsequent treaties under which one party promises a benefit to another party to that subsequent treaty will also be extended to parties to the earlier treaty.[335]

(b) *Lex posterior*

243. As observed above, the principle that *lex posterior derogat legi priori* is well embedded in domestic jurisprudence and often cited in an international law context as well. Nevertheless, there are few cases where it would have been applied as such. It may often be more useful to refer directly to the will of the parties than to the *lex posterior* principle, to which, as also noted above, it may simply give expression. Inasmuch as it is a question of parties to a later treaty being *different* from parties to an earlier treaty, it is doubtful whether any meaningful role is left to *lex posterior*.

244. There may, however, be rare cases in which a later treaty concluded by parties different from those to

[327] See also the discussion in Schwarzenberger (footnote 80 above), pp. 483–484.

[328] *Costa Rica v. Nicaragua*, decision of the Central American Court of Justice of 30 September 1916, AJIL, vol. 11, No. 1 (January 1917), p. 181, at p. 228. See also *El Salvador v. Nicaragua*, decision of the Central American Court of Justice of 9 March 1917, AJIL, vol. 11, No. 3 (July 1917), p. 674. For a detailed discussion, see, for example, Borgen (footnote 10 above), pp. 591–594. For the Interoceanic Canal (Bryan–Chamorro) Treaty, signed at Washington, D.C., on 5 August 1914 between Nicaragua and the United States, see C. I. Bevans (ed.), *Treaties and Other International Agreements of the United States of America, 1776-1949*, vol. 10, Washington, D.C., United States Government Printing Office, 1972, p. 379.

[329] *Customs Régime between Germany and Austria* (see footnote 39 above), p. 42, article 88 of the Treaty of Saint-Germain.

[330] See Aufricht (footnote 118 above), p. 672. *Oscar Chinn* case (see footnote 138 above), separate opinion of Judge van Eysinga, p. 131, and separate opinion of Judge Schücking, p. 148.

[331] *Oscar Chinn* case (see footnote 138 above). See also the discussion in Schwarzenberger (footnote 80 above), p. 485, and in the second report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur, *Yearbook ... 1963*, vol. II, document A/CN.4/156 and Add.1–3, pp. 56–57, para. (15) of the commentary to draft article 14. See also *Jurisdiction of the European Commission of the Danube between Galatz and Braila* (footnote 108 above), p. 23 (*inter se* agreement).

[332] Jenks (see footnote 8 above), p. 442.

[333] First report on the law of treaties by Hersch Lauterpacht, Special Rapporteur (document A/CN.4/63) (see footnote 144 above), pp. 156–159.

[334] Rousseau, "De la compatibilité des normes juridiques contradictoires…" (see footnote 36 above), pp. 150–151; Borgen (see footnote 10 above), p. 599.

[335] Aufricht (see footnote 118 above), pp. 679–682.

an earlier treaty abrogates the earlier treaty. This is of course a violation of the principle that third States are not affected by something that remains *res inter alios acta*. As Aufricht points out, this is a case of an unequal (subsequent) treaty in which the inequality might relate, for example, to the great Power status of the parties to the later treaty.[336]

245. Might there be legislative treaties of this type, overriding previous treaties irrespective of any question of *jus cogens*? The *lex posterior* principle is clearly applicable in the case of instruments of revision. This is also the case for *inter se* agreements, as provided under article 41 of the 1969 Vienna Convention, of which more in section D below. But what about the case where the parties to the two treaties are different? Wilfred Jenks suggests that: "There may be great advantages in providing for the fuller application of the principle in certain fields of legislative action by conferring the necessary powers on the appropriate international bodies…".[337]

246. This matter links again to the special character of certain multilateral treaties. In an important case, the European Court of Human Rights held that the European Convention on Human Rights controlled the content and/or application of an earlier bilateral treaty, or at least determined how the latter was to be interpreted and applied by the national authorities. The issue here concerned the application of a Russian–Latvian Treaty of 1994 insofar as it concerned the deportation of certain former members of the Soviet army and their families from Latvian territory. The court examined the rights of the individuals concerned on the basis of the European Convention, to which Latvia had acceded at a later date, and concluded that

> the [Russian–Latvian] treaty cannot serve as a valid basis for depriving the Court of its power to review whether there was an interference with the applicants' rights and freedoms … and, if so, whether such interference was justified…[338]

247. That view was based on an earlier admissibility decision in which the Court had specifically noted the following:

> It follows from the text of Article 57 § 1 of the [European] Convention [on Human Rights], read in conjunction with Article 1, that ratification of the Convention by a State presupposes that any law then in force in its territory should be in conformity with the Convention…
>
> In the Court's opinion the same principles must apply as regards any provisions of international treaties which a Contracting State has concluded prior to the ratification of the Convention and which might be at variance with certain of its provisions.[339]

248. This is an important statement of principle. Under it, it seems difficult to deny that, if *lex posterior* should be read in favour of the European Convention on Human Rights, it should also favour any other later human rights treaties, if not any other later multilateral legislative treaties. Again, we are in the presence of a hierarchy that seems best dealt with by the notion of special "integral" obligations—such as obligations in human rights treaties—that enjoy some kind of precedence over merely transactional, bilateral instruments. It is hard to say, however, if this is a case of *lex specialis*, *lex posterior* or *lex superior*, and also to an extent irrelevant. The important point is that the bilateral treaty did not have a life that would be independent from its normative environment at the time of its application. The construction of the bilateral treaty by reference to the later multilateral treaty was reasonable, and little else seems pertinent.

249. Yet it is hard to generalize from this case. It highlights the normative force of human rights treaties (perhaps as "integral" or "absolute" treaties) but probably does not resolve the general question of primacy, and certainly cannot be cited as a blanket endorsement of *lex posterior*. Also, the fact that the case comes from the European Court of Human Rights, specifically assigned to apply the European Convention on Human Rights, is not irrelevant—even as it may be hard to square with the Court's willingness to yield in favour of an earlier customary rule of State immunity in the *Al-Adsani* case.[340]

250. In fact, irrespective of whatever normative power the *lex posterior* rule may enjoy (as pointed out above, that power is much greater in a legislative than in a contractual system), just like the *lex specialis*, it fails to render itself applicable in any mechanical way. Depending on the case, many other considerations may be relevant as well, including the simultaneous applicability of the "special law"/"general law" and "superior law"/"inferior law" distinctions. It is best to discuss these problems in connection with the Commission's debates on article 30 of the 1969 Vienna Convention.

B. Article 30 of the Vienna Convention on the Law of Treaties: from invalidity to responsibility

251. The general law on conflict of successive treaties fails, as we have seen, to provide definite resolution to the most important problems—at least the most important problems of *theory*—regarding the case where the parties to a later treaty are not identical with parties to an earlier one. It was clear that something needed to be said about the matter in the 1969 Vienna Convention. The matter is dealt with in article 30 of the Convention which, however, is only residual.[341]

Article 30. Application of successive treaties relating to the same subject-matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

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[336] *Ibid.*, pp. 673–674.

[337] Jenks (see footnote 8 above), p. 446.

[338] *Slivenko v. Latvia* [GC], No. 48321/99, ECHR 2003-X, p. 265, para. 120. The Agreement on the withdrawal of the armed forces of the Russian Federation from the territory of the Republic of Latvia was signed in Moscow on 30 April 1994.

[339] *Slivenko and Others v. Latvia* (dec.) [GC], No. 48321/99, decision on admissibility of 23 January 2002, ECHR 2002-II (extracts), pp. 482–483, paras. 60–61. For a critical discussion, see also I. Ziemele, "Case-law of the European Court of Human Rights and integrity of international law", in Huesa Vinaixa and Wellens (eds.) (footnote 14 above), p. 201.

[340] *Al-Adsani v. the United Kingdom* (see footnote 219 above), p. 79.

[341] Sinclair (see footnote 63 above), p. 97; Aust, *Modern Treaty Law…* (see footnote 74 above), p. 174.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(*a*) As between States parties to both treaties the same rule applies as in paragraph 3;

(*b*) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

252. Much of this text is relatively uncontroversial and/or captures the state of general law as represented above. This is especially so as regards the reference to Article 103 of the Charter in paragraph 1 and to the conflict clauses in paragraph 2. Paragraph 3 "effectively codifies the *lex posterior* rule".[342] This concerns the situation where either the parties to the later treaty are identical or, in addition to all the parties to the earlier treaty, some new parties are also present. As under the traditional standard, too, *lex posterior* applies only if nothing else follows from party intent.

1. The question of "same subject-matter"

253. Article 30 deals with the issue of conflict between prior and subsequent treaties. As many commentators have noted, however, it does not appear to do so very successfully.[343] One of the problems is that the title of the article (and paragraph 1) seems to limit it to a conflict between treaties "relating to the same subject-matter". If that limitation is interpreted strictly, then it seems to leave most of the important cases—for example conflicts between environmental and trade treaties, or conflicts between human rights and humanitarian law treaties—outside its scope.[344] However, as pointed out in the previous section, this is neither a necessary nor a reasonable interpretation of the expression "same subject-matter".

254. Terms such as "human rights law", "trade law", "environmental law" and so on are arbitrary labels for forms of professional specialization. There are no rules on how to qualify particular treaty regimes, and most regimes could be qualified from a number of such perspectives. Human rights treaties, for example, are often used to further environmental objectives, while trade regimes presuppose and are built upon the protection of human rights (in particular the right to property). The qualifications do not link to the *nature of the instrument* but to the *interest* from the perspective of which the instrument is assessed by the observer. To limit the application of article 30 to treaties "dealing with the same subject" would allow States to deviate from their obligations simply by qualifying a novel treaty in terms of a novel "subject". They might, for example, derogate from their obligations under refugee instruments simply by concluding an instrument on an allegedly novel subject of "the law of human movement".[345] As pointed out above, the test of whether two treaties deal with the "same subject-matter" is resolved by assessing whether fulfilment of an obligation under one treaty affects the fulfilment of obligations under another. This "affecting" might then take the form either of strictly preventing the fulfilment of the other obligation or of undermining its object and purpose in one way or another.

255. Nevertheless, it will also be argued below that the question of the relationship between two treaties cannot be resolved completely in abstraction from any institutional relationship between them. The way a WTO treaty links with a human rights treaty, for example, is not identical to the way a framework treaty on an environmental matter relates to a regional implementation instrument. It may not be possible to determine, in an abstract way, when two instruments deal with the "same subject-matter". But this does not mean that it would be impossible to establish an institutional connection between "chains" or clusters of treaties that are linked institutionally and that States parties envisage as part of the same concerted effort. The significance of identifying such "treaty regimes" lies in the way it seems relatively less complicated to establish a relationship between two instruments *within* one such regime than between two instruments *across* different regimes. For example, the *lex posterior* or *lex specialis* arguments clearly seem more powerful between treaties within a regime than between treaties from different regimes. In the former case, the legislative analogy seems less improper than in the case of two treaties concluded with no conscious sense that they are part of the "same project".

256. The distinction between treaties dealing with the "same subject-matter" and treaties within the same "regime" may appear slight, but it constitutes an important practical shift of perspective. In the former case, focus is on the object that is being regulated, while in the latter case focus is on the intent of the States parties and the institutions they have established. The former is dependent on an abstract characterization of an issue as a "human rights issue", an "environmental problem" or a "trade question", and meets with the difficulty that often many characterizations may be applied to a single problem and different actors may have an interest in characterizing the problem in different ways so as ensure that their preferred rule systems will be applied. By contrast, the notion of a "regime" points to the institutional arrangements that may have been established to link sets of treaties to each other. Treaties may of course end up in conflict both within and across regimes. To make that distinction is merely to point out that the task of settling the conflict—for example, by seeking a "mutually supportive solution"—may be much easier or more straightforward in the former than in the latter situation, where a conflict of wider objectives or values underlying the very regimes themselves is often at issue.

[342] Borgen (see footnote 10 above), p. 603; Mus (see footnote 21 above), pp. 219–220.

[343] Vierdag (see footnote 20 above), pp. 92–108; Sadat-Akhavi (see footnote 21 above), pp. 70–84; Borgen (see footnote 10 above), p. 603; Fitzmaurice amd Elias, *Contemporary Issues…* (see footnote 74 above), pp. 314–331; Sinclair (see footnote 63 above), p. 98.

[344] This has been suggested most recently by Borgen (see footnote 10 above), pp. 611–615. Cf. Sinclair (footnote 63 above), p. 98.

[345] Some of the debate about a new "terrorism law" exemplifies this concern.

2. The International Law Commission's debates

257. If much of article 30 was uncontroversial, this was not so in regard to paragraph 4, that is to say, the situation where the later treaty does not include as parties all the States that are parties to the earlier treaty. Unsurprisingly, this was the question on which most of the debates in the Commission focused. Two questions were highlighted: whether the relationship between incompatible treaties should be thought of in terms of "validity" or "priority" between them; and whether there was reason to single out special groups of treaties for separate treatment. There was general agreement (and therefore less discussion) on the fact that the provisions would need to reflect the priority to be accorded to *jus cogens* and to the Charter of the United Nations, as provided under Article 103 thereof.[346] There was also no disagreement that, in cases of subsequent bilateral or multilateral treaties with identical membership, the later treaty would generally prevail—the parties being always entitled to terminate the prior treaty by a subsequent one (apart from the question of peremptory norms). The most important question was how to deal with a situation where not all of the parties to the prior treaty were parties to the later treaty and where there were States that were parties to the later but not to the prior treaty. The discussions have frequently been summarized in the literature so a brief exposé will be sufficient.[347]

258. The first Special Rapporteur on the law of treaties, Lauterpacht, conceived of treaty conflict in terms of validity and advocated the *lex prior* rule—the invalidity of the later treaty.[348] It was qualified by two conditions, however. First, invalidity (of the later treaty) would follow only "if the departure from the terms of the prior treaty is such as to interfere seriously with the interests of the other parties to that treaty or seriously impair the original purpose of the treaty".[349]

259. The second exception concerned "multilateral treaties, such as the Charter of the United Nations, partaking of a degree of generality which imparts to them the character of legislative enactments properly affecting all members of the international community or which must be deemed to have been concluded in the international interest."[350]

260. In this latter case, the subsequent treaty would override the prior treaty. These provisions express Lauterpacht's effort to think of treaties in the image of domestic law, and especially to view multilateral treaties as functional equivalents to domestic legislation within a robust system of international legality. While he thought of the first qualification as already *de lege lata*, he felt the latter would involve progressive development.[351]

261. The second Special Rapporteur on the law of treaties, Fitzmaurice, rejected invalidity as the proper consequence of treaty conflict. There were so many treaties, and States were generally so ignorant of each other's commitments, that it would be unfair to the innocent party if conflict were to occasion automatic invalidity.[352] Besides, Fitzmaurice held, there was practically no support from international practice for such a drastic consequence. Therefore, he preferred the solution already proposed in the Harvard research on the law of treaties in 1935 that would provide, as the main rule, for the "priority" of the earlier—a position that that would not invalidate the later treaty, nor even prohibit States from entering into incompatible treaties.[353] The practical problem would be resolved by liability to the innocent party. It remained in practice (although Fitzmaurice was clearly unhappy about this) for the State having undertaken the incompatible obligations to choose which of the agreements it would fulfil.[354]

262. Like Lauterpacht, Fitzmaurice felt the need to qualify the priority of the earlier treaty by taking into account the case of treaties that involved "a more absolute type of obligation" than ordinary treaties building on reciprocal promises or benefits between parties. He defined two types of such treaties: "integral" and "interdependent" ones. Treaties of the former group were such that the performance of the obligation by one party was altogether independent of the performance of that obligation by others, such as with humanitarian or human rights conventions. In the second case—typically disarmament treaties—the obligation of each party was "dependent on a corresponding performance of the same thing by *all** the parties". Treaties conflicting with these would be sanctioned by invalidity. In other words, Fitzmaurice preserved Lauterpacht's solution for this special type of ("objective", "legislative") treaties.[355]

263. The third Special Rapporteur on the law of treaties, Waldock, maintained and extended the move from invalidity to priority. He stressed the need to treat with extreme caution suggestions that treaties among sovereign States could face the sanction of invalidity. Potential conflicts needed to be dealt with first by interpretation and by seeking to make them coherent. If it were impossible to reconcile the treaties, then the States would have to agree on priority, with liability to the innocent party.

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[346] Third report on the law of treaties by Gerald Fitzmaurice, Special Rapporteur (A/CN.4/115) (see footnote 139 above), pp. 27, 41, draft article 18, para. 1, and commentary, para. 77; and second report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur (A/CN.4/156 and Add.1–3) (see footnote 331 above), pp. 54, 61, draft article 14, paras. 3, and 4, and paras. (32)–(35) of commentary. The question of whether conflict with *jus cogens* or Article 103 of the Charter leads invariably to the invalidity of the conflicting rule will be discussed in chapter IV below.

[347] See, for example, Binder (footnote 145 above), pp. 49–65, and Mus (footnote 21 above), pp. 222–227.

[348] See the first report on the law of treaties by Hersch Lauterpacht, Special Rapporteur (A/CN.4/63) (footnote 144 above), pp. 156–159. In accordance with his consistent application of the domestic analogy, he insisted that international tribunals should have jurisdiction to declare the nullity of the later treaty and to provide for damages for any resulting loss to a party to the later treaty that had been unaware of the prior treaty (*ibid*., p. 156).

[349] *Ibid*., draft article 16, para. 3.

[350] *Ibid.*, para. 4.

[351] *Ibid.*, p. 157, paras. (5) and (6) of the commentary to draft article 16.

[352] Third report on the law of treaties by Gerald Fitzmaurice, Special Rapporteur (A/CN.4/115) (see footnote 139 above), pp. 41–42, para. 83, commentary to draft article 18.

[353] Draft convention on the law of treaties, Harvard Research in International Law, AJIL, vol. 29, supplement (1935), pp. 1024–1025.

[354] He conceded that, although there was no "right of election", there was nonetheless a "power of election" (third report on the law of treaties by Gerald Fitzmaurice, Special Rapporteur (A/CN.4/115) (see footnote 139 above), p. 42, para. 85).

[355] Second report on the law of treaties by Gerald Fitzmaurice, Special Rapporteur, *Yearbook ... 1957*, vol. II, document A/CN.4/107, p. 54, paras. 124–126; see also third report on the law of treaties (A/CN.4/115) (footnote 139 above), p. 49, para. 91.

264. Unlike his predecessors, Waldock did not reserve special treatment for legislative or "objective" treaties. There was, he felt, no support for this in international practice.[356] The nature and importance of the provisions in such treaties were in any case so heterogeneous that a general rule was out of place. If some treaties—such as those on the laws of war—contained especially important provisions, they were protected by their *jus cogens* character. But because the treaties preserved the right of unilateral denunciation, it seemed illogical to exclude the possibility of giving effect to subsequent treaties that in fact implied such a denunciation.[357]

265. Waldock's solution was to relativize the problem. For States that were parties to the first but not the second treaty, the first enjoyed priority. If all parties to the second were also parties to the first treaty, then this was an *inter se* agreement whose permissibility would have to be resolved by interpreting the first treaty.[358]

266. In the course of the discussion, an important distinction emerged between two types of cases where the group of parties to the later multilateral treaty was not identical with the group of parties to the earlier treaty: (*a*) cases where some States were parties to the later treaty but not parties to the earlier one; and (*b*) cases where *all* parties to the later treaty were also parties to the earlier treaty. The latter case covered what was subsequently called *inter se* modification of the treaty, which was dealt with separately under article 41 (see section D below).

C. Special clauses

267. Owing to the inconclusive nature of the general law on conflicts between successive norms, as well as the generally open-ended formulations of article 30 of the 1969 Vienna Convention, it seems important that States include some direction in treaties themselves as to what to do with subsequent or prior conflicting treaties. The following sections will contain: (*a*) a brief typology of conflict clauses; (*b*) a discussion of conflict clauses between and across "regimes"; (*c*) the conflict clauses incorporated in the Treaty establishing the European Community; and (*d*) the practice of the so-called "disconnection clause".

1. A typology of conflict clauses

268. Among the various categories of conflict clauses, at least the following may be distinguished:[359]

(*a*) *Clauses that prohibit the conclusion of incompatible subsequent treaties*. This is an express exception to the *lex posterior* rule, designed to guarantee the normative power of the earlier treaty. For example, under article 8 of the North Atlantic Treaty: "Each Party declares that none of the international engagements now in force between it and any other of the Parties or any third State is in conflict with the provisions of this Treaty, and undertakes not to enter into any international engagement in conflict with this Treaty".[360]

(*b*) *Clauses that expressly permit subsequent "compatible" treaties*. One example might be article 311, paragraph 3, of the United Nations Convention on the Law of the Sea, which provides as follows:

> Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

(*c*) *Clauses in the subsequent treaty providing that it "shall not affect" the earlier treaty*. One example would be article 30 of the 1958 Geneva Convention on the High Seas, according to which:

> The provisions of this Convention shall not affect conventions or other international agreements already in force, as between States Parties to them.

This provides for a presumption of harmony, also rebuttable, between the earlier and the subsequent treaty.[361]

(*d*) *Clauses in the subsequent treaty which provide that, among the parties, it overrides the earlier treaty*. This is really one case of "modification" of an agreement by an *inter se* agreement and will be covered at more length in section D below.

(*e*) *Clauses in the subsequent treaty that expressly abrogate the earlier treaty*.[362] An example would be article 311, paragraph 1, of the United Nations Convention on the Law of the Sea, according to which between parties to it and to the 1958 Geneva Conventions on the Law of the Sea, the former shall prevail.

(*f*) *Clauses in subsequent treaties that expressly maintain earlier compatible treaties*. One example would be article 311, paragraph 2, of the United Nations Convention on the Law of the Sea, according to which:

> This convention shall not alter the rights and obligations of States parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States parties of their rights or the performance of their obligations under this Convention.

(*g*) *Clauses promising that future agreements will abrogate earlier treaties*. This is a kind of *pactum de contrahendo*. One example is article 307 (formerly article 234) of the Treaty establishing the European Community, which provides that the rights and obligations

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[356] Second report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur (A/CN.4/156 and Add.1–3 (see footnote 331 above), p. 58, para. (20) of the commentary to draft article 14.

[357] *Ibid.*, pp. 59–60, paras. 25–30.

[358] *Ibid.*, p. 60, para. 31.

[359] See Rousseau, "De la compatibilité des normes juridiques contradictoires…" (footnote 36 above), pp. 154–164; Czapliński and Danilenko (footnote 74 above), p. 14; Mus (footnote 21 above), pp. 214–217; Aust, *Modern Treaty Law…* (footnote 74 above), pp. 174–181; Sadat-Akhavi (footnote 21 above), pp. 86–97; Fitzmaurice and Elias, *Contemporary Issues…* (footnote 74 above), pp. 323–325; Daillier and Pellet, *Droit international public* (footnote 74 above), pp. 268–271; and Borgen (footnote 10 above), pp. 584–587.

[360] See Aufricht (footnote 118 above), pp. 666–667.

[361] See Borgen (footnote 10 above), p. 586, and Aufricht (footnote 118 above), p. 669.

[362] Aufricht (see footnote 118 above), pp. 661–663.

of members ensuing from treaties concluded before membership are not affected. The members, however, commit to take action so as to abrogate those treaties (see further subsection C.3 below).

269. Although such clauses are undoubtedly useful, there is a limit to what they can achieve. They cannot, for instance, affect the rights of third parties or interfere with the operation of *jus cogens* or other hierarchical principles (such as those having to do with integral or interdependent obligations).[363]

270. But even though there are conflict clauses, their meaning or effect may sometimes be obscure. An example is provided by article 22 of the 1992 Convention on Biological Diversity:

> 1. The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except when the exercise of those rights and obligations would cause serious damage or threat to biological diversity.
>
> 2. Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea.

271. It seems unclear what is in fact being overridden by what in these formulations. Of course, the provision may be read as an exhortation that the relevant instruments should always be read as compatible with each other (*i.e.* the principle of systemic integration—see chapter V below) within an overall obligation to cooperate.[364] Sometimes this objective is actually written into the relevant conflict clause.[365] But where a party claims a right on the basis of the Convention on Biological Diversity or some other treaty, it would seem difficult to *deny* such a right by interpretation or "coordination". Besides, sometimes conflict clauses may themselves conflict or cancel each other out.[366] In such cases, recourse must be had to general principles of conflict resolution.

2. Relations within and across regimes: environmental treaties

272. As the previous considerations have shown, article 30 of the 1969 Vienna Convention has its limits. It works best when dealing with a relationship between two treaties on a related topic that have identical parties. It is then fair to assume that the later treaty expresses a more recent party will, and should therefore be given effect. When the parties are non-identical, article 30 allows the State having concluded incompatible obligations to choose which of them it will observe. Confronted with relations *between* treaty regimes, such as those habitually understood to exist in trade law, human rights law or environmental law, article 30 remains equally disappointing. The straightforward priority of one treaty over another (that is, in fact, of one regime over another) cannot be reasonably assumed on a merely chronological basis. There is a need for a more nuanced approach. It is unlikely, however, that such an approach might be developed within dispute settlement, which will perforce be limited to *ad hoc* considerations. Instead, it might be facilitated through the adoption of appropriate conflict clauses. Two types of such clauses may be distinguished. A first type might follow article 30 of the Convention and seek resolution by establishing firm priority between two treaties. A second type, discussed in this section, avoids straightforward priority and seeks instead to coordinate the simultaneous application of the two treaties as far as possible.

273. The relationship between treaties that belong to different regimes is a general problem. Its most acute manifestation has concerned relations between instruments forming part of trade and environmental regimes.[367] Although negotiators appear increasingly aware of the problem, practice has so far developed in an incoherent manner. For instance, in the negotiations on the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2000), the relationship of the Protocol to the obligations of the parties under agreements covered by WTO was extensively debated. As a result, the Protocol includes provisions concerning its relationship with trade instruments, but leaves many other important treaty relations unaddressed. These include its relationship to, for example, the International Plant Protection Convention, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction.[368]

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[363] Third report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur (A/CN.4/167 and Add.1–3) (see footnote 323 above), p. 38, para. (15) of the commentary to draft article 65.

[364] As suggested in Wolfrum and Matz, *Conflicts in International Environmental Law* (see footnote 22 above), p. 125; Matz, *Wege zur Koordinierung völkerrechtlicher Verträge…* (see footnote 22 above), pp. 191–194 *et seq.*; and Fitzmaurice and Elias, *Contemporary Issues…* (see footnote 74 above), p. 333. For a useful discussion of the ambiguities of the conflict clause in the Cartagena Protocol on the Safety of Biotechnology to the Convention on Biological Diversity, see S. Safrin, "Treaties in collision? The Biosafety Protocol and the World Trade Organization agreements", AJIL, vol. 96, No. 3 (July 2002), p. 606.

[365] Article 237, paragraph 2, of the United Nations Convention on the Law of the Sea, for example, yields to specific environmental treaties, provided these are implemented "in a manner consistent with the general principles and objectives of this Convention". See further Fitzmaurice and Elias, *Contemporary Issues…* (footnote 74 above), pp. 334–336.

[366] This is the case of article 311, paragraph 3, of the United Nations Convention on the Law of the Sea and article 22, paragraph 1, of the Convention of Biological Diversity. For a discussion, see Fitzmaurice and Elias, *Contemporary Issues…* (footnote 74 above), p. 334.

[367] For instance, Sadat-Akhavi (see footnote 21 above), pp. 213–247, has dealt with specific conflict resolution techniques for different types of treaties, *e.g.* human rights treaties and the principle of "more favourable provision"; Pauwelyn, *Conflict of Norms…* (see footnote 21 above), pp. 345–361, has dealt with the conflict clauses in the WTO treaty; D. E. Siegel, "Legal aspects of the IMF/WTO relationship: the Fund's articles of agreement and the WTO agreements", AJIL, vol. 96, No. 3 (July 2002), p. 561; A. Lindroos, "Addressing norm conflicts in a fragmented legal system: the doctrine of *lex specialis*", *Nordic Journal of International Law*, vol. 74, No. 1 (2005), p. 27, at pp. 30–34, 60–64; Wolfrum and Matz, *Conflicts in International Environmental Law* (see footnote 22 above) have extensively dealt with conflicts between environmental and other treaties. The fact that environmental treaties have particularly wide potential for conflict with other treaties, as most matters bear a relationship to the environment, is stressed in Matz, *Wege zur Koordinierung völkerrechtliche Verträge…* (see footnote 22 above), pp. 53–73. The World Health Organization has considered the issue in the context of the International Health Regulations: "*Review and approval of proposed amendments to the International Health Regulations: relations with other international instruments*"(A/IHR/IGWG/INF.DOC./1), 30 September 2004.

[368] Safrin (see footnote 364 above), p. 617.

274. The final wording of the relevant preambular passages in the Cartagena Protocol on Biosafety to the Convention on Biological Diversity illustrates current problems:

> *Recognizing* that trade and environment agreements should be mutually supportive with a view to achieving sustainable development,
>
> *Emphasizing* that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements,
>
> *Understanding* that the above recital is not intended to subordinate this Protocol to other international agreements…[369]

275. The negotiators have been reluctant to decide how, exactly, environmental and trade agreements should be related to each other or to any other further agreement.[370] The only thing they appear to have agreed is that the Cartagena Protocol on Biosafety to the Convention on Biological Diversity should be seen as no less important than any other agreement. Similar clauses may be found in other treaties. For example, the preamble to the International Treaty on Plant Genetic Resources for Food and Agriculture (2001) provides that it should not be interpreted as "implying in any way a change in the rights and obligations of the Contracting Parties under other international agreements". It then expresses the understanding that this principle "is not intended to create a hierarchy between this Treaty and other international agreements".

276. Such formulations do imply a willingness to acknowledge the existence of parallel and potentially conflicting treaty obligations. But they fall short of indicating clearly what should be done in the event that conflicts emerge. Instead, recourse is had to compromise formulas that, as it were, push the resolution of problems to the future. The first paragraph of the conflict clause in the preamble to the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, for example, provides that "trade and environment agreements should be mutually supportive with a view to achieving sustainable development". The assumption is that conflicts may and should be resolved between treaty partners as they arise and with a view to mutual accommodation.[371] Likewise, the International Treaty on Plant Genetic Resources for Food and Agriculture, mentioned above, recognizes "that this Treaty and other international agreements relevant to this Treaty should be mutually supportive with a view to sustainable agriculture and food security". Other treaties include conditional conflict clauses that also leave much room for appreciation and negotiation. For instance, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989) allows parties to enter into other agreements "provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention".[372] And the 1992 Convention on Biological Diversity states that "[t]he provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause serious damage or threat to biological diversity."[373]

277. Such clauses give recognition to the fact that that it seems inadvisable to produce a general rule on treaty priority. For this, the treaties and the situations that may arise are too heterogeneous. Instead, the parties appeal to each other's sense of accommodation and willingness to envisage "mutually supportive" roles for their instruments. This is simply another way to emphasize the importance of harmonizing interpretation. This may work well between treaties that are part of the same regime and share a similar object and purpose or carry a parallel "ethos", for example between several environmental or trade instruments *inter se*. But it cannot be assumed *a priori* that a similar readiness exists between parties to treaties across regimes, treaties that seek to achieve physically incompatible solutions, or treaties inspired by very different (perhaps opposite) objectives in situations experienced as zero-sum games. In such cases, at the end of the day, one treaty must be preferred over the other. At that point, focus shifts from coordination to rights and obligations. While open-ended or programmatic provisions are easily amenable to accommodation, this cannot be said of provisions laying out (subjective) rights or obligations. In giving effect to them, it remains important to provide for the possibility of recourse to regime-independent dispute settlement.

278. Mutual accommodation is easiest between two instruments within a regime, especially between a framework agreement and a more specific (implementation) agreement.[374] For example, many of the conflict clauses in the United Nations Convention on the Law of the Sea are quite open-ended and refrain from setting up neat priorities. This is understandable. There is often reason to encourage further specific regulation. The implementation agreement will then prevail as *lex specialis,* while the framework instrument remains "in the background" as *lex generalis,* as pointed out in chapter II above. Article 311, paragraph 3, of the United Nations Convention on the Law of the Sea allows States to conclude modifying agreements

> provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied

[369] Cartagena Protocol on the Safety of Biotechnology to the Convention on Biological Diversity, depositary notification C.N.251.2000. TREATIES-1 of 27 April 2000; C.N.1471.2003.TREATIES-41 of 22 December 2003 (proposal of corrections to the Arabic text of the Protocol) and C.N.291.2004.TREATIES-11 of 26 March 2004 (rectification of the Arabic text of the Protocol and transmission of the relevant *procès-verbal*). See also ILM, vol. 39, No. 5 (September 2000), p. 1027.

[370] Safrin (see footnote 364 above), pp. 618–621, and Borgen (see footnote 10 above), p. 614.

[371] The content and form of this "obligation to coordinate" is discussed at length in Matz, *Wege zur Koordinierung völkerrechtlicher Verträge…* (see footnote 22 above), pp. 233–390.

[372] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, art. 11, para. 1.

[373] Convention on Biological Diversity, art. 22, para. 1.

[374] Wolfrum and Matz, *Conflicts in International Environmental Law* (see footnote 22 above), p. 121. The relationship between the United Nations Convention on the Law of the Sea as an umbrella convention and an implementing agreement, in relation to a dispute settlement system, was raised in the *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan* (see footnote 26 above).

herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

279. Here "compatibility" has been formulated rather loosely. Parties are given wide latitude to conclude agreements on topics dealt with by the Convention, with the sole caveat that this should not "affect the application of the basic principles" or the "rights" and "obligations" of the parties. Although there is room to interpret the expressions "rights" and "obligations" either more or less strictly, the thrust of the provision lies in a search for reasonable accommodation. Like the environmental treaties discussed above, it seems to look for "mutually supportive" roles for the Convention and those particular instruments. What this means if an agreement seems to be in outright conflict with the Convention remains unclear.[375]

280. The weakness of the strategy of seeking a "mutually supportive" interpretation lies in its open-endedness. By concluding this type of conflict clause, States parties transfer their competence to decide on what should be done if conflicts arise to those who apply the law. This may work well if the two treaties are part of the same regime. But if the conflict is between treaties across two regimes, then the solution works only if the law-applier is an impartial third party that approaches the conflicting instruments from beyond the regimes of which the treaties are part. It might happen, however, that the law-applier will be a body or an administrator closely linked to one or other of the (conflicting) regimes. In such a case, an open-ended conflict clause will come to support the primacy of the treaty that is part of the law-applier's regime.

281. Conflict clauses referring to the fundamental purpose of the treaty are in line with the language of article 41, paragraph 1 (*b*) (ii), of the 1969 Vienna Convention, which requires that *inter se* agreements should not frustrate the object and purpose of the original treaty. Often such clauses also support the idea of interpreting treaties in a manner which preserves the rights and obligations under both treaties in a maximal way. A harmonizing approach ("mutually supportive") fits best with the aim of efficient management.

282. Nevertheless, the resulting interpretative openness creates a danger of "structural bias", *i.e.* that what is understood as a "mutually supportive" solution is determined in accordance with the priorities of the body whose task it is to interpret the conflict clause. To prevent this, it is still advisable to write the key provisions in multilateral treaties—and especially provisions that have to do with the substantive rights and obligations of the parties—with sufficient clarity so that they are not compromised at the stage of application.

3. Conflict clause in the Treaty establishing the European Community

283. Agreements establishing international organizations often contain a conflict clause. The best-known example is Article 103 of the Charter of the United Nations (see further chapter IV below). Likewise, article 307 (previously article 234) of the Treaty establishing the European Community sets up a conflict rule for agreements between member States and third parties.[376] The Treaty establishing the European Community takes absolute precedence over agreements that member States have concluded between themselves. In relation to third States, however, article 307 stipulates:

> The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more [m]ember States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.
>
> To the extent that such agreements are not compatible with this Treaty, the [m]ember State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.
>
> In applying the agreements referred to in the first paragraph, [m]ember States shall take into account the fact that the advantages accorded under this Treaty by each [m]ember State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other [m]ember States.

284. This article gives priority to treaties that a member State has concluded with third States before the entry into force of European Community treaties in regard to it.[377] The European Court of Justice has frequently clarified the scope of article 307.[378] In the *Burgoa* case, the Court confirmed that article 307 "is of general scope and it applies to any international agreement, irrespective of subject-matter, which is capable of affecting the application of the Treaty".[379] Neither the wording of the article nor subsequent case law accepts the extension of the provision to agreements concluded by member States after accession.[380] According to the leading case, the provision covers the rights of third parties and the obligations of member States:

> The applicant replies that the terms "rights and obligations" in Article 234 refer, as regards the "rights", to the rights of third countries and, as regards the "obligations", to the obligations of [m]ember States and that, by virtue of the principles of international law, by assuming a new obligation which is incompatible with rights held under a prior

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[375] Fitzmaurice and Elias, *Contemporary Issues…* (see footnote 74 above), p. 335, and Wolfrum and Matz, *Conflicts in International Environmental Law* (see footnote 22 above), pp. 15–31.

[376] I. MacLeod, I. D. Hendry and S. Hyett, *The External Relations of the European Communities: A Manual of Law and Practice,* Oxford, Clarendon Press, 1996, p. 229, and P. Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations*, Oxford, Oxford University Press, 2004, p. 334. See also, for example, J. Klabbers, "Re-inventing the law of treaties: the contribution of the EC courts", *Netherlands Yearbook of International Law,* vol. 30 (1999), p. 45; J. Klabbers, "Moribund on the fourth of July? The Court of Justice on prior agreements of the member States", *European Law Review*, vol. 26 (2001), pp. 187–197; C. N. K. Franklin, "Flexibility vs. legal certainty: article 307 EC and other issues in the aftermath of the Open Skies cases", *European Foreign Affairs Review*, vol. 10 (2005), p. 79; P. J. Kuijper, "The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties 1969", *Legal Issues of European Integration*, vol. 25, No. 1 (1998), p. 1; F. E. Dowrick, "Overlapping European laws", *International and Comparative Law Quarterly*, vol. 27, No. 3 (July 1978), pp. 629–660.

[377] Klabbers, "Moribund on the fourth of July?…" (see footnote 376 above), pp. 187–188.

[378] Eeckhout (see footnote 376 above), p. 334.

[379] Case 812/79, *Attorney General v. Juan C. Burgoa*, judgment of 14 October 1980, *European Court Reports 1980*, p. 2787, at p. 2802, para. 6.

[380] Eeckhout (see footnote 376 above), p. 335.

treaty a State *ipso facto* gives up the exercise of these rights to the extent necessary for the performance of its new obligations.[381]

The applicant's interpretation is well founded and the objection raised by the defence must be dismissed.[382]

285. The distinction between the *rights* of third States and the *obligations* of member States relates to the question of whether a member State can claim that it cannot fulfil its obligations under Community law towards other member States owing to a treaty it has made with third States. In the aforementioned case the Italian Government had argued that it could not fulfil its obligations of intra-Community trade owing to its GATT commitments. This was quickly dispelled by the Court: "in matters governed by the [Treaty establishing the European Community], that Treaty takes precedence over agreements concluded between [m]ember States before its entry into force, including agreements made within the framework of GATT."[383] Article 307 cannot therefore be relied upon in relations between members to justify trade restrictions within the European Community.[384] Yet the division of rights and obligations is not unproblematic.[385] As pointed out by Klabbers, article 307 is clearly applicable to bilateral treaties, as well as to "bilateralizable" multilateral treaties. In respect of other kinds of multilateral treaties, article 307 has only limited applicability.[386]

286. Article 307 places no obligation on the European Community itself. However, as stated by the European Court of Justice in the *Burgoa* case:

Although the first paragraph of Article 234 makes mention only of the obligations of the [m]ember States, it would not achieve its purpose if it did not imply a duty on the part of the institutions of the Community not to impede the performance of the obligations of [m]ember States which stem from a prior agreement. However, that duty of the Community institutions is directed only to permitting the [m]ember State concerned to perform its obligations under the prior agreement and does not bind the Community as regards the non-member country in question.[387]

287. Under article 307 of the Treaty establishing the European Community, member States are allowed to carry out their earlier agreements with third States, and the European Community is under an obligation not to impede this. Nevertheless, member States are also obliged to take all appropriate steps to eliminate the incompatibilities between their European Community obligations and these previous treaties.[388] As the European Court of Justice has pointed out, this involves a duty to work actively so as to bring external obligations into line with European Community obligations:

Although, in the context of Article 234 of the Treaty, the [m]ember States have a choice as to the appropriate steps to be taken, they are nevertheless under an obligation to eliminate any incompatibilities existing between a pre-Community convention and the EC Treaty. If a [m]ember State encounters difficulties which make adjustment of an agreement impossible, an obligation to denounce that agreement cannot therefore be excluded.[389]

As regards the argument that such denunciation would involve a disproportionate disregard of foreign-policy interests … as compared with the Community interest, it must pointed out that the balance between the foreign-policy interests of a [m]ember State and the Community interest is already incorporated in Article 234 of the Treaty, in that it allows a [m]ember State not to apply a Community provision in order to respect the rights of third countries deriving from a prior agreement and to perform its obligations thereunder. That article also allows them to choose the appropriate means of rendering the agreement concerned compatible with Community law.[390]

288. The position of the European Court of Justice is that the requirement under article 307 "to eliminate any incompatibilities" is rather strict.[391] The Court appears willing to accept that a member State may face difficulties in bringing its external commitments into line with European Community law. This may sometimes involve a duty to denounce such commitments. In other words, as pointed out by Eeckhout, "[f]oreign-policy interests of the [m]ember States cannot override that obligation, and a [m]ember State cannot in principle argue that denunciation would be too harmful to those interests".[392] He also remarks that "[t]here is no suggestion that there may ever be cases where the [European] Community itself is required to act so as to remove incompatibilities, for example by amending Community law".[393]

4. Disconnection clauses

289. One practice that it may be appropriate to discuss here is the expansion of the so-called "disconnection clause" in multilateral agreements to which the European Community is a party. There are presently at least 17 multilateral treaties, having as parties both members and non-members of the European Community (and, in some cases, also the European Community itself), that contain this clause.[394] The purpose of the clause is, according

[381] Case 10/61, *Commission of the European Economic Community v. Government of the Italian Republic*, judgment of 27 February 1962, *European Court Reports 1962*, English special edition, p. 1, at p. 10. See also MacLeod, Hendry and Hyett (footnote 376 above), p. 230, and Eeckhout (footnote 376 above), pp. 337–338.

[382] *Commission of the European Economic Community Government of the Italian Republic* (see footnote 381 above), p. 132.

[383] *Ibid*.

[384] MacLeod, Hendry and Hyett (see footnote 376 above), p. 230. This was confirmed by the European Court of Justice in case 121/85, *Conegate Limited v. HM Customs & Excise*, judgment of 11 March 1986, *European Court Reports 1986*, p. 1007, at p. 1024.

[385] Klabbers, "Re-inventing the law of treaties…" (see footnote 376 above), p. 63.

[386] *Ibid.*, pp. 64–65.

[387] *Attorney General v. Juan C. Burgoa* (see footnote 379 above), p. 2803, para. 9.

[388] *Ibid.*, pp. 2807–2809, paras. 23–26, and Klabbers, "Moribund on the fourth of July?…" (see footnote 376 above), pp. 188–189.

[389] Case 62/98, *Commission of the European Communities v. Portuguese Republic*, judgment of 4 July 2000, *European Court Reports 2000*, p. 5171, at pp. 5211–5212, para. 49.

[390] *Ibid.*, p. 5212, para. 50.

[391] Klabbers, "Moribund on the fourth of July?…" (see footnote 376 above), pp. 195–196.

[392] Eeckhout (see footnote 376 above), p. 342.

[393] *Ibid.*

[394] Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, 2005, art. 52, para. 4; Council of Europe Convention on Action against Trafficking in Human Beings, 2005, art. 40, para. 3; Council of Europe Convention on the Prevention of Terrorism, 2005, art. 26, para. 3; Convention on Contact concerning Children, 2003, art. 20, para. 3; Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, 2003, art. 20, para. 2; European Convention for the Protection of the Audiovisual Heritage, 2001, art. 21; European Convention on the Legal Protection of Services based on, or consisting of, Conditional Access, 2001, art. 11, para. 4; European Convention on the Promotion of a Transnational Long-Term Voluntary Service for Young People, 2000, art. 19, para. 2; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 1995, art. 13, para. 3; Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs

(*Continued on next page.*)

to the European Commission, to ensure the continuing application of Community rules between European Community member States, without any intent to affect obligations between member States and other parties to treaties.[395] The exact formulation of these clauses differs from one convention to another, but the core substance is captured in article 27, paragraph 2, of the Convention on Mutual Administrative Assistance in Tax Matters of 1988:

> Notwithstanding the rules of the present Convention, those Parties which are members of the European Economic Community shall apply in their mutual relations the common rules in force in that Community.

290. Some disconnection clauses are general and cover the whole of a treaty. Other clauses are only partial or qualified.[396] The clause in article 20, paragraph 2, of the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters is an example of a partial disconnection clause, aiming to replace only certain articles of the original treaty.[397] As an example of a conditional disconnection clause, mention could be made of article 26, paragraph 3, of the Council of Europe Convention on the Prevention of Terrorism, which refers to European Community rules "without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties". Another, perhaps equally ambiguous, condition is written into article 30, paragraph 3, of the Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which stipulates: "If two or more Parties have already concluded an agreement or treaty in respect of a subject dealt with in this Agreement or have otherwise established their relations in respect of that subject, they may agree to apply that agreement or treaty or to regulate those relations accordingly, in lieu of the present Agreement, if it facilitates international co-operation."[398]

291. In all cases, the rules of the treaty are replaced, in whole or in part, by European Community rules in relations between European Community members. The obligations between European Community members and other treaty parties remain, however, fully governed by the treaty. The inclusion of such clauses in multilateral treaties has given some cause for concern. It has seemed difficult to classify them by reference to provisions in the 1969 Vienna Convention, and the effect of the proliferation of such clauses on the coherence of the original treaty has seemed problematic.[399]

292. Article 30, paragraph 2, of the 1969 Vienna Convention provides that: "[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail." This formulation also covers disconnection clauses. They are thus best analysed as conflict clauses added to treaties with a view to regulating potential conflicts between European Community law and the treaty. What may seem disturbing about such clauses is that they are open only to some parties to the original treaty, and the content of the European Community law to which they refer may be both uncertain and subject to change. Nevertheless, this is scarcely different from regular *inter se* amendments that also apply only between some parties and that may be subject to future modification.

293. Under what conditions is this type of clause permissible? The starting point is, of course, that the clause is agreed to by all the parties, so that no question of validity will arise. Nevertheless, the possibility cannot be excluded that the other parties might not know of the real import of the disconnection clause because the rules referred to therein (the relevant European Community rules) are obscure, or have been modified or interpreted in a new way. In this case, the European Community rules begin to resemble a new, successive treaty, covered by article 30, paragraph 4, of the 1969 Vienna Convention. According to article 30, paragraph 5, of this Convention, "[p]aragraph 4 [of article 30] is without prejudice to article 41".[400] Through this means, an open-ended discon-

(*Footnote 394 continued.*)

and Psychotropic Substances, 1995, art. 30, para. 3; European Convention relating to questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite, 1994, art. 9, para. 1; Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, 1993, art. 25, para. 2; European Convention on Certain International Aspects of Bankruptcy, 1990, art. 38, para. 2; Protocol to the Convention on Insider Trading, 1989, art. 1; European Convention on Transfrontier Television, 1989, art. 27, para. 1; Convention on Insider Trading, 1989, art. 16 *bis*; Convention on Mutual Administrative Assistance in Tax Matters, 1988, art. 27, para. 2.

[395] The European Community/European Union and its [m]ember States have also included the following declaration in the Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism: "'The European Community/European Union and its [m]ember States reaffirm that their objective in requesting the inclusion of a "disconnection clause" is to take account of the institutional structure of the Union when acceding to international conventions, in particular in case of transfer of sovereign powers from the [m]ember States to the Community. This clause is not aimed at reducing the rights or increasing the obligations of a non-European Union Party *vis-à-vis* the European Community/European Union and its [m]ember States, inasmuch as the latter are also parties to this Convention. The disconnection clause is necessary for those parts of the Convention which fall within the competence of the Community/Union, in order to indicate that European Union [m]ember States cannot invoke and apply the rights and obligations deriving from the Convention directly among themselves (or between themselves and the European Community/Union). This does not detract from the fact that the Convention applies fully between the European Community/European Union and its [m]ember States on the one hand, and the other Parties to the Convention, on the other; the Community and the European Union [m]embers States will be bound by the Convention and will apply it like any Party to the Convention, if necessary, through Community/Union legislation. They will thus guarantee the full respect of the Convention's provisions *vis-à-vis* non-European Union Parties.' As an instrument made in connection with the conclusion of a treaty, within the meaning of Article 31, para. 2(*b*) of the Vienna Convention on the Law of Treaties, this declaration forms part of the 'context' of the Convention" (Council of Europe, *Council of Europe Treaty Series*, No. 196, para. 272); see also L. Azoulai, "The acquis of the European Union and international organizations", *European Law Journal*, vol. 11 (2005), especially p. 211, and A. Schulz, "The relationship between the judgments project and other international instruments", preliminary document No. 24 of December 2003, Hague Conference on Private International Law, available from https://assets.hcch.net/upload/wop/genaff_pd19e.pdf.

[396] For a typology, see C. P. Economides and A. G. Kolliopoulos, "La clause de déconnexion en faveur du droit communautaire: une pratique critiquable", RGDIP, vol. 110 (2006), p. 273.

[397] *Ibid.*

[398] *Ibid.*

[399] *Ibid.*

[400] The drafting processes for the two articles overlapped considerably. See sections B.2, above, and D.4, below, of this chapter.

nection clause would *also* become conditioned by the requirements of article 41. During the preparatory work for the 1969 Vienna Convention, Mustafa Kamil Yasseen confirmed that a right to *inter se* modification should not be unlimited, but that any modification would need to respect the object and purpose of the treaty.[401] A similar position was taken by Alain Pellet in the context of reservations, as he explained that an expressly authorized, unspecified reservation must also fulfil the object and purpose test.[402] Thus, while the scope and content of the disconnection clause is normally covered by the original consent, if the regulation referred to in that clause will be modified, such modification may only be allowed to the extent that it does not "affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations [or] relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole", as stipulated in article 41, paragraph 1 (*b*), of the Convention.

294. Like *inter se* modification, a disconnection clause makes it possible for a limited group of parties to enhance the objectives of the treaty by taking measures that correspond to their special circumstances. But just like *inter se* agreements, this practice creates the possibility of undermining the original treaty regime. The actual effect of a disconnection clause depends on its specific wording. Their common point, however, is that they seek to replace a treaty in whole or in part with a different regime that should be applicable only between certain parties. The real substance of the clause is not apparent on its surface but lies in the regime referred to in the clause. It is the conformity of the substance of that regime with the treaty itself where the real point of concern lies. From the perspective of other treaty parties, the use of a disconnection clause might create double standards, be politically incorrect or just cause confusion.[403] To alleviate such concerns, some disconnection clauses are worded so as to be "without prejudice to the object and purpose of the present Convention". Nevertheless, even if they did not contain such a reference, the condition of conformity with object and purpose may, as pointed out above, derive from the conditions laid down for *inter se* modification. In assessing such conformity, two concerns seem relevant. First, a disconnection clause is agreed to by all the parties to a treaty. From this perspective, the practice seems unproblematic. The validity of a disconnection clause flows from party consent. On the other hand, it is not obvious that parties are always well informed of the content of the regime to which the clause refers, and that regime may change independently of the will or even knowledge of the other parties. In such cases, the criterion concerning conformity with object and purpose will provide the relevant standard for assessing the practice of the treaty parties. As elsewhere, the consideration of whether the provisions to which the treaty refers are what Fitzmaurice called "integral" or "interdependent" provisions—that cannot be separated from the treaty—seems relevant.

□□ *Inter se* agreements

295. As pointed out above, during debates in the Commission on treaty conflict a distinction was constantly made between subsequent agreements among some treaty parties to *modify* the application of a treaty in their relations *inter se* and subsequent treaties in which, in addition to parties to the earlier treaty, also other States participated. The former situation (*inter se* agreements) is now covered in article 41 of the 1969 Vienna Convention.

296. The Commission's Special Rapporteurs emphasized the practical importance of *inter se* modifications to multilateral treaties. Lauterpacht pointed out that these were a much used technique whereby treaties could be developed so as to apply better in the relations between some parties, the only question being whether such an agreement might affect the rights of the other parties to the treaty to the extent of invalidating it.[404] Fitzmaurice described the *inter se* treaty as "one of the chief instruments, increasingly in use today, whereby a given treaty situation can be changed in a desirable and perhaps necessary manner".[405] Waldock agreed that practice confirmed *inter se* agreements as "a normal method of revising general multilateral treaties".[406] Thus,

> in 1906 the Geneva Convention of 1864 for the Amelioration of the Condition of Wounded in Armies in the Field was revised by a new Convention which expressly provided that, when duly ratified, it should supersede the 1864 Convention in the relations between the contracting States, but that the 1864 Convention should remain in force in the relations of parties to that Convention who did not ratify the new Convention. A similar provision was inserted in the Hague Convention of 1907 on the Laws and Customs of War on Land, which revised the earlier Convention of 1899.[407]

297. Indeed, the conclusion of agreements between a limited number of parties to a multilateral treaty is an old practice, often provided for by the final clauses of a treaty itself.[408] Such *inter se* agreements do not necessarily derogate from the treaty. Instead, they serve to implement, update and strengthen the treaty in the relations between the parties to the modifying treaty. There is no reason in such cases not to allow them full effect.

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[401] *Yearbook ... 1966*, vol. I (Part Two), p. 219, summary record of the Commission's 876th meeting, held on 23 June 1966, para. 4.

[402] Tenth report on reservations to treaties by Alain Pellet, Special Rapporteur, *Yearbook … 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, p. 141.

[403] See, for example: the speech by Serhiy Holovaty, Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, 7 April 2005, at the 26th Conference of European Ministers of Justice in Helsinki (available from www.coe.int/en/web/human-rights-rule-of-law/mju26-2005-helsinki); report for debate in the Standing Committee under urgent procedure, submitted by Rapporteuse Mrs. Ruth-Gaby Vermot-Mangold, concerning draft Council of Europe convention on action against trafficking in human beings, 15 March 2005 (available from http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=10806&lang=EN); P.J. Kuijper, "The conclusion and implementation of the Uruguay Round results by the European Community", EJIL, vol. 6 (1995), pp. 223–224; interim Health Protection Agency operational statement on the International Health Regulations, 12 May 2004.

[404] Second report on the law of treaties by Hersch Lauterpacht, Special Rapporteur, *Yearbook ... 1954*, vol. II, document A/CN.4/87, p. 136.

[405] Third report on the law of treaties by Gerald Fitzmaurice, Special Rapporteur (A/CN.4/115) (see footnote 139 above), p. 43, para. 89 (*b*), commentary to paragraph 8 of draft article 18.

[406] Third report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur (A/CN.167 and Add.1–3) (see footnote 323 above), p. 49, para. (7) of the commentary to draft article 69.

[407] *Ibid.*

[408] For a discussion of typical cases where multilateral treaties have been updated and improved by later "special" (*inter se*) agreements, see Sadat-Akhavi (footnote 21 above), pp. 114–119.

298. For example, the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations both allow the conclusion of agreements on their respective subject matters that provide more favourable treatment or confirm, supplement, extend or amplify their relevant provisions.[409] An example relating to the latter would be the agreement concluded between Czechoslovakia and Austria in 1979, in which the two States wished "to confirm, supplement and amplify the provisions of [the Vienna] Convention [on Consular Relations] in accordance with its article 73, paragraph 2, and thereby also contribute to the further development of friendly relations between the two States in conformity with the provisions of the Final Act of the Conference on Security and Co-operation in Europe".[410] Another example would be the European Convention on Consular Functions of 11 December 1967, in which member States of the Council of Europe that were parties to the Vienna Convention on Consular Relations extended the relevant privileges beyond what had been granted by that Convention, noting that these special rules had been established by virtue of the close cooperation among them.[411]

299. An example of a treaty expressly encouraging parties to conclude agreements that implement or extend its provisions further is provided by the Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968, article VII of which provides that "[n]othing in this Treaty affects the right of any group of States to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories". As a consequence, several regional agreements reinforcing the prohibition of nuclear weapons at the regional level have in fact been concluded.[412]

300. Although all the Special Rapporteurs agreed that the faculty to conclude *inter se* agreements could not be unlimited, the emphasis was initially on the need to act in good faith in consultation with other parties.[413] The Commission focused on the process of notifying the other parties of an intended *inter se* agreement.[414] A separate draft (draft article 69) on this issue emerged from the Commission's debates in 1964.[415] Much of the debate was still about notification, although Bartoš paid attention to the case where *inter se* agreements "might also have an indirect effect on the interests of the parties to the original treaty".[416] In his sixth report, Waldock presented revised draft article 67, which dealt with agreements to modify multilateral treaties between certain parties only.[417] This article was generally accepted by Governments, and in discussion within the Commission in 1966 Reuter observed that it constituted "an ingenious compromise between two needs: the need to recognize the rights of the parties to a treaty in its initial form and the need to permit the modification of the treaty in order to take account of certain international requirements".[418] This was the basis on which the United Nations Conference on the Law of Treaties adopted what became article 41 of the 1969 Vienna Convention.

Article 41. Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(*a*) The possibility of such a modification is provided for by the treaty; or

(*b*) The modification in question is not prohibited by the treaty and:

(i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) Does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.[419]

[409] Article 47 of the Vienna Convention on Diplomatic Relations, and article 72 and article 73, para. 2, of the Vienna Convention on Consular Relations.

[410] Agreement on Consular Relations, signed at Prague on 14 March 1979, United Nations, *Treaty Series*, vol. 1224, No. 19752, p. 3. This agreement adds, *inter alia*, "member of the family" to the categories of persons defined in article 1 of the Vienna Convention on Consular Relations and expands the consular functions defined in the various paragraphs of article 5 of the Convention.

[411] Preamble. States members of the Council of Europe have concluded many *inter se* agreements that introduce more advanced special regimes into their relations than the general regimes of multilateral treaties that have their basis in the aim of the Council of Europe, which is "to achieve a greater unity between its members … [with a view to] facilitating their economic and social progress … by agreements and common action in economic, social, cultural, scientific, legal and administrative matters" (Statute of the Council of Europe, art. 1). See, for example, the European Convention relating to the Formalities required for Patent Applications of 11 December 1953 and the Convention on the Unification of Certain Points of Substantive Law on Patents for Invention of 27 November 1963, concluded on the basis of article 15 of the Paris Convention for the Protection of Industrial Property of 20 March 1883, as revised in 1934.

[412] See, for example, the Treaty on the Southeast Asia Nuclear Weapon-Free Zone of 15 December 1995 between the States of South-East Asia, the South Pacific Nuclear Free Zone Treaty (Rarotonga Treaty) of 6 August 1985 between the States of the South Pacific (Australia, New Zealand and the island States of the region) and the African Nuclear-Weapon-Free Zone Treaty (Pelindaba Treaty) of 11 April 1996, establishing nuclear-weapon-free zones in, respectively, South-East Asia, the Pacific (where a protocol expressly prohibits nuclear testing) and Africa.

[413] Third report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur (A/CN.4/167 and Add.1–3) (see footnote 323 above), p. 47.

[414] *Yearbook … 1964*, vol. I, p. 140, summary record of the Commission's 745th meeting, held on 15 June 1964.

[415] *Ibid.*, p. 143; see also pp. 140–152.

[416] *Ibid.*, p. 272, summary record of the Commission's 764th meeting, held on 13 July 1964, para. 84.

[417] Sixth report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur (A/CN.4/186 and Add.1–7) (see footnote 34 above), pp. 86–87, 119. Paragraph 1 of draft article 67 (Agreements to modify multilateral treaties between certain of the parties only) read: "Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: (*a*) The possibility of such modification is provided for by the treaty; or (*b*) The modification in question: (i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) Does not relate to a provision derogation from which is incompatible with the effective execution of the objects and purposes of the treaty as a whole; and (iii) Is not prohibited by the treaty."

[418] *Yearbook … 1966*, vol. I (Part II), p. 219, summary record of the Commission's 876th meeting, held on 23 June 1966, para. 9.

[419] A similar provision is also included in article 41 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986 Vienna Convention). They deal with the case of agreement between two or more parties to a multilateral treaty to modify the treaty as between

301. *Inter se* agreements give rise to two types of legal relations: the "general" relations that apply between all the parties to the original treaty and the "special" relations that apply between the States parties to the *inter se* agreement. Situations of this kind are not, however, peculiar to *inter se* agreements. For example, the option to object to or accept reservations can lead to a multilateral treaty having, on the one hand, comprehensive validity among the parties at large and, on the other, restricted validity between them and the States making reservations.[420]

302. An analogous situation may also arise in the process of treaty amendment when some of the parties undertake to revise the treaty but not all parties agree to the revision. In such a case, the treaty remains in force in its original form for the parties that do not participate in the amendment.[421] The same is true in regard to parties that do not ratify amendments: the original treaty remains in force between them, while the amended treaty enters into force for the others.[422] The difference between "amendment" and *inter se* agreements under article 41 is that the purpose of the latter is not to revise the original treaty, merely to modify its application in relations between certain parties.[423] Article 41 is intended to cover only the latter case.[424]

303. Article 41 seeks a compromise between two requirements: that of meeting the needs of a limited number of parties wishing to regulate their relations by *inter se* rules and that of allowing the other parties to continue applying the treaty regime in its initial form. It recognizes the right of parties to a multilateral treaty to create a special regime through an *inter se* agreement but, by placing strict conditions on the exercise of that right, seeks to protect the general regime of the treaty.

1. The conditions applicable to the conclusion of *inter se* agreements

304. A treaty may of course either expressly allow or expressly prohibit the conclusion of *inter se* agreements, either wholly or in part. When a treaty is silent, or to the extent that it is so, the question of their permissibility emerges. There may be cases where a modification might affect the interests or rights of the other parties to the treaty or the execution of the object and purpose of the treaty. For those reasons, article 41 of the 1969 Vienna Convention subjects the conclusion of *inter se* agreements to strict conditions.[425] An *inter se* agreement is permissible when it:

> (i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
>
> (ii) Does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

(a) *Preservation of the rights and interests of the parties to the original treaty*

305. Article 41, paragraph (1) (*b*) (i), sets out the first of the conditions that an *inter se* agreement must satisfy, namely that the agreement must not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations. This seems natural.[426] The legal effects of an *inter se* agreement are limited to its parties. They remain bound by the original treaty and must continue to observe it in their relations with the other parties as if the *inter se* agreement did not exist. However, in some cases the drafters of the original treaty may have expressly foreseen and permitted particular types of *inter se* deviation. For example, article XXIV of GATT provides for the formation and maintenance of "customs unions" and "free-trade areas" on condition that the conditions of commerce under them "on the whole [must not] be higher or more restrictive than the general incidence" of such duties and regulations before the formation of the union. The assumption here is, clearly, that RTAs do not generally undermine the multilateral free trade system. Nonetheless, they may also create vested interests and counteract any wider trade harmonization. In any case, such agreements have frequently been referred to in the WTO dispute settlement system, and there has certainly

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themselves only. Such *inter se* agreements may be rationalized as a case of either *lex posterior* or *lex specialis*. Whichever rationale is used, however, the provision operates similarly.

[420] See P. Reuter, *Introduction au droit des traités*, 3rd ed. revised by P. Cahier, Paris, Presses Universitaires de France, 1995, p. 76.

[421] See the statement by Mr. Yasseen at the Commission's 746th meeting, held on 16 May 1964, *Yearbook ... 1964*, vol. I, pp. 151–152, para. 51.

[422] See the statement by Mr. Castrén at the Commission's 752nd meeting, held on 26 June 1964, *ibid.*, p. 190, para. 67.

[423] The Commission has rejected the use of the term "revision" because of its political connotation, opting for the term "amendment" to denote alteration of a multilateral treaty by all the parties and "modification" to denote alteration of a multilateral treaty by an *inter se* agreement, an event dealt with in a separate article. See the discussion at the Commission's 747th meeting, held on 17 May 1964, *ibid.*, pp. 152–157.

[424] The Commission nonetheless felt it necessary to spell out the distinction in its report to the General Assembly by saying: "there is an essential difference between amending agreements designed to amend a treaty between the parties generally and agreements designed *ab initio* to modify the operation of the treaty as between certain of the parties only, that is, as *inter se* agreements. Although an amending instrument may equally turn out to operate only between certain of the parties, the Commission considered that a clear-cut distinction must be made between the amendment process *stricto sensu* and *inter se* agreements modifying the operation of the treaty between a restricted circle of the parties" (*ibid.,* vol. II, pp. 195–196, para. (9), commentary to article 66).

[425] See the statement by Sir Humphrey Waldock at the Commission's 860th meeting, held on 27 May 1966: "However, the Commission attached importance to article 67 and by specifying fairly strict conditions in paragraph 1, had recognized that *inter se* agreements could represent a potential threat to the interests of the other parties to the original agreement" (*Yearbook ... 1966*, vol. I (Part II), p. 128, para. 88). Article 22 (*b*) of the draft convention on the law of treaties in the Harvard Research in International Law (see footnote 353 above), pp. 1016–1024, laid down similar conditions for *inter se* agreements. See also F. Capotorti, "L'extinction et la suspension des traités", *Recueil des cours de l'Académie de droit international de La Haye, 1971-III*, vol. 134, p. 509, and Sadat-Akhavi (footnote 21 above), pp. 57–59.

[426] That the *inter se* agreement must not add to ("affect") the performance of their obligations by the other parties was incorporated in article 41 in response to a statement by Mr. Paredes. Mr. Paredes remarked that it was essential that an *inter se* agreement should not impose greater obligations or burdens on them. He gave the example that an *inter se* agreement might make provision for navigation by vessels of deeper draught or for navigation at other periods of the year than those specified in the original treaty and so impose greater obligations or burdens on other parties to the original treaty that were not parties to the *inter se* agreement. See summary record of the Commission's 764th meeting, *Yearbook ... 1964*, vol. I, p. 272, para. 79. See also the commentary to article 22 (*b*) of the draft convention on the law of treaties in the Harvard Research in International Law (footnote 353 above), pp. 1016–1024.

not been any suggestion that they have been made *a priori* in violation of GATT.[427]

306. On the other hand, GATT contains no rules that would apply should two or more members wish to conclude an *inter se* agreement to *restrict* trade between themselves. In the absence of such rules, there appears to be nothing to prevent members from concluding an *inter se* agreement to the effect that in their dealings with each other they will not invoke, say, articles III and XI of GATT[428] with respect to what they feel to be justified trade restrictions. Such an agreement would affect the rights and obligations of the other members of WTO but, as it would do so beneficially, the condition set in article 41 would be satisfied.[429]

307. Sometimes an *inter se* agreement might not directly infringe the rights of the other parties, though it may nevertheless have the potential to damage their interests.[430] It is generally assumed, however, that participation in a multilateral treaty creates a community of interests and a solidarity implying an entitlement for the parties to express their views on the compatibility of special arrangements concluded between some of them with the overall regime of the treaty. This is particularly the case for treaties aimed at unifying the rules of law in specific domains. This idea is reflected in article 311, paragraph 3, of the United Nations Convention on the Law of the Sea, which provides that *inter se* agreements applicable to relations between parties to the Convention must not affect the "*application of the [Convention's] basic principles**" or the other States parties' "enjoyment … of their rights or the performance of their obligations under [the] Convention".

308. What the "obligation of solidarity" amounts to is, of course, difficult to say *in abstracto*. In most cases, this is likely to be covered by the second condition laid out in article 41, according to which an *inter se* agreement may not "relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole".

(b) *Preservation of the object and purpose of the multilateral treaty*

309. The concept of incompatibility with the object and purpose of a treaty was first set forth by the International Court of Justice in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* case (1951)[431] and has been increasingly accepted and applied, in particular to reservations. The same concept also has a prominent place in several articles of the 1969 Vienna Convention: articles 18 (obligation not to defeat the object and purpose), 19 (reservations), 31 (interpretation), 41 (*inter se* agreements), 58 (termination and suspension by *inter se* agreement) and 60 (material breach). The concept of object and purpose had received little systematic treatment in the literature until the Commission's reports on reservations addressed these questions in depth.[432] The concerns expressed in those debates are not essentially different from concerns that also seem relevant for determining the permissibility of *inter se* agreements under article 41, as well as under article 58, paragraph (1) (*b*) (ii), which deals with the suspension of the operation of a multilateral treaty.[433]

310. During preparatory work for the 1969 Vienna Convention, debate in the Commission focused on the distinction between treaties containing (merely) reciprocal obligations and treaties whose obligations were non-reciprocal—that is to say, of a "more absolute type". In the former case, *inter se* agreements did not pose any grave problems. Their permissibility followed from the fact that they normally only affected bilateral relationships or, if their effects went further, were positive from the perspective of the other parties.[434] The *inter se* agreement could be seen as a development of the treaty, fully in line with its ethos and its object and purpose.

311. However, in the case of obligations that could not be broken down into bilateral relationships, an *inter se* agreement might more easily be understood to be contrary to the object and purpose of a treaty. During the Commission's discussions, non-reciprocal treaties were characterized in terms of the "absolute", "integral" or "interdependent" nature of their obligations.[435] Although none of this language ("absolute", "integral", "interdependent") found its way into article 41, there has been wide agreement that not all treaties have the same character in this regard. Thus, for example, article 60, paragraph 2 (*c*), of the 1969 Vienna Convention provides a special rule on invoking breach where "the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party

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[427] See, for example, *Turkey—Restrictions on Imports of Textile and Clothing Products* (footnote 88 above), para. 9.97 ("we are well aware that regional trade agreements have greatly increased in number and importance since the establishment of GATT 1947 and today cover a significant proportion of world trade"). As of January 2005, WTO had been notified of 312 RTAs, 170 of which remained in force. See I. van Damme, "What role is there for regional international law in the interpretation of the WTO agreements?", in L. Bartels and F. Ortino (eds.), *Regional Trade Agreements and the WTO Legal System*, Oxford, Oxford University Press, 2006, p. 553.

[428] These articles respectively proscribe discrimination against imported products in favour of domestic products and the application of quantitative restrictions at frontiers.

[429] See Pauwelyn, "The role of public international law in the WTO…" (footnote 43 above), pp. 548–549.

[430] See the statements by Mr. Verdross and Mr. Castrén at the Commission's 860th meeting, *Yearbook … 1966*, vol. I (Part II), p. 126, paras. 58–59.

[431] *Reservations to the Convention on Genocide* (see footnote 326 above).

[432] For a recent exposé and discussion, see the tenth report on reservations to treaties by Alain Pellet, Special Rapporteur (A/CN.4/558 and Add.1–2) (footnote 402 above). See also I. Buffard and K. Zemanek, "The 'object and purpose' of a treaty: an enigma?", *Austrian Review of International and European Law*, vol. 3, No. 3 (1998), p. 311, and J. Klabbers, "Some problems regarding the object and purpose of treaties", *The Finnish Yearbook of International Law*, vol. 8 (1997), p. 138.

[433] See article 55 (art. 58 of the 1969 Vienna Convention) of the draft articles on the law of treaties with commentaries, *Yearbook … 1966*, vol. II, document A/6309/Rev.1, part II, pp. 252.

[434] See, for example, the third report on the law of treaties by Gerald Fitzmaurice, Special Rapporteur (A/CN.4/115) (footnote 139 above), pp. 43–44, paras. 88–89.

[435] See, generally, *ibid.*, pp. 41–45, paras. 77–94; *Yearbook … 1964*, vol. II, document A/5809, p. 188, para. (10); third report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur (A/CN.4/167 and Add.1–3) (footnote 323 above), p. 39, para. (17). See also paras. 109 and 262 above.

with respect to the further performance of its obligations under the treaty". Likewise, article 42 (*b*) (ii) of the Commission's draft articles on responsibility of States for internationally wrongful acts (2001) makes reference to what the commentary calls "interdependent obligations"—that is, obligations the breach of which "is of such a character as radically to change the position of all the other States to which the obligation is owed".[436]

312. There is no doubt about the relevance of the distinction between the two groups of treaties. The 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations are examples of treaties containing essentially reciprocal obligations. The parties may derogate at will from those obligations in their relations *inter se*. This is not so in regard to a disarmament treaty, for example, where the performance by one party of its obligations is a prerequisite for the performance by the other parties of theirs. A breach by one party is in effect a breach *vis-à-vis* all the other parties.[437] A human rights convention, for its part, is an absolute or "integral" treaty. The obligations it imposes are independent of any expectation of reciprocity or performance on the part of other parties of their obligations.

313. It is above all *inter se* agreements modifying treaties containing such non-reciprocal (*i.e.* "integral", "interdependent" or "absolute") obligations that are likely to affect the execution of the object and purpose of the treaties and that are, therefore, prohibited under article 41, paragraph 1 (*b*) (ii), of the 1969 Vienna Convention. Nevertheless, the question of the procedure through which "incompatibility" is determined will remain. According to the main rule set out by the International Court of Justice in its advisory opinion concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, each State will appraise for itself whether or not a reservation made by a State is compatible with the object and purpose of a treaty and decide what action it should take regarding that reservation.[438] The matter is left to the discretion of the parties—although the use of that discretion is, of course, subjected to the duty of good faith.[439] There is no evidence that the situation as regards *inter se* agreements is any different: it is open to any party to a multilateral treaty to object to the conclusion of an *inter se* agreement on the ground that the agreement is likely to frustrate execution of the object and purpose of the treaty.[440]

(c) *Other situations*

314. There may of course be situations where the drafters of a multilateral treaty, motivated by a desire to uphold and consolidate its rules, insert clauses that prohibit the parties from concluding agreements that derogate from those rules or insert clauses guaranteeing the primacy of a rule contained in the multilateral treaty over a rule contained in a special agreement, thereby establishing a hierarchy of treaty rules. The 1982 United Nations Convention on the Law of the Sea is an example of this. Its article 311, paragraph 6, provides that "States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and that they shall not be party to any agreement in derogation thereof".[441]

315. Another conflict clause might allow the parties to conclude *inter se* agreements provided that they do not contravene the rules established by the original treaty. This is the case, for example, with article 19 of the Paris Convention for the Protection of Industrial Property, amended in 1979. However, in most cases treaties do not contain clauses permitting or prohibiting *inter se* agreements. In this case, the faculty of the parties to conclude *inter se* agreements will have to be determined in accordance with the criteria in article 41, the point of which is to allow modification when and to the extent that it does not undermine the unity or effectiveness of the treaty regime.

2. Notification of the other parties and their reaction

316. According to article 41, paragraph 2, of the 1969 Vienna Convention, the other parties must be notified of an *inter se* agreement and notification must be given in time for those parties to react.[442] In 1964, the Commission was of the view that notification should be given of every proposal to conclude an *inter se* agreement, but subsequently, following comments from the Government of the Netherlands, it decided that the requirement should be to notify the other parties of every intention to conclude an *inter se* agreement except when the treaty itself made provision for the conclusion of such agreements.[443] In the latter instance, the treaty may require notification both of an *inter se* agreement and of the termination of such an agreement. For example, the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of

[436] See the commentary to article 42 of the draft articles on responsibility of States for internationally wrongful acts (especially para. (13)), *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 119. The examples mentioned are those of "a disarmament treaty, a nuclear-free zone treaty, or any other treaty where each party's performance is effectively conditioned upon and requires the performance of each of the others".

[437] For an example, see *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, part II, p. 255, para. (8). See also the commentary to article 42 (*b*) (ii) of the Commission's draft articles on responsibility of States for internationally wrongful acts (especially para. (13)), *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 117.

[438] *Reservations to the Convention on Genocide* (see footnote 326 above), p. 26.

[439] See Reuter, *Introduction au droit des traités*, 2nd rev. ed. (footnote 75 above), pp. 74–75.

[440] See D. N. Hutchinson, "Solidarity and breaches of multilateral treaties", *British Year Book of International Law 1988*, vol. 59, p. 190.

[441] See also the commentary to article 311, para. 6, in M. H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. V, Dordrecht, Martinus Nijhoff, 1989, pp. 241 *et seq.*

[442] This provision was, at the time of its adoption, an example of the progressive development of international law rather than of codification. See the statement by Sir Humphrey Waldock at the Commission's 764th meeting, *Yearbook ... 1964*, vol. I, pp. 273–274, para. 102. This view is borne out by the fact that, when the Commission discussed notification, some members opined that notification was necessary only in the case of *inter se* agreements not provided for in multilateral treaties, while others considered it necessary only in the case of a multilateral treaty concluded between a small number of States. See the statements by Mr. Ago at the Commission's 754th meeting, held on 29 June 1964, *ibid.*, p. 203, para. 85, and by Mr. Tunkin at the Commission's 764th meeting, *ibid.*, p. 273, para. 97.

[443] See the sixth report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur (A/CN.4/186 and Add.1–7) (footnote 34 above), p. 87, para. 3.

Children, of 20 May 1980, provides, in article 20, paragraph 2, that when two or more contracting States have by some means, including an agreement between themselves, created a special system of recognition or enforcement, they may apply that system in place of the Convention or of any part of it. Parties to the Convention wishing to take that step must "notify their decision to the Secretary General of the Council of Europe" and "[a]ny alteration or revocation of [their] decision must also be notified".

317. Article 41, paragraph 2, provides that parties wishing to conclude an *inter se* agreement ("the parties in question") must notify the other parties of their intention. While notification may be given by one of the "parties in question", a treaty may provide that it be given through the medium of the depositary of the treaty.[444] Although notification is usually given by States or the depositaries of treaties, cases have arisen in practice where notification can be considered to have been given because the intention to modify is universally apparent from the object of the *inter se* agreement.

318. If a notification is to protect the interests of the other parties, it must reach them in time. Some Commission members were of the opinion that the other parties should be informed immediately of the intention to conclude an *inter se* agreement.[445] Others felt that, quite apart from the difficulty of communicating an intention, information should be provided once the agreement had been concluded and published.[446] The Commission decided that the parties should be given time to react and that that could only be done if concrete proposals were communicated to them, whence the wording in paragraph 2 to the effect that the other parties must be informed of the "modification to the treaty for which [the agreement] provides". In other words, notification must be given at a relatively advanced stage in the negotiation of the *inter se* agreement but nevertheless sufficiently prior to its conclusion so as to enable a meaningful reaction.

3. Consequences for breach of the multilateral treaty by parties to an *inter se* agreement

319. The text of article 41 leaves two questions open. The first is that of the legal effect of the conclusion of an *inter se* agreement in violation of article 41, paragraph 1, that constitutes a material breach of the treaty; the second is that of the legal effect of an objection made after notification has been given under article 41, paragraph 2.[447] However, it seems clear that an *inter se* agreement concluded in deviation from the original agreement is not thereby invalidated. It would seem to follow from the considerations set out above regarding a conflict of treaties with non-identical parties that it should depend on the interpretation of the original treaty as to what consequences should follow. In addition, the consequences of breach of treaty are dealt with in article 60 of the 1969 Vienna Convention and through the regime of State responsibility. This is not the place to deal with these issues. Nevertheless, two comments may be in order. First, the collective termination or suspension of the original treaty make take place through the unanimous agreement of those parties to the original treaty that are not parties to the modification if the latter constitutes a material breach—*i.e.* relates to a provision that is essential to its execution. Second, individual decisions to suspend the operation of a treaty in whole or in part are permitted in two cases. A party that is especially affected by an (illegal) modification may suspend the operation of the treaty in relations between itself and the parties to the offending *inter se* agreement. And when a material breach constituted by a modification radically changes the position of every other party with respect to the performance of their obligations under the treaty, any of the affected parties may similarly suspend the operation of the treaty with respect to itself.[448]

4. Conclusion on successive agreements

320. The law on conflicts between successive agreements is largely based on presumptions about party intent and the object and purpose of treaties. Conflict resolution here is inextricable from treaty interpretation. Neither the earlier nor the later treaty enjoys automatic preference. It is by now well settled that in cases of conflict, the issue is not with invalidity but with relative priority between treaties. That approach is also reflected in article 30 of the 1969 Vienna Convention, which, while largely codifying an open-ended earlier practice, leaves some of the most difficult questions open. For example, it is clearly unsatisfactory that a party that has concluded incompatible agreements will have the right of election as to which agreement it will fulfil and which parties will have to satisfy themselves with State responsibility.

321. The question of special types of treaties that might enjoy priority owing to their nature was also left open by the 1969 Vienna Convention. While Lauterpacht and Fitzmaurice both felt that there was reason to assume the existence of such categories—those labelled by the latter "integral" or "interdependent" treaties—article 30 refrains from mentioning them, perhaps because Waldock assumed (wrongly) that the problem would be taken care of by the provision on *jus cogens*. In any case, this does not accord with some of the practice in regard to human rights treaties. However, something of this debate was reflected in the limits that article 41 places on *inter se* modification—limits which, by virtue of article 30, paragraph 5, also apply to other subsequent treaties and which might also have some relevance (as suggested above) in the discussion of disconnection clauses.

322. The faculty to conclude *inter se* agreements is an important and widely accepted instrument through which a limited number of parties to a treaty may seek to guarantee the most appropriate and effective implementation of the original treaty between themselves. Nevertheless, article 41 of the 1969 Vienna Convention also limits the

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[444] See the commentary to article 311, para. 4, of the United Nations Convention on the Law of the Sea in Nordquist (ed.) (footnote 441 above), p. 240.

[445] See the version of draft article 67 (the future article 41) proposed by Sir Humphrey Waldock at the Commission's 860th meeting, *Yearbook ... 1966*, vol. I (Part II), p. 123.

[446] See the statement by Mr. Reuter at the Commission's 754th meeting, *Yearbook ... 1964*, vol. I, p. 201, para. 51.

[447] See the statement by Mr. Briggs at the Commission's 860th meeting, *Yearbook ... 1966*, vol. I (Part II), p. 126, paras. 71 *et seq.*

[448] Article 60, paragraph 2, of the 1969 Vienna Convention. See also, for example, Reuter, *Introduction au droit des traités*, 2nd rev. ed. (footnote 75 above), pp. 161–162.

faculty to conclude *inter se* agreements, especially if they would go too firmly against the object and purpose of the original treaty.

323. Much of the law is open to *ad hoc* regulation by the adoption of specific conflict clauses. In practice, however, States have often been reluctant to establish clear hierarchies in this way. The turn to "coordination" in the application of several treaties may seem a practical way to proceed, especially when the treaties form part of what has been called a "regime"—that is, are institutionally linked and intended to achieve parallel objectives. However, such coordination is problematic across regimes, that is to say, where a "legislative" approach to treaty conflict seems least pertinent. Those are also the situations in which the *lex posterior* rule has least application. In such situations, the emphasis should be on guaranteeing the rights established in the relevant conventions. If a right should be overruled because of its incompatibility with another treaty, then State responsibility should follow. It is uncertain whether this is a realistic expectation within regime-specific treaty "management". For the settlement of conflicts across regimes and even *inside* regimes when the treaties have established clearly specified (subjective) rights, recourse to general dispute settlement organs would seem the best alternative.

Chapter IV

Relations of importance: Article 103 of the Charter of the United Nations, *jus cogens* and obligations *erga omnes* as conflicting rules

324. Much of the concern over the fragmentation of international law emerges from awareness of the "horizontal" nature of the international legal system. The rules and principles of international law are not in a hierarchical relationship with each other. Nor are the different sources (treaty, custom, general principles of law) ranked in any general order of priority. This is a key difference between the international and domestic legal systems. Whereas domestic law is organized in a strictly hierarchical way, with the constitution regulating the operation of the system at the highest level, there is no such formal constitution in international law and, consequently, no *general* order of precedence among international legal rules.

325. Nevertheless, this has never meant that one could not, in particular cases, decide on an order of precedence among conflicting rules. In the previous chapters we have seen how relations of speciality *versus* generality or those of temporal succession are sometimes used as criteria on the basis of which one rule may be preferred over another. Nevertheless, we also saw how the operation of those relationships cannot be determined abstractly. The applicability of *lex specialis* or *lex posterior* depended on a prior assessment of the relevance of a particular criterion. This reflected the pragmatic sense that some criteria are, in particular contexts, more important than others, for example because they better secure important interests or protect important values.

326. There has never been any doubt about the fact that some considerations in the international world are more important than others and must be legally recognized as such—although how that sense of importance could be articulated has been the subject of lasting academic controversy. Here there is no suggestion that a position be taken on that controversy—for example, on the role of natural law or political justice in international law or on whether or to what extent international law might be in a process of "constitutionalization". Irrespective of the difficulty of finding a general vocabulary that would express the role of the sense of importance of particular norms, the practice of international law has always recognized the presence of some norms that are superior to other norms and must therefore be given effect. It is not without significance that the International Court of Justice could, in the *Corfu Channel* case (1949), limit State sovereignty by what it called "elementary considerations of humanity"[449] and, in *Legality of the Threat or Use of Nuclear Weapons*, presume the existence of "intransgressible principles of international customary law",[450] without this having raised fundamental objections.

327. There is an important practice that gives effect to the informal sense that some norms are more important than others and that, in cases of conflict, those important norms should be given effect. In the absence of a general theory about where to derive this sense of importance from, practice has developed a vocabulary that gives expression to something like an informal hierarchy in international law. This chapter deals with three aspects of that vocabulary: Article 103 of the Charter of the United Nations and the concepts of peremptory norms (*jus cogens*) and obligations *erga omnes*.

A. Article 103 of the Charter of the United Nations

328. The Covenant of the League of Nations contained a provision suggesting that the Covenant itself was "higher law" in respect to other international obligations.[451] Article 20 of the Covenant was drafted as follows:

> The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings *inter se* which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.
>
> In case any Member of the League shall, before becoming a Member of the League, have undertaken any obligations inconsistent with the terms of this Covenant, it shall be the duty of such Member to take immediate steps to procure its release from such obligations.

329. This provision was the starting point for drafting Article 103 of the Charter of the United Nations. At San

[449] *Corfu Channel case*, Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 4, at p. 22.

[450] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 122 above), p. 257, para. 79.

[451] See especially H, Lauterpacht, "The Covenant as the 'higher law'", *British Year Book of International Law 1936*, vol. 17, p. 54.

Francisco there was already a general understanding that obligations under the Charter should prevail over Members' other treaty commitments.[452] After minor disagreements over the formulation of this principle, the present text was adopted unanimously and 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.

330. Unlike the Covenant, Article 103 also extends the priority of Charter provisions to Members' future agreements, as well as to their agreements with non-members of the United Nations.

1. What are the prevailing obligations?

331. Article 103 does not say that the *Charter* prevails, but refers to *obligations under the Charter*. Apart from the rights and obligations in the Charter itself, this also covers duties based on binding decisions by United Nations bodies. The most important case is that of Article 25, which obliges Member States to accept and carry out resolutions of the Security Council that have been adopted under Chapter VII of the Charter. Even if the primacy of Security Council decisions under Article 103 is not expressly spelled out in the Charter, it has been widely accepted in practice as well as in doctrine.[453] The question has sometimes been raised of whether Security Council resolutions adopted *ultra vires* also prevail by virtue of Article 103.[454] Since obligations for Member States of the United Nations can only derive from resolutions that are taken within the limits of its powers, decisions *ultra vires* do not give rise to any obligations to begin with. Hence, no conflict exists. The issue is similar with regard to non-binding resolutions adopted by United Nations organs, including the Security Council. These are not covered by Article 103.[455]

332. Finally, the Security Council often suggests that its resolutions prevail not only over other international obligations but also over private law contracts, licences, permits and the like.[456] In principle, there is nothing troubling in viewing agreements between States subjected to municipal law as international agreements for present purposes. But as regards the effect of Security Council resolutions on pure private law instruments, the assumption must be that they are not automatically invalidated but that the obligation is on States not to give effect to such contracts. This may give rise to difficult issues of liability and compensation for non-performance, but here it is not necessary to enter into that set of problems.

2. What does it mean for one obligation to prevail over another?

333. What happens to an obligation over which Article 103 establishes precedence? Most commentators agree that the question here is not of validity but of priority. The lower-ranking rule is merely set aside to the extent that it conflicts with the obligation under Article 103.[457] This was how Waldock saw the matter during the Commission's debates on article 30 of the 1969 Vienna Convention: "[T]he very language of Article 103 makes it clear that it prescribes the *priority* of the Charter, not the *invalidity* of treaties conflicting with it."[458]

334. A small number of authors have developed a more extensive view of the effects of Article 103—that is, the invalidity of the conflicting treaty or obligation—on the basis of a view of the Charter as a "constitution".[459] A clear-cut answer to this question (priority or invalidity?) cannot be deduced from the text of Article 103. Yet the word "prevail" does not grammatically imply that the lower-ranking provision would become automatically null and void, nor even suspended. The State is merely prohibited from fulfilling an obligation arising under that other norm. Article 103 says literally that in the event of a conflict, the State in question should fulfil its obligation under the Charter and perform its duties under other agreements in as far as compatible with obligations under the Charter.[460] This also accords with the drafting materials for the Charter, which state that

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[452] R. Bernhardt, "Article 103", in B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd ed., vol. II, New York, Oxford University Press, 2002, p. 1292.

[453] To use the words of Bernhardt, "[a]s far as [M]embers of the [United Nations] are bound by Art. 25 'to accept and carry out the decisions of the Security Council in accordance with the present Charter', they are also bound, according to Art. 103, to give these obligations priority over any other commitments" (*ibid.*, pp. 1295–1296). See further, for example, Dupuy, "L'unité de l'ordre juridique international…" (footnote 14 above), p. 240, and Zemanek, "The legal foundations of the international system…" (footnote 31 above), p. 230. For an alternative view, see D. Bowett, "The impact of Security Council decisions on dispute settlement procedures", EJIL, vol. 5 (1994), p. 89, at p. 92: "A Council decision is *not* a treaty obligation. The obligation to comply may be, but the decision *per se* is not."

[454] S. Lamb, "Legal limits to United Nations Security Council powers", in G.S. Goodwin-Gill and S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie,* Oxford, Clarendon Press, 1999, p. 361; E. De Wet, *The Chapter VII Powers of the United Nations Security Council,* Oxford, Hart, 2005; N. Blokker, "Is the authorization authorized? Powers and practice of the UN Security Council to authorize the use of force by 'coalitions of the able and willing'", EJIL, vol. 11, No. 3 (2000), p. 541; G. Nolte, "The limits of the Security Council's powers and its functions in the international legal system: some reflections", in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law*, Oxford, Oxford University Press, 2000, p. 315.

[455] For a discussion, see R. Kolb, "Does Article 103 of the Charter of the United Nations apply only to decisions or also to authorizations adopted by the Security Council?", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 64 (2004), p. 21.

[456] See, for example, Security Council resolutions 1160 (1998), 1127 (1997), 1173 (1998), 1267 (1999) and 1298 (2000).

[457] See, for example, Dupuy, "L'unité de l'ordre juridique international…" (footnote 14 above), p. 243; Zemanek, "The legal foundations of the international system…" (footnote 31 above), p. 230.

[458] Third report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur (A/CN.4/167 and Add.1–3) (see footnote 323 above), p. 36, para. (8) of the commentary to draft article 65.

[459] See Bernhardt, "Article 103" (footnote 452 above), p. 1297. Another commentator has argued that conflicts between obligations under treaties and obligations under the Charter lead to the same result as conflicts with *jus cogens*—invalidity. See B. Fassbender, "The United Nations Charter as constitution of the international community", *Columbia Journal of Transnational Law*, vol. 36 (1998), p. 590. See also McNair (footnote 58 above), p. 217.

[460] See further E. Sciso, "On Article 103 of the Charter of the United Nations in the light of the Vienna Convention on the Law of Treaties", *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht*, vol. 38 (1987), p. 161, at pp. 169–170, and P.-M. Dupuy, "The constitutional dimension of the Charter of the United Nations revisited", *Max Planck Yearbook of United Nations Law*, vol. 1 (1997), p. 1, at pp. 13–15. Goodrich and Hambro conclude that "[i]t is to be noted that this Article [103] does not provide for the automatic

it would be enough that a conflict should arise from the carrying out of an obligation of the Charter. It is immaterial whether the conflict arise because of intrinsic inconsistency between the two categories of obligations or as the result of the application of the provisions of the Charter under given circumstances…[461]

335. A conflict between an obligation under the Charter and some other obligation may arise in a purely *ad hoc* manner. This is what happened with the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation in the *Lockerbie* case, for example.[462] It is hard to see how the drafters could have intended that such a conflict would render null and void the conflicting treaty—in the *Lockerbie* case, the whole of the Convention. This would be senseless. From a teleological perspective, a better view is to see Article 103 as a means of ensuring that Charter obligations can be performed effectively, not abolishing other treaty regimes, however incidental the conflict might be.

336. In another recent case, the High Court of Justice in the United Kingdom delivered its judgment affirming the superiority of Security Council resolutions over the human rights obligations of the United Kingdom.[463] The claimant—a dual citizen of Iraq and the United Kingdom—had been detained by British forces in Iraq for 10 months without being charged. He contended that the detention was in breach of his rights under the Human Rights Act 1998. From the viewpoint of normative conflicts, the judgment is particularly relevant in two regards. First, the Court tested the legality of the claimant's detention against what it called "the context of international human rights law".[464] However, the Court read the detention itself as a human rights measure in a way that enabled it to bypass the question of conflict:

> The Security Council, charged as it is with primary responsibility for maintaining international peace and security, has itself determined that a multinational force is required. Its objective is to restore such security as will provide effective protection for human rights for those within Iraq. Those who choose to assist the Security Council in that purpose are authorised to take those steps, which include detention, necessary for its achievement.[465]

337. The Court added, nevertheless, that a hierarchy was also implied:

> For the purposes of restoring and maintaining that peace and security without which there can be no human rights within Iraq, the Security Council has authorised such detention as is necessary for imperative reasons of security in accordance with Article 78 of Geneva IV.[466]

It may be noteworthy that in "testing the legality of the detention", the Court never took up the question of possible *jus cogens*.[467]

338. Second, the Court, discussing the relationship between the Charter of the United Nations and all other treaty obligations, concluded that Article 103 of the Charter also embraces resolutions of the Security Council and that actions taken in pursuance of them prevail over other treaty obligations—even of a human rights character—such as those deriving from the European Convention on Human Rights.[468] Thus, the Court did not find a violation of the claimant's rights.

339. Finally, the primacy of Article 103 is expressly mentioned in article 30, paragraph 1, of the 1969 Vienna Convention:

> Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

340. The context of this provision is informative. As discussed in chapter III above, article 30—which deals with the application of "successive treaties relating to the same subject-matter"—does not presume that the treaty being set aside under it would be invalid, but merely set aside in order to apply the higher-ranking treaty and to the extent necessary. In fact, to say this is simply to point to the manner in which the hierarchical effect of obligations under the Charter differs from *jus cogens*, conflict with which renders other norms invalid or terminates them.[469]

3. Special cases

(a) *Conflicts with treaties between United Nations Member States and non-members*

341. Conflicts between obligations under the Charter and treaties concluded between Member States and non-member States of the United Nations give rise to difficult legal questions.[470] To use the words of the Commission itself, "[t]he precise effect of the provision in the relations between Members of the United Nations and non-member States may not be entirely clear".[471] Indeed, the text of Article 103 does not differentiate between obligations incurred among United Nations Member States and obligations of and towards non-member States. Inasmuch as

abrogation of obligations inconsistent with the terms of the Charter. The rule is put in such form as to be operative only when there is an actual conflict" (L.M. Goodrich and E. Hambro, *Charter of the United Nations: Commentary and Documents*, 2nd rev. ed., London, Stevens and Sons, 1949, p. 519).

[461] United Nations Conference on International Organization, Report of the Rapporteur of Committee IV/2, document 933, IV/2/42 (2) (*Documents of the United Nations Conference on International Organization*, San Francisco, 1945, vol. XIII, p. 703, at pp. 707–708), as quoted in Goodrich and Hambro (see footnote 460 above), p. 519.

[462] See section A.4 below, especially the *Lockerbie* case.

[463] *The Queen (on the application of Hilal Abdul-Razzaq Ali Al-Jedda) v. Secretary of State for Defence*, judgment of 12 August 2005, No. CO/3673/2005, [2005] EWHC 1809 (Admin).

[464] *Ibid.*, see paras. 94 *et seq.* of the judgment.

[465] *Ibid.*, para. 104.

[466] *Ibid.*, para. 108.

[467] Nevertheless, Mr. Al-Jedda was granted permission to appeal and the case was heard by the Court of Appeal in January 2006.

[468] Para. 112 of the judgment in *The Queen (on the application of Hilal Abdul-Razzaq Ali Al-Jedda) v. Secretary of State for Defence* (see footnote 463 above).

[469] It has also been argued that "[a] clear solution to the problem of conflicting obligations appears possible where a Charter provision reflects a norm of *ius cogens*. In this case, conflicting obligations are and remain invalid" (Bernhardt, "Article 103" (see footnote 452 above), p. 1298). Nevertheless, the source of invalidity in such a situation is not the Charter of the United Nations, but the rule which states that all agreements incompatible with *jus cogens* are invalid.

[470] Admittedly, owing to the fact that very few States remain outside the circle of Members of the United Nations, these questions are more theoretical than practical.

[471] Draft articles on the law of treaties, *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, part II, p. 214, para. (3) of the commentary to draft article 26.

one reads the Charter as a "constitutional" document, then there is of course no problem. For example, Bernhardt solves the question in a straightforward manner:

> [T]here are good reasons for assuming that treaties concluded with third States that are in clear or at least apparent contradiction to the Charter are not only unenforceable but also invalid with respect to such States. The Charter has become the "constitution" of the international community, and third States must, in their treaty relations and otherwise, respect the obligations arising under the Charter for UN [M]embers.[472]

342. In the same vein, Goodrich and Hambro wrote in their early commentary to the Charter:

> The Charter … assumes the character of basic law of the international community. Non-[m]embers, while they have not formally accepted it, are nevertheless expected to recognize this law as one of the facts of international life and to adjust themselves to it.[473]

343. Yet it remains the case that non-members are not formally bound by the Charter, which for them remains *res inter alios acta*.[474] In the normal course of events, Member States should not be able to rid themselves of the duty to perform their treaty obligations towards non-member States by reliance on Article 103.[475] Nevertheless, a strong doctrinal opinion tends to affirm, at least for United Nations Members, the absolute primacy of Charter obligations over conflicting obligations with non-members of the United Nations.[476] This may perhaps be rationalized by reference to article 30, paragraph 1, of the 1969 Vienna Convention, which may be read as acceptance by parties to the Convention of the Charter's pre-eminence.[477] In any case, this leaves open any responsibility that will arise towards non-members as a result of the application of Article 103.

(b) *Conflicts with norms of customary international law of a non-peremptory character*

344. The wording of Article 103, reading "obligations under any other international agreement", implies that only conventional obligations are targeted by that provision. Opinions on whether customary law is also covered are split, however. During the drafting of the Charter, a formula according to which *all* other commitments, including those arising under customary law, were to be superseded by the Charter was ultimately omitted from the final text.[478] This suggests the conclusion that, at least for the drafters, Article 103 covered only other treaties. This does not, however, exclude the possibility of later developments in the law. Indeed, at least those who uphold the "constitutional" vision claim that Article 103 extends to conflicting customary law as well:

> [I]t would not be correct to assume that obligations under the Charter do not also prevail in relation to these other [including customary-law-based] obligations. Article 103 must be seen in connection with Art. 25 and with the character of the Charter as the basic document and "constitution" of the international community. Therefore, the ideas underlying Art. 103 are also valid in case of conflict between Charter obligations and obligations other than those contained in treaties.[479]

345. While some have supported this view[480], others have doubted whether Article 103 elevates the Charter above customary law.[481] Two considerations might perhaps be relevant here. First, a literal interpretation renders a clear result. However expansively one interprets "international agreements", it does not cover international custom. Second, however, and as pointed out in chapter II above, as *lex generalis*, customary law normally yields to treaties as *lex specialis*—including, one would suppose, treaties establishing an international organization such as the United Nations. In any case, the practice of the Security Council has continuously been grounded in the understanding that Security Council resolutions override conflicting customary law. As the Security Council is a creation of the Charter, it would be odd if the prevailing effect of Security Council resolutions did not extend to the Charter itself. It therefore seems sound to join the prevailing opinion that Article 103 should be read extensively, so as to affirm that Charter obligations also prevail over the customary law obligations of United Nations Member States.[482]

(c) *Conflicts with norms of* jus cogens

346. If United Nations Member States are unable to draw up valid agreements in dissonance with *jus cogens*, they must also be unable to vest an international organization with the power to go against peremptory norms.

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[472] Bernhardt, "Article 103" (see footnote 452 above), p. 1298. See also, for example, Fassbender (footnote 459 above), p. 532; but for an alternative view see also J.-M. Thouvenin, "Article 103", in J.-P. Cot and A. Pellet (eds.), *La Charte des Nations Unies: Commentaire article par article*, 3rd rev. ed., Paris, Economica, 2005, p. 2133, at pp. 2136–2139 and especially p. 2146: "Il ne saurait alors être considéré, en lui-même, comme l'élément clé permettant de reconnaître à la Charte des Nations Unies les qualités d'une constitution de la communauté internationale" ("It cannot be regarded in itself as the crucial element that imbues the Charter of the United Nations with the character of a constitution for the international community").

[473] Goodrich and Hambro (see footnote 460 above), p. 519.

[474] See article 34 of the 1969 Vienna Convention. Lord McNair also confirms that even the Charter of the United Nations does not have the power to make the rules contained therein binding upon non-members. See McNair (footnote 58 above), p. 218.

[475] For further discussion see Sciso (footnote 460 above), pp. 167 *et seq.*

[476] See, for example, Daillier and Pellet, *Droit international public* (footnote 74 above); Dupuy, "L'unité de l'ordre juridique international…" (footnote 14 above), p. 241; A. L. Paulus, *Die internationale Gemeinschaft im Völkerrecht: Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung,* Munich, Beck, 2001, p. 113.

[477] The extent to which the 1969 Vienna Convention codifies customary international law is also relevant for present purposes.

[478] J. Combacau, *Le pouvoir de sanction de l'ONU: étude théorique de la coercition non militaire,* Paris, Pedone, 1974, p. 282. An early commentary on the Charter also confirms that the possibility of Charter obligations' pre-eminence over customary law obligations was not even considered as a question to be answered. See Goodrich and Hambro (footnote 460 above), pp. 517–518.

[479] Bernhardt, "Article 103" (see footnote 452 above), pp. 1298–1299.

[480] See, for example, A. Kaczorowska, *Public International Law,* London, Old Bailey Press, 2002, p. 21, where she states that "[a] number of commentators have suggested that this provision would apply equally to inconsistent customary law". Unfortunately, no references are provided.

[481] See, for example, N. D. White and A. Abass, "Countermeasures and sanctions", in M. D. Evans (ed.), *International Law*, Oxford, Oxford University Press, 2003, p. 505, at p. 518, arguing that "Article 103 gives obligations arising out of the [Charter of the United Nations] pre-eminence over obligations arising under any other international treaty, though it is not clear that this affects [M]ember States' customary rights".

[482] See, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 13 September 1993, *I.C.J. Reports 1993*, p. 325, at p. 440, para. 100 (separate opinion of Judge Lauterpacht).

Indeed, both doctrine and practice unequivocally confirm that conflicts between the Charter of the United Nations and norms of *jus cogens* result not in the Charter obligations' pre-eminence, but in their invalidity.[483] In this sense, the Charter is an international agreement like any other treaty. This is particularly relevant in relation to resolutions of the Security Council, which has more than once been accused of going against peremptory norms.[484]

347. This matter came up in September 2005 before the Court of First Instance of the European Communities.[485] The cases concerned the freezing of assets of individuals and entities suspected of having links to terrorists by the Council of the European Union on the basis of resolutions adopted by the Security Council. The Court decided that the European Community was competent to order the measures. For the most part, they also fell outside the scope of judicial review. The judgment is noteworthy in two aspects.

348. First, the Court found that, according to international law, the obligations of United Nations Member States under the Charter prevail over any other obligation, including those under the European Convention on Human Rights and the Treaty establishing the European Community. This paramountcy extended to decisions of the Security Council:

> [T]he resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and … the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law. On the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations.[486]

349. Second, however, this paramountcy was not absolute. In the words of the Court:

> International law … permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community.[487]

350. In its subsequent analysis of the question of whether freezing applicants' rights constituted a breach of *jus cogens*, the Court found in the negative.

[483] See, for example, Fassbender (footnote 459 above), pp. 590 *et seq.*

[484] See, for example, Zemanek, "The legal foundations of the international system…" (footnote 31 above), p. 231 and the chapter on *jus cogens*.

[485] Judgments in two cases: judgments of the Court of First Instance of 21 September 2005 in case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities,* and case T-315/01, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, *Digest of case-law 2005*, pp. 3533 and 3649, respectively.

[486] Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, *ibid*., p. 3626, para. 276. The Court also added that although it is not a member of the United Nations, the Community must also be considered to be bound by the obligations flowing from the Charter of the United Nations, in the same way as are its Member States, by virtue of the Treaty establishing it. See paragraph 210 of the judgment.

[487] *Ibid.*, p. 3627, para. 281.

4. Application

351. Not surprisingly, Article 103 has most frequently been invoked in the practice of United Nations organs, especially in connection with binding decisions of the Security Council taken under Chapter VII. Although direct references to Article 103 are not very frequent, its substance appears more often.

352. Since the beginning of the 1990s, many Security Council resolutions made under Chapter VII (*i.e.* resolutions creating obligations) have underlined their priority in relation to any other obligations. A famous reference to Article 103 is to be found in resolution 670 (1990), in which the Council decided on measures against Iraq. The resolution reads:

> *Recalling* the provisions of Article 103 of the Charter,
>
> *Acting* under Chapter VII of the Charter,
>
> … *Calls upon* all States to carry out their obligations to ensure strict and complete compliance with resolution 661 (1990) …

353. Only a year later, the crisis on the territory of the former Yugoslavia led to numerous Security Council resolutions imposing an embargo, many of which emphasize, expressly or implicitly, their and prior resolutions' priority in relation to any other commitments.[488] Resolution 748 (1992) concerning Libya—to which the International Court of Justice referred in its order of 14 April 1992 (see below)—stated in paragraph 7:

> *Calls upon* all States, including States not members of the United Nations, and all international organizations, to act strictly in accordance with the provisions of the present resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement…[489]

354. In its subsequent practice the Security Council has started using a standard clause, which can be found, with minor modifications, in a number of resolutions adopted under Chapter VII. For example, paragraph 7 of resolution 1267 (1999) states the following:

> [The Security Council] *Calls upon* all States to act strictly in accordance with the provisions of this resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any licence or permit granted prior to the date of coming into force of the measures imposed [by the Council]…[490]

355. Although this clause does not expressly mention Article 103, it receives its legal force from that provision. Hence it does not address only United Nations Members, but all States, as well as international and regional organizations. It covers rights and obligations based not only on treaties, but also on private contracts, licences and permits. This is natural, as it is the very rationale of sanctions regimes to influence private transactions between entities in the target State and the outside world. As pointed out above, however, this leaves the issue of private liability unanswered.

[488] See Security Council resolutions 713 (1991), 724 (1991), 727 (1992), 743 (1992), 757 (1992), 787 (1992) and 820 (1993).

[489] See also similar decisions in respect of Somalia (Security Council resolution 733 (1992)) and Liberia (Security Council resolution 788 (1992)).

[490] See also, for example, Security Council resolutions 1127 (1997), 1173 (1998), 1132 (1997) and 1298 (2000).

356. In separate opinions, members of the International Court of Justice have occasionally mentioned Article 103.[491] Before 1992, however, the Court itself had discussed it in only one decision. Yet already then, in the *Military and Paramilitary Activities in and against Nicaragua* case in 1984, the Court underlined the priority of obligations under the Charter over other treaty obligations.[492] Article 103 was given full attention in the *Lockerbie* case (1992).[493] The Governments of the United Kingdom and the United States had requested Libya to surrender certain individuals in connection with investigations into the destruction of an aeroplane over the village of Lockerbie in Scotland. The Security Council, acting under Chapter VII of the Charter, supported the measures to be taken against Libya, which in turn considered the requests of the two above-mentioned Governments incompatible with the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and submitted the dispute to the International Court of Justice.

357. At first, Libya asked the Court to indicate provisional measures, whereas the respondents argued that a binding decision of the Security Council did not permit such an indication. In its order of 14 April 1992 the Court stated:

> 39. Whereas both Libya and the United Kingdom, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that *prima facie* this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention;
>
> 40. Whereas the Court, while thus not at this stage called upon to determine definitively the legal effect of Security Council resolution 748 (1992), considers that, whatever the situation previous to the adoption of that resolution, the rights claimed by Libya under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures…[494]

358. Several judges confirmed the same line of argumentation in their separate and dissenting opinions.[495] It is noteworthy that the Court, as well as individual judges, referred merely to the enforceability, not the invalidity or suspension, of conflicting treaty obligations.

359. Judge Lauterpacht, in his separate opinion appended to the order of the International Court of Justice in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, discussed the relationship between Article 103 and *jus cogens*:

> The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot—as a matter of simple hierarchy of norms—extend to a conflict between a Security Council resolution and *jus cogens*. Indeed, one only has to state the opposite proposition thus—that a Security Council resolution may even require participation in genocide—for its unacceptability to be apparent.[496]

360. This seems natural. If (as pointed out above) the Charter of the United Nations is not above *jus cogens*, then it also cannot transfer a power to contradict *jus cogens* to bodies that receive their jurisdiction from the Charter.

□□ *Jus cogens*

361. The view that some norms are of a higher legal rank than others has found its expression in one way or another in all legal systems.[497] In international law, propositions have consistently been made that there is a category of norms that are so fundamental that derogation from them can never be allowed. No doubt the idea of peremptory norms (*jus cogens*) is older than modern international law itself. Commentators often point to the Roman law distinction between *jus strictum* and *jus dispositivum*,[498] and to the maxim *jus publicum privatorum pactis mutari non potest*.[499] Seventeenth- and eighteenth-century natural lawyers had no doubt whatsoever that certain norms existed timelessly and above the will of States, limiting what could lawfully be agreed by secular rulers or their communities.[500] In addition, the development of the inter-

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[491] See, for example, *Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden)*, Judgment of 28 November 1958, *I.C.J. Reports 1958*, p. 55, at p. 107 (separate opinion of Judge Moreno Quintana); *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962, *I.C.J. Reports 1962*, p. 319, at p. 407 (separate opinion of Judge Jessup); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *I.C.J. Reports 1971*, p. 16, at p. 99 (separate opinion of Judge Ammoun); *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya)*, Judgment, *I.C.J. Reports 1985*, p. 192, at pp. 232–233 (separate opinion of Judge Ruda).

[492] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility*, Judgment, *I.C.J. Reports 1984*, p. 392, at p. 440, para. 107.

[493] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Preliminary Objections, Judgment, *I.C.J. Reports 1998*, p. 115.

[494] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures*, Order of 14 April 1992, *I.C.J. Reports 1992*, p. 3, at p. 15, paras. 39–40. See also *ibid.*, pp. 114 *et seq.*, especially pp. 126–127, paras. 42–43.

[495] For example, Judge Shahabuddeen wrote in his separate opinion that "Article 25 of the Charter of the United Nations obliges Libya to comply with the decision set out in [resolution 748 (1992)]. By virtue of Article 103 of the Charter, that obligation prevails over any conflicting treaty obligation which Libya may have … Treaty obligations can be overridden by a decision of the Security Council imposing sanctions … Hence, assuming that Libya has the rights which it claims, *prima facie* they could not be enforced during the life of the resolution" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of 14 April 1992, *ibid.*, p. 28 (separate opinion of Judge Shahabuddeen).

[496] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 482 above), p. 440, para. 100 (separate opinion of Judge Lauterpacht).

[497] "It is difficult to imagine any society, whether of individuals or of States, whose law sets no limit whatever to freedom of contract" (McNair (see footnote 58 above), pp. 213–214).

[498] J. A. Frowein, "*Jus cogens*", in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 3, Amsterdam, Elsevier, 1997, p. 65.

[499] Sinclair (see footnote 63 above), p. 203. See also D. Shelton, "International law and relative normativity", in Evans (ed.) (footnote 481 above), p. 151. Nevertheless, the term *jus cogens* itself is said not to have been used in ancient law. See M. Lachs, "The development and general trends of international law in our time", *Recueil des cours de l'Académie de droit international de La Haye, 1980-IV*, vol. 169, p. 202.

[500] Emmerich de Vattel provided what has become a classic formulation, as follows: "Since … the necessary Law of Nations consists in applying the natural law to States, and since the natural law is not subject to change, being founded on the nature of things and particularly

national law notion of *jus cogens* has undoubtedly been influenced by domestic laws that provide for the nullity of agreements conflicting with *ordre public* or public policy objectives.[501] The background, nature and effects of *jus cogens* were summarized by the International Tribunal for the Former Yugoslavia:

> Because of the importance of the values [the prohibition of torture] protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.[502]

362. *Jus cogens* found its way into positive international law during preparations for the 1969 Vienna Convention. The Commission presented it in articles 50 and 61 of its final draft articles on the law of treaties in 1966.[503] At the United Nations Conference on the Law of Treaties, the concept was moulded into articles 53 and 64 in the following format:

Article 53

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 64

> If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

363. In academic literature, the concept has been the object of a sizeable volume of attention—especially since its incorporation into the 1969 Vienna Convention.[504] Over the years, most of the initial scepticism around the notion itself has tended to vanish. As the Commission has recently remarked, "[t]he concept of peremptory norms of general international law is recognized in international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine".[505] However, disagreement about its theoretical underpinnings, scope of application and content remains as rife as ever. As Anthony Aust has put it: "The concept *was once controversial**. Now it is more its scope and applicability that is unclear."[506]

364. Two aspects require discussion: the effects of *jus cogens* and its content.

1. The effect of *jus cogens*: invalidity of the conflicting norm

365. Article 53 of the 1969 Vienna Convention provides for the invalidity of treaties which, at the time of their conclusion, are in conflict with a peremptory norm of general international law. Thus, and unlike the mere "priority" provided under article 31 of the Convention, what the concept of *jus cogens* encapsulates is a rule of hierarchy *sensu stricto*, not simply a rule of precedence.[507] Hence, the result of conflicts between treaties and *jus cogens* is that the former are not only non-applicable, but wholly void, giving rise to no legal consequences whatsoever.[508] This entails a further consequence written into article 71, paragraph 1, of the Convention:

> In the case of a treaty which is void under article 53 the parties shall: (*a*) Eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and (*b*) Bring their mutual relations into conformity with the peremptory norm of general international law.

366. This has to be understood in context with article 64 of the Convention, making it clear that the hierarchically higher status of *jus cogens* norms does not have a retroactive character.[509] If the coming into being of a peremp-

upon the nature of man, it follows that the *necessary* Law of Nations is *not subject to change*. Since this law is not subject to change and the obligations which it imposes are necessary and indispensable, Nations can not alter it by agreement, nor individually or mutually release themselves from it. It is by the application of this principle that a distinction can be made between lawful and unlawful treaties or conventions and between customs which are innocent and reasonable and those which are unjust and deserving of condemnation" (de Vattel (see footnote 67 above), vol. I, introduction, p. 4).

[501] Article 6 of the Napoleonic Code provides a good example: "On ne peut déroger, par des conventions particulières, aux lois qui intéressent l'ordre public et les bonnes mœurs" ("Laws concerning public order or social mores are not susceptible to derogation by private agreement").

[502] *Prosecutor v. Anto Furundžija*, Trial Chamber, International Tribunal for the Former Yugoslavia, case No. IT-95-17/1, judgement, 10 December 1998, *Judicial Reports 1998*, p. 467, at p. 569, para. 153 (footnote omitted); ILR, vol. 121 (2002), p. 260.

[503] Article 50: "A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"; article 61: "If a new peremptory norm of general international law of the kind referred to in article 50 is established, any existing treaty which is in conflict with that norm becomes void and terminates" (*Yearbook ... 1966*, vol. II, document A/6309/Rev.1, part II, pp. 247, 261).

[504] Nevertheless, the term *jus cogens* was already used, although not extensively, prior to its adoption by the Commission. See generally J. Sztucki, *Jus cogens and the Vienna Convention on the Law of Treaties: A Critical Appraisal,* Vienna, Springer-Verlag, 1974. Cassese views it as being especially a result of developments in the 1960s. See Cassese (footnote 240 above), pp. 199–200.

[505] Para. (2) of the commentary to article 40 of the draft articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 112.

[506] A. Aust, *Handbook of International Law,* Cambridge, Cambridge University Press, 2005, p. 11. Likewise, *Sosa v. Alvarez-Machain et al.*, United States District Court of Appeals, 3 June 2003, ILR, vol. 127 (2005), p. 705. Michael Byers, for example, has written that "[t]oday, there is widespread acceptance among international lawyers of the concept of *jus cogens*" (Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (see footnote 296 above), p. 184). For a famous sceptical appraisal, see Weil (footnote 181 above), p. 413, who believes that any trend toward recognition of the distinction between peremptory norms and "merely binding norms" contributes to a "dilution" of normativity itself and fosters the development of pathology in the international system.

[507] There is wide agreement on this. See, for example, J. Combacau and S. Sur, *Droit international public*, 6th ed., Paris, Montchrestien, 2004, p. 157.

[508] It is not necessary, however, for this to lead to the invalidation of the whole treaty. Clauses that do not conflict with *jus cogens* and are separable from those that do may remain valid. Cassese (see footnote 240 above), p. 206.

[509] In the words of the Commission itself, there was no question of what was to become article 53 of the 1969 Vienna Convention having retroactive effect. See the draft articles on the law of treaties, *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, part II, p. 248, para. (6) of the commentary to draft article 50.

tory norm of general international law is subsequent to the conclusion of a treaty, the treaty itself terminates but the rights and obligations based on it only become void inasmuch as they are themselves contrary to the (new) *jus cogens*. This structure is written into article 71, paragraph 2, of the Convention, which states that:

> In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty: (*a*) Releases the parties from any obligation further to perform the treaty; (*b*) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

367. Three types of conflict situation may be envisaged. A norm of *jus cogens* might conflict with a regular treaty, with a rule of (general) customary international law or with another norm of *jus cogens*. The first situation is the simplest. Conflict of a treaty with *jus cogens* renders the treaty—or a separable provision thereof—invalid. It makes no difference whether the treaty is bilateral or multilateral. As pointed out above, the Charter of the United Nations constitutes no exception.[510] The same goes for resolutions of international organizations. The same logic applies to a conflict between *jus cogens* and (general) customary law. A conflict between them renders the latter invalid. The question concerning the relationships between conflicting *jus cogens* norms—for example the question of the right to use force in order to realize the right of self-determination—is much more difficult. At this stage, it cannot be presumed that the doctrine of *jus cogens* could itself resolve such conflicts: there is no hierarchy among *jus cogens* norms *inter se*.

368. Already during discussions in the Commission, and also at the United Nations Conference on the Law of Treaties, several delegates expressed their concern that introducing the concept of *jus cogens* into positive law might result in the destabilization of treaty relations. It was feared that States might start using arguments based on *jus cogens* to justify non-performance of treaty obligations.[511] To prevent or minimize such occasions, a mechanism was written into the 1969 Vienna Convention, according to which parties to a dispute concerning the validity of a treaty need to seek a solution through the peaceful means listed in the Charter of the United Nations; if they fail to reach one, then

> [a]ny one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration.[512]

369. No cases have been brought to the International Court of Justice under this article to date.

370. The most significant use of *jus cogens* as a conflict norm has been by the British House of Lords in the *Pinochet* case.[513] Here, as is well known, the question arose of whether immunity of a former Head of State could be upheld against an accusation of his having committed torture while in office. Referring to relevant passages in the *Furundžija* case,[514] the Lords held that "[t]he *jus cogens* nature of the international crime of torture justifies [S]tates in taking universal jurisdiction over torture wherever committed".[515] As the condition of "double criminality" was fulfilled, Pinochet could not plead immunity against a request for extradition to Spain. To use the words of Lord Millett:

> International law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is coextensive with the obligation it seeks to impose.[516]

371. The Pinochet litigation turned out to have historic consequences, not so much for Senator Pinochet personally, but rather in the sense that, for the first time, a local domestic court denied immunity to a former Head of State on the grounds that there cannot be any immunity against prosecution for breach of *jus cogens*.

372. That it is the point of *jus cogens* to invalidate inferior norms does not mean that *jus cogens* would provide automatic access to justice, irrespective of procedural obstacles, to punish individuals or, for example, concerning relief in civil matters. In *Al-Adsani*, the European Court of Human Rights was called upon to adjudge whether the United Kingdom had violated the European Convention on Human Rights, as British courts had upheld the immunity of the State of Kuwait in a civil matter that concerned liability that it was alleged to owe to a person (Al-Adsani) who had been tortured by Kuwaiti agents.[517] The court held the prohibition of torture to be part of *jus cogens* but did not find a violation of articles 1 and 3 of the European Convention on Human Rights in the way United Kingdom courts had been applying the State Immunity Act 1978. The court stated:

> While the Court accepts … that the prohibition of torture has achieved the status of a peremptory norm in international law, it observes that the present case concerns not, as in *Furundžija* and *Pinochet*, the criminal liability of an individual for alleged acts of torture, but the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of that State. Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.[518]

373. Thus, the court, while noting the growing recognition of the prohibition of torture as part of *jus cogens*,

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[510] Since the Charter was adopted years before the entry into force of the 1969 Vienna Convention, the relationship between the Charter and *jus cogens* cannot be dealt with on the basis of the latter, but instead under the framework of customary international law.

[511] For a famous sceptical appraisal, see Weil (footnote 181 above), p. 413, arguing that any distinction between peremptory norms and "ordinary" norms contributes to a "dilution" of normativity itself and fosters the erosion of the international system.

[512] See articles 65, paragraph 3, and 66 (*a*) of the 1969 Vienna Convention.

[513] *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, House of Lords, 24 March 1999, [1999] UKHL 17, [2000] 1 AC 147, reproduced in ILR, vol. 119, p. 135.

[514] *Prosecutor v. Anto Furundžija* (see footnote 502 above), *Judicial Reports 1998*, p. 569, para. 153; ILR, vol. 121 (2002), p. 260.

[515] *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* (see footnote 513 above), ILR, vol. 119, p. 149.

[516] *Ibid.*, p. 232.

[517] *Al-Adsani v. the United Kingdom* (see footnote 219 above), p. 79.

[518] *Ibid.*, p. 101, para. 61.

did not find it established that there was yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State. By finding as it did, the court did not afford a norm of *jus cogens* an effect which would override the rights of States under customary international law.[519]

2. The content of *jus cogens*

374. In the final text of its draft articles on the law of treaties, the Commission deliberately dispensed with listing concrete examples of *jus cogens* norms.[520] It did so because, as it put the matter, "there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*".[521] The adoption of the 1969 Vienna Convention was then predictably followed by an extensive debate about precisely this matter. There are today a number of pronouncements from various judicial or diplomatic organs that give an idea of what might count as *jus cogens* norms. In its commentary to the draft articles on responsibility of States for internationally wrongful acts of 2001, the Commission gave as examples of *jus cogens* the prohibitions on aggression, slavery and the slave trade, genocide, racial discrimination and apartheid, and torture (as defined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984); the basic rules of international humanitarian law applicable in armed conflict; and the right to self-determination.[522] In the *Furundžija* case, the International Tribunal for the Former Yugoslavia defined torture as both a peremptory norm and an obligation *erga omnes*.[523] Overall, the most frequently cited candidates for the status of *jus cogens* include: (*a*) the prohibition of aggressive use of force; (*b*) the right to self-defence; (*c*) the prohibition of genocide; (*d*) the prohibition of torture; (*e*) crimes against humanity; (*f*) the prohibition of slavery and the slave trade; (*g*) the prohibition of piracy; (*h*) the prohibition of racial discrimination and *apartheid*; and (*i*) the prohibition of hostilities directed at civilian populations ("basic rules of international humanitarian law").[524]

375. The problem of how to identify *jus cogens* is not easy to resolve *in abstracto*. As most commentators point out, it is not only that there is no single authoritative list of *jus cogens* norms; there is also no agreement about the criteria for inclusion on that list. The starting point must be the formulation of article 53 itself, identifying *jus cogens* by reference to what is "accepted and recognized by the international community of States as a whole". Although that formulation itself is not free from controversy (especially references to a community of "*States*" and to the meaning of the requirement "*as a whole*"),[525] there is also a disturbing circularity about it. If the point of *jus cogens* is to limit what may be lawfully agreed by States, can its content simultaneously be made dependent on what is agreed between States?[526] The historical background of *jus cogens* lies in an anti-voluntarist, often religiously inclined natural law—the presumption of the

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[519] In his dissenting opinion in the *Al-Adsani* case, which began with the words "What a pity!", Judge Ferrari Bravo expressed deep disappointment in the outcome of the case: "The Court … had a golden opportunity to issue a clear and forceful condemnation of all acts of torture. To do so, it need only have upheld the thrust of the House of Lords' judgment in *Regina v. Bow Street Metropolitan Stipendiary and Others, ex parte Pinochet Ugarte (No. 3)* … to the effect that the prohibition of torture is now *jus cogens*, so that torture is a crime under international law. It follows that every State has a duty to *contribute* to the punishment of torture and cannot hide behind formalist arguments to avoid having to give judgment. … But it is precisely one of those old formalist arguments which the Court endorsed when it said … that it was unable to discern any rules of international law requiring it not to apply the rule of immunity from civil suit where acts of torture were alleged. … There will be other such cases, but the Court has unfortunately missed a very good opportunity to deliver a courageous judgment" (*ibid.*, p. 114, dissenting opinion of Judge Ferrari Bravo).

[520] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, part II, p. 248, para. (3) of the commentary to draft article 50.

[521] *Ibid.*, pp. 247–248, para. (2). Lord McNair has elegantly expressed the same idea by writing that "it is easier to illustrate these rules [*jus cogens*] than to define them" (see McNair (footnote 58 above), p. 215). Likewise, for example, Aust, *Handbook of International Law* (see footnote 506 above), p. 11, and Shelton (see footnote 499 above), p. 151.

[522] Paras. (4)–(6) of the commentary to article 40 of the draft articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 112–113.

[523] *Prosecutor v. Anto Furundžija* (see footnote 502 above), *Judicial Reports 1998*, pp. 567–573, paras. 151–157; ILR, vol. 121 (2002), pp. 260–262.

[524] Brownlie lists, as the least controversial examples of the class, the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy (Brownlie, *Principles of Public International Law* (see footnote 166 above)); Aust sees the prohibitions on the use of force (as laid down in the Charter of the United Nations) and on genocide, slavery and torture as perhaps the only generally accepted examples (Aust, *Handbook of International Law* (see footnote 506 above), p. 11); Rosalyn Higgins mentions as examples the prohibitions on genocide, torture and the killing of prisoners of war (R. Higgins, *Problems and Process: International Law and How We Use It*, Oxford, Oxford University Press, 1994, pp. 21–22). The examples of obligations articulated by the International Court of Justice in the *Barcelona Traction* case—prohibition of aggression, genocide, breaches of rules concerning the basic rights of the human person, including protection from slavery and racial discrimination—are also often cited as examples of *jus cogens* (*Barcelona Traction, Light and Power Company, Limited*, Judgment, *I.C.J. Reports 1970*, p. 3, at p. 32, para. 34). For rules described as "fundamental" in the practice of the International Court of Justice, see V. Gowlland-Debbas, "Judicial insights into fundamental values and interests of the international community", in A. S. Muller and others (eds.), *The International Court of Justice: Its Future Role after Fifty Years,* The Hague, Kluwer Law International, 1997, p. 327, at pp. 335–342. For lists, see also J. Petman, "Panglossian views to the new world order: review of Cassese, *International Law* (2001)", *Finnish Yearbook of International Law*, vol. 13 (2002), pp. 337–338; see also Daillier and Pellet, *Droit international public* (footnote 74 above), pp. 206–207. Some commentators have proposed that *jus cogens* also encompasses the freedom of the high seas (see Frowein, "*Jus cogens*" (footnote 498 above), p. 67), yet the view of the Commission seems always to have been different. The Commission has stated continuously that it is not universal acceptance that elevates a norm to the status of *jus cogens*, but its content. In the words of the Commission, "[i]t is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of *jus cogens*" (*Yearbook ... 1966*, vol. II, document A/6309/Rev.1, part II, p. 248, para. (2) of the commentary to draft article 50). Following the same line, the Commission has added only recently that obligations under peremptory norms of international law "arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values" (*Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 112, para. (3) of the commentary to article 40 of the draft articles on responsibility of States for internationally wrongful acts).

[525] See, for example, Cassese (footnote 240 above), p. 201 ("most important and representative States"), and the discussion in Combacau and Sur, *Droit international public* (footnote 507 above), pp. 158–160.

[526] See Koskenniemi, *From Apology to Utopia…* (footnote 79 above), pp. 323–325.

existence of "absolute" norms for human conduct. While most people (and States) still hold it important—indeed very important—that such norms exist, the vocabularies of present-day diplomacy and law seem unable to produce a plausible justification for them. Any "criterion" that one might wish to invoke in support of the status of any particular norm as *jus cogens* would seem to infect that putative norm with all the uncertainties and vulnerabilities that relate to that criterion.

376. Instead of trying to determine the content of *jus cogens* through abstract definitions, it is better to follow the path chosen by the Commission in 1966 as it "considered the right course to be to provide in general terms that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals".[527] That still seems the right way to proceed.

3. Case law

377. The extent of case law on *jus cogens* is vast. Many courts and tribunals, both international and domestic, have used arguments based on *jus cogens* to substantiate their decisions and judgments.[528] Yet the number of cases in which *jus cogens* has appeared from the viewpoint of norm conflict is considerably more limited. As noted by Antonio Cassese:

> no dispute has arisen between States as to the *jus cogens* nature of a specific rule. Nor have one or more States insisted on the peremptory nature of a rule in a dispute with other States, accompanied by either acquiescence by other States or contestation by them. Nor has any international tribunal, let alone the [International Court of Justice], settled any dispute revolving around the question of whether or not a specific rule must be regarded as belonging to the corpus of norms under discussion.[529]

378. The International Court of Justice has been reluctant to refer to *jus cogens* in its decisions. An explicit mention of the term can be found only in very few cases. An example may be given by the decision of the Court most often referred to in relation to *jus cogens*, in the *Military and Paramilitary Activities in and against Nicaragua* case in 1986.[530] Nevertheless, more has perhaps been read into this decision than is warranted: the Court only mentions the words *jus cogens* by quoting (although apparently with approval) the Commission and the representatives of both parties to the dispute—it never picked up the vocabulary as part of its own language.[531]

379. Yet the fact that the Court has repeatedly referred to general and fundamental principles that lie beyond contractual treaty relations allows for the assumption that the Court has, in substance, affirmed the concept. In its very first case, it pointed out that the obligations of States do not necessarily have to have a conventional nature, but instead may also be founded on certain general and well-recognized principles, among which are "elementary considerations of humanity".[532] Just a year later the Court gave one of its most famous advisory opinions, in which it stated that "the principles underlying the Convention [on Genocide] are principles which are recognized by civilized nations as binding on States, even without any conventional obligation".[533] In the same vein, an advisory opinion of 1996 contained a reference to "intransgressible principles of international customary law".[534] These lines, and also the reasoning in the *Barcelona Traction* case, show that the Court has, from the very beginning, deemed it necessary to highlight the existence of particularly important norms in international law, although it has been less than clear about their status or operation.[535]

C. Obligations *erga omnes*

380. Obligations *erga omnes* are different from Article 103 of the Charter of the United Nations and *jus cogens*. Whereas the latter are distinguished by their normative power—their ability to override a conflicting

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[527] Draft articles on the law of treaties, *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, part II, p. 248, para. (3) of the commentary to article 50.

[528] For an overview of references to fundamental norms in the judicial pronouncements of the International Court of Justice and its predecessor, see Gowland-Debbas, "Judicial insights into fundamental values and interests…"(footnote 524 above), pp. 332–342. For other bodies, see, for example, *Prosecutor v. Kupreškić and others*, Trial Chamber, International Tribunal for the Former Yugoslavia, case No. IT-95-16-T, Judgment of 14 January 2000, *Judicial Reports 2000*, vol. II, para. 520, which states that "most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character". See the case law section for further examples of occasions where the concept has been endorsed by various judicial authorities.

[529] Cassese (see footnote 240 above), p. 202.

[530] *Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgment of 27 June 1986 (see footnote 51 above), pp. 100–101, para. 190.

[531] The only format in which the term *jus cogens* has really been put to use by the International Court of Justice comprises separate and dissenting opinions of individual judges of the Court. In fact, back in 1934, Judge Schücking of the Permanent Court of International Justice referred in his separate opinion to the possibility of creating *jus cogens* in the form of agreements between States. See the *Oscar Chinn* case (footnote 138 above), p. 149 (separate opinion of Judge Schücking). Throughout the following years, numerous references have been made to peremptory norms in this format. See, for example, *Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants* (footnote 491 above), pp. 106 *et seq.* (separate opinion of Judge Moreno Quintana); *North Sea Continental Shelf* (footnote 95 above), pp. 97, 248 (separate opinion of Judges Padilla Nervo and Sörensen), and p. 182 (dissenting opinion of Judge Tanaka); *Barcelona Traction, Light and Power Company, Limited* (footnote 524 above), p. 304 (separate opinion of Judge Ammoun); *Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgment of 27 June 1986 (footnote 51 above), p. 153 (separate opinion of President Nagendra Singh), and pp. 199 *et seq.* (separate opinion of Judge Sette-Camara); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 482 above), p. 440 (separate opinion of Judge Lauterpacht); *Legality of Use of Force (Yugoslavia v. United States of America)*, Provisional Measures, Order of 2 June 1999, *I.C.J. Reports 1999*, p. 916, at pp. 965–973, paras. 10–17 (dissenting opinion of judge *ad hoc* Kreća); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, *I.C.J. Reports 2002*, p. 3, at p. 96, para. 3 (dissenting opinion of Judge Al-Khasawneh); *Oil Platforms (Islamic Republic of Iran v. United States of America)* (footnote 128 above), p. 279, para. 23 (separate opinion of Judge Buergenthal).

[532] *Corfu Channel* (see footnote 449 above), p. 22.

[533] *Reservations to the Convention on Genocide* (see footnote 326 above), p. 23.

[534] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 122 above), p. 257, para. 79. The same was confirmed by the Court in its latest advisory opinion to date, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *I.C.J. Reports 2004*, p. 136.

[535] *Barcelona Traction, Light and Power Company, Limited* (see footnote 524 above), p. 32.

norm—obligations *erga omnes* designate the *scope of application* of the relevant law and the procedural consequences that follow from this. The duty to comply with a norm that creates obligations *erga omnes* is owed to the "international community as a whole", and all States—irrespective of their particular interest in the matter—are entitled to invoke State responsibility in case of breach. The *erga omnes* nature of an obligation, however, indicates no clear superiority of that obligation over other obligations. Although in practice norms recognized as having an *erga omnes* validity set up undoubtedly important obligations, this importance does not translate into a hierarchical superiority similar to that of Article 103 and *jus cogens*.

381. It may be true that "[t]he question as to the legal significance of the category of State obligations *erga omnes* has been hotly contested among scholars and lawyers and remains stubbornly unsettled within international legal literature and practice".[536] Yet although this may apply to particular understandings (and listings) of *erga omnes* obligations, the concept itself—the idea of the *erga omnes* applicability of certain rules of international law—is deeply rooted in international practice.

1. From bilateral obligations to obligations *erga omnes* owed to "the international community as a whole"

382. The bulk of international law emerges from contractual relations between individual States and remains in this sense "bilateralist".[537] Obligations are owed by States to each other, and each State is only individually entitled to invoke a breach as a basis for State responsibility. International law's special nature is well captured by Professor Allott, who has described it as "the minimal law necessary to enable State-societies to act as closed systems internally and to act as territory-owners in relation to each other".[538] Or, in the words of Simma:

> [T]raditional international law was left entirely in the hands of sovereign States, predicated on their bilateral legal relations, on the intrinsically bilateral character of legal accountability … As to the substance built upon such a bilateralist grounding, international law had, in the course of centuries, developed into a system of rules delimiting the spheres of sovereignty of States in space and time, as well as with regard to persons and certain jurisdictional matters respectively. In essence, these rules obliged States to abstain from interfering in the areas so demarcated. In addition, international law provided a reciprocity-based framework for … legal transactions in the form of treaties…[539]

383. The bilateralism of international law means that international law obliges States reciprocally in their relations *inter se* and not towards each other as members of some more or less general idea of an international public realm. The bilateralist mode of operation is particularly important in the law of State responsibility, which may be characterized in terms of "private justice" or an "every-man-for-himself doctrine":

> For a [S]tate to enjoy a right implies its possession of legal standing to claim performance of the corresponding obligation and, in default, to bring to book the person or persons owing that obligation. … In sum, no international obligations *erga omnes*, traditionally, exist: it is up to each [S]tate to protect its own rights; it is up to none to champion the rights of others.[540]

384. This view was expressed by the International Court of Justice in its advisory opinion concerning *Reparation for injuries suffered in the service of the United Nations*, when it held that "only the party to whom an international obligation is due can bring a claim in respect of its breach".[541]

385. Contemporary international law has, however, moved well beyond bilateralism. In the Commission's debates on what would become the 1969 Vienna Convention, the Special Rapporteurs were already making a distinction between treaties creating obligations that were owed by States to each other in a network of reciprocal relationships and treaties creating what Fitzmaurice called "a more absolute type of obligation"—that is, an obligation of an "integral" or "interdependent" character. As examples of these categories he gave disarmament and humanitarian law conventions. The obligations in such conventions could not be meaningfully reduced into reciprocal State-to-State relationships.[542] In that context, the interest of the distinction lay in the manner in which conflicts between treaties were to be dealt with, the "more absolute" type of obligation being less easily derogated from by "modification" or *lex posterior*.

386. The case most frequently mentioned in the early debates concerned the prohibition of genocide. According to the reasoning of the International Court of Justice in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* case, classical treaties were about individual advantages and disadvantages to States, or about the maintenance of a contractual balance.[543] Yet under conventions such as the Convention on the Prevention and Punishment of the Crime of Genocide, States were not pursuing their national, individual interests. Instead, they had a "common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention" and "[c]onsequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the

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[536] I.D. Seiderman, *Hierarchy in International Law: The Human Rights Dimension,* Antwerp, Intersentia, 2001, p. 123.

[537] See especially B. Simma, "From bilateralism to community interest in international law", *Recueil des cours de l'Académie de droit international de La Haye, 1994-VI*, vol. 250, pp. 230 *et seq.* This notion was first used by Special Rapporteur Willem Riphagen in his third report on the State responsibility (A/CN.4/354 and Add.1–2) (see footnote 185 above), p. 36, para. 91. As pointed out by Simma, the term "bilateralist" grasps the essence of international law more precisely and is less prone to misunderstandings than the adjectives "relative" or "relational" (Simma, "From bilateralism to community interest in international law", p. 230*).*

[538] P. Allott, *Eunomia: New Order for a New World*, Oxford, Oxford University Press, 1990, p. 324.

[539] Simma, "From bilateralism to community interest in international law" (see footnote 537 above), p. 229.

[540] Weil (see footnote 181 above), p. 431. Likewise, Alland (see footnote 251 above). For another argument, suggesting that the concept of obligations *erga omnes* is not viable as a matter of law, see J. Klabbers, "The scope of international law: *erga omnes* obligations and the turn to morality", in M. Tupamäki (ed.), *Liber Amicorum Bengt Broms: Celebrating His 70th Birthday 16 October 1999,* Helsinki, Finnish Branch of the International Law Association, 1999, p. 177.

[541] *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, *I.C.J. Reports 1949*, p. 174, at pp. 181–182.

[542] Third report on the law of treaties by Gerald Fitzmaurice, Special Rapporteur (A/CN.4/115) (see footnote 139 above), p. 44, para. 91.

[543] *Reservations to the Convention on Genocide* (see footnote 326 above), p. 23.

maintenance of a perfect contractual balance between rights and duties".[544] Since that case, it has become common for scholars—but also tribunals, both international and domestic—to refer to "certain overriding universal values"[545] and shared interests or preferences upon which a distinction is made between contract-type norms and those of a more public law character.

387. The *locus classicus* here is, of course, the statement by the Court in the *Barcelona Traction* case, which may have received inspiration from the debates under way since the adoption of the 1969 Vienna Convention concerning the nature and role of "fundamental norms" that could not be reduced to the regulation of bilateral State-to-State relations.[546] Here the term "*erga omnes*" (which is a Latin equivalent for "towards everyone/all") received major public attention for the first time.[547] As is well known, the Court held that Belgium did not possess legal standing to act against Spain on behalf of Belgian shareholders in a Canadian company. In a famous *obiter dictum*, the Court stated the following:

> 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*.
>
> 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 … ; others are conferred by international instruments of a universal or quasi-universal character.[548]

388. The significance of these passages lies foremost in outlining that there are indeed different types of obligations in international law. On the one hand there are obligations of a traditional type, which exist towards another particular State or States on a bilateralist basis; then there are obligations that are the concern of all States and in the protection of which all States have a legal interest.

389. Although the examples given by the International Court of Justice of obligations *erga omnes* may also have the nature of *jus cogens*, the Court did not seek to emphasize their non-derogability. Instead, it wanted to point to the fact that there were some rules that gave rise to a generality of standing to make claims in the event of a violation.[549] *Erga omnes* norms were not necessarily distinguished by the importance of their substance. They were norms with certain procedural features—specifically the feature that a breach of them can be invoked by any State and not just by individual beneficiaries. These were obligations that were about secondary, not primary rules.[550] The Commission itself has confirmed the doctrine of obligations *erga omnes*. Even though the idea of some violations constituting such grave offences against the international public order as a whole as to be labelled "crimes" was in the end omitted from the Commission's draft articles on responsibility of States for internationally wrongful acts of 2001, draft article 48 of the final text was, as part of the resulting compromise, drafted so as to recognize the possibility of an invocation of responsibility by a State other than an injured State:

> 1. Any State other than an injured State is entitled to invoke the responsibility of another … if:
>
> (*a*) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
>
> (*b*) the obligation breached is owed to the international community as a whole.[551]

390. In its commentary, the Commission makes it clear that this provision is intended to deal with obligations of the kind referred to in the *Barcelona Traction* case. And, although the language is different, the provision also takes up the cases that Fitzmaurice dealt with under the vocabulary of treaties establishing "integral" and "interdependent" obligations. Paragraph 1 (*a*), in particular, deals with what the commentary addresses as "obligations *erga omnes partes*"—that is to say, obligations arising out of a treaty and designed to protect the "collective interests" of the treaty parties.[552] Paragraph 1 (*b*) deals with obligations *erga omnes* proper, that is, obligations in the general law whose implementation is the concern of "the international community as a whole".

2. To whom are obligations *erga omnes* owed?

391. Most (though not all) *erga omnes* obligations have emerged in the field of human rights and humanitarian law. In these fields, the law does not create reciprocal

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[544] *Ibid.*

[545] Gowlland-Debbas, "Judicial insights into fundamental values and interests…" (see footnote 524 above), p. 328. See further C. J. Tams, *Enforcing Obligations Erga omnes in International Law,* Cambridge, Cambridge University Press, 2005, pp. 2–3 and *passim*.

[546] J. A. Frowein, "Obligations *erga omnes*", in Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 3 (see footnote 498 above), p. 757.

[547] *Barcelona Traction, Light and Power Company, Limited* (see footnote 524 above), p. 32, para. 33. For support for the concept of obligations *erga omnes*, see O. Schachter, *International Law in Theory and Practice,* Dordrecht, Martinus Nijhoff, 1991, pp. 343–345; C. Annacker, "The legal régime of *erga omnes* obligations in international law", *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht*, vol. 46, No. 2 (1994), p. 131. For criticism, see Weil (footnote 181 above), p. 413.

[548] *Barcelona Traction, Light and Power Company, Limited* (see footnote 524 above), p. 32, paras. 33–34.

[549] See M. Byers, "Conceptualising the relationship between *jus cogens* and *erga omnes* rules", *Nordic Journal of International Law*, vol. 66 (1997), p. 211, at p. 230.

[550] See also the fourth report on State responsibility by Gaetano Arangio-Ruiz, Special Rapporteur (A/CN.4/444 and Add.1–3) (footnote 203 above), p. 34, para. 92: "the concept of *erga omnes* obligations is not characterized by the importance of the interest protected by the norm (as is typical of *jus cogens*) but rather by the 'legal indivisibility' of the content of the obligation, namely by the fact that the rule in question provides for obligations which bind simultaneously each and every State concerned with respect to all others. This legal structure is typical not only of peremptory norms, but also of other norms of general international law and of a number of multilateral treaty rules (*erga omnes partes* obligations)."

[551] Art. 48 of the draft articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 126.

[552] *Ibid.*, pp.126–128, commentary to draft article 48. The examples given by the Commission concern treaties that have to do with the environment, or the security of a region, or a regional system of human rights protection.

obligations between States in the bilateralist manner. An obligation to respect the right to freedom of speech in a State's territory, for example, is not directed towards any particular States or the citizens of particular States. Rather, under such a norm a State assumes a responsibility in relation to all persons under its jurisdiction. There is no *quid pro quo* in such relations. A State is obliged to respect that right irrespective of how other States may have behaved.[553]

392. This raises the question of who the beneficiaries of *erga omnes* obligations are and whether one's status as an immediate beneficiary has any bearing on the capacity to react to violations. It may, from an academic perspective, be quite correct to state that *erga omnes* obligations "are grounded not in an exchange of rights and duties but in an adherence to a normative system".[554] Yet it is far from clear what this means in terms of the procedural rights triggered by any actual violation.

393. If a State is responsible for torturing its own citizens, no single State suffers any direct harm. Apart from the individual or individuals directly concerned, any harm attributed to anyone else is purely notional, that is, constructed on the basis of the assumption that such action violates some values or interests of "all", or in the vocabulary of the *Barcelona Traction* case, the "international community as a whole". Although the State committing torture has breached its obligations, under bilateralism, there would be no injured State and thus no State in possession of a claim right.[555] But of course, the Commission has now accepted that there may be situations where non-injured States may also be entitled to invoke breaches and that those are precisely the kinds of situations where the violations concern the "international community as a whole" and where all States have a legal interest.[556] The case of *erga omnes partes* dealt with in draft article 48, paragraph 1 (*a*), covers the situation where a collective interest of treaty parties has been violated and where, consequently, it is reasonable to entitle all the parties to invoke the breach. Draft article 48, paragraph 1 (*b*), deals with general *erga omnes* obligations that establish a right for all States—that is to say, in their capacity as members of the "international community"—to invoke the breach.[557]

394. Again, a good summary can be found in the *Furundžija* judgment of the International Tribunal for the Former Yugoslavia. Having stated that the prohibition of torture was a *jus cogens* norm, the Tribunal also defined it as establishing an *erga omnes* obligation, as follows:

> Furthermore, the prohibition of torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.[558]

395. The distinction between "bilateral" and *erga omnes* obligations seems analogous to the domestic distinction between contracts and public law obligations. In the latter, the relationship is between the legal subject and the public power. Even if a breach of such an obligation may violate an individual interest, the capacity to react (as in most criminal law) lies in the hands of the public power.

396. This does not, however, mean that States could react only through a collective process. Indeed, if that were the case, the absence of general collective reaction procedures—apart from those under Chapter VII of the Charter of the United Nations—would render the provision on *erga omnes* practically meaningless. As pointed out by Gaja in his report to the Institute of International Law, a collective reaction involving all States "is in practice impossible". Therefore it must be concluded that an obligation owed to the "international community as a whole" is also owed to each State individually and without any specific interest on that State's part, and that each of them has the capacity to react in case of breach. Whether other subjects—individuals, groups of individuals or organizations—might also be entitled to react depends on the content of the relevant norm and whether suitable avenues for such reaction are present.[559]

397. It has also been suggested that the fact that an obligation is owed *erga omnes* is relevant to determining the consequences of its breach. In particular, it may involve the obligation of non-recognition. Considering the legality of the security barrier built by Israel partly on the

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[553] As noted by Simma, human rights treaties are among those agreements in regard to which "obligations do not run between the States parties at all but rather oblige the contracting States to adopt a certain 'parallel' conduct within their jurisdiction which does not manifest itself as any tangible exchange or interaction *between* the parties" (B. Simma, "Bilateralism and community interest in the law of State responsibility", in Y. Dinstein (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne,* Dordrecht, Martinus Nijhoff, 1988, p. 821, at p. 823).

[554] See R. Provost, "Reciprocity in human rights and humanitarian law", *British Year Book of International Law 1994*, vol. 65, p. 383, at p. 386.

[555] Seiderman goes so far as to assert that "it is inappropriate to divide human rights norms into those which entail obligations *erga omnes* and those which do not" (Seiderman (see footnote 536 above), p. 124). For an alternative view, see Byers, "Conceptualising the relationship between *jus cogens* and *erga omnes* rules" (footnote 549 above), p. 232. Byers sees obligations *erga omnes* as still being within the bilateralist paradigm, suggesting that "an *erga omnes* rule might be considered to involve a series of identical bilateral relationships between every possible pair of States", plus having the characteristic that every State has the right to present a claim, whoever suffers the direct loss from a breach of such obligations. Inspiration for such treatment of the doctrine might be based on what the International Court of Justice stated in 1974 in the *Nuclear Tests* case. In its decision, the Court held that "[t]he unilateral statements of the French authorities were made outside the Court, publicly and *erga omnes* … The objects of these statements are clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effect" (*Nuclear Tests (Australia v. France)*, Judgment, *I.C.J. Reports 1974*, p. 253, at p. 269, paras. 50–51). According to the argumentation in this early opinion, obligations *erga omnes* would really be no more than obligations a State has taken in relation to all the States of the international community.

[556] Art. 42 (*b*) of the draft articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 117.

[557] *Ibid.*, pp. 126–128, commentary to draft article 48.

[558] *Prosecutor v. Anto Furundžija* (see footnote 502 above), *Judicial Reports 1998*, p. 567, para. 151; ILR, vol. 121 (2002), p. 260.

[559] G. Gaja, "Obligations and rights *erga omnes* in international law", *Annuaire de l'Institut de droit international*, vol. 71-I (Session of Krakow, 2005—First Part), p. 117, at p. 126.

occupied territory of Palestine, the International Court of Justice stated the following:

> The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.
>
> …
>
> Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall…[560]

398. The Court specified this by holding:

> They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.[561]

3. Obligations *erga omnes partes*

399. The judgment of the International Court of Justice in the *Barcelona Traction* case contains a statement to the effect that "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".[562] These lines may be taken to mean that obligations *erga omnes* cannot be based on treaty law. This, however, cannot have been the Court's meaning. A better view seems to be that the Court wished to say that specific agreements may channel legal standing into appropriate procedures. In other words, the statement would not relate to the sources of obligations *erga omnes*, but to the technical particularities of human rights treaties. As Ian Seiderman has stated, "in order to institute an *actio popularis*, a State or other subject of international law would need both standing and a forum. *Erga omnes* addresses itself only to the former requirement."[563]

400. Yet not too much should be made of the distinction (standing and jurisdiction). In the case of State responsibility—the principal field of *erga omnes* obligations—the absence of jurisdiction does not extinguish the claim. In the human rights field, for instance, the general law of State responsibility becomes fully available for actors representing the "international community as a whole", even where an "*actio popularis*" might remain beyond the possibilities offered by the particular forum.[564]

401. This logic was long ago expressed in regard to the European Convention on Human Rights. In the *Pfunders* case, in 1961,[565] the Austrian Government alleged that criminal proceedings in Italian courts had been carried out in conflict with article 6 of the Convention. The Italian Government objected that the treaty bodies lacked competence *ratione temporis* to entertain the case, as Austria had not ratified the Convention at the time of the disputed events and was thus not empowered to bring the claim. However, the European Commission of Human Rights rejected this argument with the famous statement that

> the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realise the aims and ideals of the Council of Europe, as expressed in its Statute, and to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law;
>
> …
>
> [T]he obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves…[566]

402. Hence it has to be concluded that the source of a norm cannot be said to be decisive as to whether that norm gives rise to obligations *erga omnes* or not.[567] It is rather the character of primary norms that determines the nature of secondary rules.

403. That obligations *erga omnes* can indeed be based on treaty norms has also been confirmed by the Institute of International Law. Its resolution entitled "Obligations

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[560] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (see footnote 534 above), pp. 199–200, paras. 155 and 159.

[561] *Ibid.*, p. 200, para. 159. This did not, however, go uncontested by the other judges. Thus, Judge Higgins in her separate opinion stated that, "unlike the Court", she did not think that "the specified consequence of the identified violations of international law ha[d] anything to do with the concept of *erga omnes*", continuing: "The Court's celebrated dictum in *Barcelona Traction ...* is frequently invoked for more than it can bear. Regrettably, this is now done also in this Opinion … That dictum was directed to a very specific issue of jurisdictional *locus standi*. … It has nothing to do with imposing substantive obligations on third parties to a case." She added: "That an illegal situation is not to be recognized or assisted by third parties is self-evident, requiring no invocation of the uncertain concept of '*erga omnes*'. … The obligation upon United Nations Members not to recognize … and not to lend support or assistance relie[s] in no way whatever on '*erga omnes*'" (*ibid.*, p. 216, paras. 37–38, separate opinion of Judge Higgins).

[562] *Barcelona Traction, Light and Power Company, Limited* (see footnote 524 above), p. 47, para. 91.

[563] Seiderman (see footnote 536 above), pp. 136–137. Likewise, in the *East Timor* case, the International Court of Justice held that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*" (*East Timor (Portugal v. Australia)*, Judgment, *I.C.J. Reports 1995*, p. 90, at p. 102, para. 29). See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (footnote 534 above), p. 216, para. 37 (separate Opinion of Judge Higgins), where she states that the *dictum* in *Barcelona Traction* was directed to a very specific issue of jurisdictional *locus standi*.

[564] For the suggestion of using the *erga omnes* concept to empower non-State actors, see, for example, H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester, Manchester University Press, 2000, pp. 94–95.

[565] Decision of the Commission as to the admissibility of application No. 788/60 lodged by the Government of the Federal Republic of Austria against the Government of the Republic of Italy, 11 January 1961, *Yearbook of the European Convention on Human Rights 1961*, vol. 4, p. 116.

[566] *Ibid.*, pp. 138, 140.

[567] See also Annacker (footnote 547 above), p. 136, who argues that "[t]he source of a norm by itself does not allow any conclusions regarding the structure of the obligations imposed and of the rights conceded by the primary norm or the régime of responsibility (secondary norms)."

erga omnes in international law", adopted in 2005, defines an obligation *erga omnes* as:

(*a*) an obligation under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action; or

(*b*) an obligation *under a multilateral treaty** that a State party to the treaty owes in any given case to all the other States parties to the same treaty, in view of their common values and concern for compliance, so that a breach of that obligation enables all these States to take action.[568]

4. The relationship between *jus cogens* and *erga omnes* obligations

404. The close relationship between *jus cogens* and the notion of *erga omnes* obligations is a constant source of confusion. *Jus cogens* norms are particularly important norms that are distinguished by their non-derogability. A norm that conflicts with them is, as we have seen, null and void. Obligations *erga omnes* are obligations in the fulfilment of which every State ("the international community as a whole") has a legal interest. It is likely that all States have a legal interest in the observance of rules from which no derogation is permitted. In this sense, it is plausible to assume that all *jus cogens* norms constitute *erga omnes* obligations. But the equation does not work the other way around. From the fact that all States have an interest in the fulfilment of an obligation it does not necessarily follow that those norms are peremptory—that is to say, they do not necessarily render conflicting obligations null and void.

405. In its commentary to the draft articles on responsibility of States for internationally wrongful acts, the Commission elaborated the relationship between *jus cogens* and obligations *erga omnes* as follows:

While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance—i.e. in terms of the present articles, in being entitled to invoke the responsibility of any State in breach. Consistently with the difference in their focus, it is appropriate to reflect the consequences of the two concepts in two distinct ways. First, serious breaches of obligations arising under peremptory norms of general international law can attract additional consequences, not only for the responsible State but for all other States. Secondly, all States are entitled to invoke responsibility for breaches of obligations to the international community as a whole.[569]

406. In the *Furundžija* case, the International Tribunal for the Former Yugoslavia made clear the relationship between the procedural thrust of *erga omnes* obligations and the linkage of *jus cogens* to normative hierarchy:

While the *erga omnes* nature just mentioned appertains to the area of international enforcement (*lato sensu*), the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order.[570]

5. Conclusion

407. The discussion of hierarchy confirms the conclusions already reached at the end of the foregoing chapters. Although there is no single, fixed set of hierarchical relationships among the rules, principles and obligations of international law, this does not mean that relations of superiority and inferiority are non-existent, only that what they are cannot be determined in an abstract way, irrespective of the contexts in which some norms (rules, principles) are invoked against countervailing considerations. Although it is customary to deal with hierarchy in international law in terms of *jus cogens* norms and *erga omnes* obligations, it is not clear that these are the only—or indeed the most practically relevant—cases. As we saw in chapters II and III above, there are other important rules—for example treaty rules of an "integral" and "interdependent" nature, "intransgressible principles", "elementary considerations of humanity" and treaty clauses that cannot be violated without simultaneously undermining the object and purpose of the treaty—that play a more significant role in the practice of legal reasoning. It may be that focus on the well-known Latin maxims has diverted attention from these more mundane types of relationships of importance.

408. However, this section has emphasized the clear difference that exists between *jus cogens* norms and obligations *erga omnes*. The former have to do with the normative "weight" of a norm, the latter with its procedural "scope". While a *jus cogens* norm necessarily has an *erga omnes* scope, not all *erga omnes* obligations have weight as *jus cogens*. And while it is true that which norms belong to these classes remains to be argued separately every time, a solid professional consensus has been building through the 1990s on the nature of at least some prohibitions as being that of *jus cogens* and the violation of some obligations as providing a standing for non-injured States. Though the categories nevertheless remain fluid, this does not mean that they are meaningless. On the contrary, their relative openness allows their reasonable use in particular situations of normative conflict (*jus cogens*) or when having to decide on standing in regard to some obligations (obligations *erga omnes*).

409. But law is a systematic craft, and debates on superior and inferior norms remain a fertile ground for deliberating "constitutionalization" and fragmentation. Article 103 of the Charter of the United Nations certainly suggests the hierarchically higher status of the Charter over other parts of international law, while the very idea of *jus cogens* suggests that even United Nations policies may meet with a "constitutional" limit. Of course, there no longer persists a meaningful challenge to the notion of

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[568] *Annuaire de l'Institut de Droit international*, vol. 71-II (Session of Krakow, 2005—Second Part), p. 287, art. 1. See also the fourth report on State responsibility by Gaetano Arangio-Ruiz, Special Rapporteur (A/CN.4/444 and Add.1–3) (footnote 203 above), p. 34, para. 92, stating that "[t]his legal structure [obligations *erga omnes*] is typical not only of peremptory norms, but also of other norms of general international law and of a number of multilateral treaty rules (*erga omnes partes* obligations)".

[569] Para. (7) of the general commentary to part II, chap. III, of the draft articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 111–112. Michael Byers has depicted the same relationship in the following terms: "*Jus cogens* rules, otherwise known as 'peremptory rules', are non-derogable rules of international 'public policy'. They render void other, non-peremptory rules which are in conflict with them. *Erga omnes* rules, on the other hand, are rules which, if violated, give rise to a general right of standing—amongst all States subject to those rules—to make claims" (Byers, "Conceptualising the relationship between *jus cogens* and *erga omnes* rules" (see footnote 549 above), p. 211).

[570] *Prosecutor v. Anto Furundžija* (see footnote 502 above), *Judicial Reports 1998*, p. 569, para. 153; ILR, vol. 121 (2002), p. 260.

jus cogens. Any actual disputes relate to the determination of its content, in particular with respect to the characterization of some action or event. Here, everything depends on the development of political preferences.[571] Nevertheless, the importance of the notion—like the importance of *erga omnes* obligations—may lie less in the way the concept is actually "applied" than as a signal of argumentative possibilities and boundaries for institutional decision-making. To that extent, these notions alleviate the extent to which international law's fragmentation may seem problematic.

[571] In this regard, particularly important are the deliberations of the Court of First Instance of the European Communities in case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (see footnote 485 above). As pointed out above, the Court stated that it had the competence to examine the conformity of United Nations Security Council decisions with *jus cogens*. At one point it speculated about "fundamental rights of the human person falling within the ambit of *jus cogens*" (para. 286), indicating that not all "fundamental rights" were by the same token *jus cogens*. However, in a later passage the Court went on to assess "whether the freezing of funds … infringes the applicants' fundamental rights" (para. 288), thereby in fact conflating the two categories—"fundamental rights" and "*jus cogens*". This wide understanding of *jus cogens* also surfaces in the Court's view that an "arbitrary deprivation" of the right to property "might, in any case, be regarded as contrary to *jus cogens*" (para. 293). Also of interest is the Court's view that while the right of access to the courts did possess *jus cogens* status, this did not mean that it was unlimited. On the contrary, its limitation by action taken in pursuit of Article 103 of the Charter appeared to be "inherent in that right as it is guaranteed by *jus cogens*" (para. 343).

Chapter V

Systemic integration and article 31, paragraph 3 (*c*), of the Vienna Convention on the Law of Treaties

A. Introduction: the "principle of systemic integration"

410. The previous chapters dealt with three types of relationship between rules and principles (norms) of international law: relations between special and general norms, between prior and subsequent norms, and between rules and principles with different normative power. In each chapter, the argument was that legal technique was perfectly capable of resolving normative conflicts or overlaps by putting these rules and principles in a determinate relationship with each other. The chapters highlighted that there was nothing automatic or mechanical about this process. The way the relevant techniques (*lex specialis*, *lex posterior* and *lex superior*) operated was dependent on what should be considered the relevant aspects of each case. Whether a rule's speciality or generality should be decisive, or whether priority should be given to the earlier or to the later rule, depended on such aspects as the will of the parties, the nature of the instruments and their object and purpose, as well as what would be a reasonable way to apply them with minimal disturbance to the operation of the legal system.

411. Alongside contextuality, another conspicuous feature in the preceding surveys of international practice has been the effort to avoid invalidating the norm that will be set aside, with only the abstract and so far substantially quite thin doctrine of *jus cogens* as an exception. In other words, care has been taken not to suggest that a treaty duly adopted or a custom followed by States would become, in some respect, altogether without legal effect. This has been achieved in particular through two techniques. First is the effort to harmonize apparently conflicting norms by interpreting them so as to render them compatible. Second is the technique whereby the question of validity has been replaced by a question of priority. The norm that will be set aside will remain as it were "in the background", continuing to influence the interpretation and application of the norm to which priority has been given.

412. It follows that, contrary to what is sometimes suggested, conflict resolution and interpretation cannot be distinguished from each other. Whether there is a conflict and what can be done with *prima facie* conflicts depends on the way the relevant rules are interpreted. This cannot be stressed too much. Interpretation does not intervene only once it has already been ascertained that there is a conflict. Rules appear to be compatible or in conflict *as a result of interpretation*. Sometimes it may be useful to stress the conflicting nature of two rules or sets of rules so as to point to the need for legislative intervention. Often, however, it seems more appropriate to play down that sense of conflict and to read the relevant materials from the perspective of their contribution to some generally shared—"systemic"—objective. The technique of "mutual supportiveness" provided an example of this. But whichever way one goes, the process of reasoning follows well-worn legal pathways: references to normal meaning, party will, legitimate expectations, good faith and subsequent practice, as well as the "object and purpose" and the principle of effectiveness. And finally, if a definite priority must be established, this may, as we have seen above, be achieved through three criteria: (*a*) specificity (*lex specialis*); (*b*) temporality (*lex posterior*); and (*c*) status (*jus cogens*, obligations *erga omnes* and Article 103 of the Charter of the United Nations).

413. It is therefore not a surprise that the 1969 Vienna Convention deals with the plurality of rules and principles in the context of treaty interpretation. In particular, article 31, paragraph 3 (*c*), may be taken to express what may be called the principle of "systemic integration"[572]—the process surveyed all through this report—whereby international obligations are interpreted by reference to their normative environment ("system"). Article 31, paragraph 3 (*c*), of the Convention provides:

[572] Combacau and Sur, *Droit international public* (footnote 507 above), p. 175, and, in much more detail, C. McLachlan, "The principle of systemic integration and article 31 (3) (*c*) of the Vienna Convention", *International and Comparative Law Quarterly*, vol. 54, No. 2 (April 2005), p. 279.

There shall be taken into account, together with the context:

…

(*c*) Any relevant rules of international law applicable in the relations between the parties.

414. The rationale for such a principle is understandable. All treaty provisions receive their force and validity from general law and set up rights and obligations that exist alongside rights and obligations established by other treaty provisions and rules of customary international law. None of these rights and obligations has any *intrinsic* priority over the others. The question of their relationship can only be approached through a process of reasoning that makes them appear as parts of some coherent and meaningful whole. This is why, as pointed out by McNair, they must also be "applied and interpreted against the background of the general principles of international law".[573] Or, as the Arbitral Tribunal in the *Georges Pinson* case noted, a treaty must be deemed to refer to such principles for all questions which it does not itself resolve expressly and in a different way.[574] Reference to general rules of international law in the course of interpreting a treaty is an everyday, often unconscious part of the interpretation process. We have surveyed how this takes place in connection with the operation of special (and not "self-contained") regimes in chapter II above. In the activity of specialized treaty bodies, a solid legal background is constantly presumed in a non-controversial way. No tribunal will ask for evidence of the rule of *audiatur et altera pars* or call into question the nature of a United Nations Member as a "State". These matters are taken as given, and if a party challenges the relevance of any such procedural standard or public law status, then it is up to that party to justify its (unorthodox) case.

415. But the principle of systemic integration goes further than merely restating the applicability of general international law in the operation of particular treaties. It points to a need to take into account the normative environment more widely. Nor is this anything new. Thus, for example, the Arbitral Tribunal in a Franco-Belgian case from 1937 was able to hold as follows, without any further explanation:

[A]bstraction faite de cette interprétation grammaticale et logique, il faut tenir compte du fait qu'il faut placer et interpréter l'accord Tardieu-Jaspar dans le cadre des accords de La Haye de janvier 1930, c'est-à-dire dans le cadre du Plan Young qui détermine soigneusement par quelle méthode les "paiements allemands" et les "transferts allemands" s'effectueront…[575]

416. In this case, one treaty was interpreted by reference to another treaty. It was obvious that the Franco-Belgian issue had a relationship to the overall effort to settle the German reparations problem and that this fact—the linkage of the treaty to that general settlement—could not be ignored in the interpretation of the agreement. More generally, if it is indeed the point of international law to coordinate relations between States, then it follows that specific norms must be read against other norms bearing upon the same facts as the treaty under interpretation. A case in point is what Fitzmaurice called "chains" of treaties that grapple with the same type of problem at different levels or from particular (technical, geographical) points of view.[576] As the Arbitral Tribunal in the *Southern Bluefin Tuna* case (2000) put the point:

it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. … There is frequently a parallelism of treaties … The current range of international legal obligations benefits from a process of accretion and cumulation …[577]

417. In the era of framework treaties and implementation treaties, this seems self-evident. The doctrine of "treaty parallelism" addresses precisely the need to coordinate the reading of particular instruments or to see them in a "mutually supportive" light. At issue in the *Southern Bluefin Tuna* case was the relationship between the 1982 United Nations Convention on the Law of the Sea and a fisheries treaty concluded for the implementation of the former. It would have been awkward, and certainly not in accord with the intent of the parties, to read those instruments independently from each other. Although how that relationship should be conceived—were they part of what in chapter III, section B.1, above was called a "regime" or were they not?—may remain the subject of some debate (particularly in view of the overlapping provisions on dispute settlement), the Tribunal itself fully realized that it could not ignore the fact that the problem arose under both treaties.[578]

418. Yet the problem is not limited to relationships between framework treaties and implementation treaties (after all, these characterizations have no determined content). Surely deciding which treaty is applicable or how a tribunal's jurisdiction is delimited cannot be dependent on how a State chooses to characterize a problem? Daillier and Pellet make the general point clearly:

Un traité ne peut être considéré isolément. Non seulement il est ancré dans les réalités sociales, mais encore ses dispositions doivent être confrontées avec d'autres normes juridiques avec lesquelles elles peuvent entrer en concurrence.[579]

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[573] McNair (see footnote 58 above), p. 466.

[574] *Georges Pinson (France) v. United Mexican States* (see footnote 244 above), p. 422.

[575] "Based on this grammatical and logical interpretation, it must be borne in mind that the Tardieu–Jaspar Agreement must be situated and interpreted in the context of the Hague Agreements of January 1930, *i.e.* within the framework of the Young Plan, which meticulously defines the methods by which the 'German payments' and 'German transfers' are to be made": *Différend concernant l'Accord Tardieu-Jaspar (Belgium/France),* Award of 1 March 1937, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1701, at p. 1713.

[576] Third report on the law of treaties by Gerald Fitzmaurice, Special Rapporteur (A/CN.4/115) (see footnote 139 above), p. 44, para. 89 (*b*).

[577] *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan* (see footnote 26 above), p. 40, para. 52.

[578] For the debate concerning the problems that emerge as a result of the Tribunal's preferring the dispute settlement provisions of the regional treaty (Convention for the Conservation of Southern Bluefin Tuna) to the (compulsory) provisions of Part XV of the United Nations Convention on the Law of the Sea, see J. Peel, "A paper umbrella which dissolves in the rain? The future for resolving fisheries disputes under UNCLOS in the aftermath of the *Southern Bluefin Tuna* arbitration", *Melbourne Journal of International Law*, vol. 3, No. 1 (May 2002), p. 53, and B. Kwiatkowska, "*The Ireland v. United Kingdom (MOX Plant)* case: applying the doctrine of treaty parallelism", *International Journal of Marine and Coastal Law*, vol. 18, No. 1 (March 2003), p. 1, at p. 52 and footnotes.

[579] "A treaty cannot be considered in isolation. Not only is it anchored in social realities; its provisions must also be confronted with other, potentially competing, legal rules": Daillier and Pellet (see footnote 74 above), p. 266.

419. None of this predetermines what it means to "confront" a norm with another or how they might enter into "competition". These matters must be left to the interpreter to decide in view of the situation. The point—but it is a key point—is simply that the normative environment cannot be ignored and that, when interpreting treaties, the principle of integration should be borne in mind. This points to the need to carry out interpretation such that the rules are seen in the light of some comprehensible and coherent objective, so as to prioritize concerns that are more important at the cost of less important objectives. This is all that article 31, paragraph 3 (*c*), requires: the integration into the process of legal reasoning—including reasoning by courts and tribunals—of a sense of coherence and meaningfulness. Success or failure here is measured by how the legal world views the outcome.

420. This chapter may be understood as an elucidation of the place and operation of article 31, paragraph 3 (*c*), of the 1969 Vienna Convention, but also as a summary of much of what has been said in previous chapters. The systemic nature of international law has received its clearest formal expression in that provision. As was suggested by Ms. Hanqin Xue during debates in the Commission on the significance of article 31, paragraph 3 (*c*), this provision operates like a "master key" to the house of international law.[580] If there is a systemic problem—an inconsistency, a conflict, an overlap between two or more norms—and no other interpretative means provides a resolution, then recourse may always be had to that provision in order to proceed in a reasoned way.

421. It may of course often be the case that no formal reference to article 31, paragraph 3 (*c*), is needed because other techniques sufficiently cover the need to take into account the normative environment. As we have seen, customary law, general principles of law and general treaty provisions form the interpretative background for specific treaty provisions, and it often suffices to refer to them to attain systemic integration. Sometimes article 31, paragraph 3 (*c*), is taken as merely confirming this. For example, in the recent arbitration between France and the Netherlands concerning the application of the Convention on the Protection of the Rhine against Pollution from Chlorides (2004), the Tribunal was requested to apply article 31, paragraph 3 (*c*), by one of the parties in support of its contention that the "polluter-pays" principle might be applicable in the affair. The Tribunal examined this contention, noting as follows:

ce principe figure dans certains instruments internationaux, tant bilatéraux que multilatéraux, et se situe à des niveaux d'effectivité variables. Sans nier son importance en droit conventionnel, le Tribunal ne pense pas que ce principe fasse partie du droit international général.[581]

422. But if that were all article 31, paragraph 3 (*c*), covered, it would have been unnecessary. Its wording, however, is not restricted to "general international law" but extends to "[a]ny relevant rules of international law applicable in the relations between the parties". Adding the word "general" was proposed in the Commission, but it was not included. The predominant, though not exclusive, references in the Commission were to other treaty rules. Whether, in the case of multilateral treaties, this requires that all parties to a treaty to be interpreted are also parties to the other treaties "to be taken into account" will be discussed below.[582]

423. It is sometimes suggested that international tribunals or law-applying (treaty) bodies are not entitled to apply law that goes "beyond" the four corners of the constituting instrument or that, when arbitral bodies deliberate an award, they ought not to take into account rules or principles that are not incorporated in the treaty under dispute or the relevant *compromis*. But if, as discussed in chapter I, section E, above, all international law exists in a systemic relationship with other law, no such application can take place without situating the relevant jurisdiction-endowing instrument in its normative environment.[583] This means that, although a tribunal may only have jurisdiction in regard to a particular instrument, it must always *interpret* and *apply* that instrument in the context of its relationship to its normative environment—that is to say "other" international law.[584] This is the principle of systemic integration to which article 31, paragraph 3 (*c*), of the 1969 Vienna Convention gives expression. It is true that the formulation of article 31, paragraph 3 (*c*), has been criticized as unclear, both in its substantive and temporal scope and in its normative force. To what extent should "other law" be taken into account? What about prior or later law? And what does "taking into account" really mean? As Judge Weeramantry noted in the *Gabčikovo-Nagymaros* case, the provision "scarcely covers this aspect with the degree of clarity requisite to so important a matter".[585] Thirlway even doubts "whether this sub-paragraph will be of any assistance in the task of treaty interpretation".[586] But if the provision is merely the expression of a larger principle—that of "systemic integration"—and if that principle, again, expresses a reasonable or even necessary aspect of the practice of legal reasoning, then a discussion of its actual and potential uses would constitute a useful contribution to the study of the alleged fragmentation (or diversification) of international law.

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[580] McLachlan (see footnote 572 above), pp. 280–281.

[581] "[T]his principle appears in some international treaties, both bilateral and multilateral, and is applicable at different levels. Without denying its importance in treaty law, the Tribunal does not consider it part of general international law": *Case concerning the audit of accounts between the Netherlands and France in application of the Protocol of 25 September 1991 Additional to the Convention for the Protection of the Rhine from Pollution by Chlorides of 3 December 1976 (the Netherlands/France),* award of 12 March 2004, UNRIAA, vol. XXV (Sales No. E/F.05.V.5), p. 267, at p. 312, para. 103.

[582] The (very limitative) suggestion that they should be was recently made by a WTO Panel in *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WTO Panel reports, WT/DS291/R and Add.1–9 and Corr.1, WT/DS292/R and Add.1–9 and Corr.1, WT/DS293/R and Add.1–9 and Corr.1, adopted 21 November 2006, paras. 7.70–7.72.

[583] In this regard, see also Pauwelyn, *Conflict of Norms…* (footnote 21 above), pp. 460–463 and *passim*.

[584] This is not to say that it would in practice be easy—or even possible—to distinguish these aspects from each other. Indeed, the impossibility of doing so was a key reason why the Commission refrained from adopting any rule on inter-temporal law (see section D.3 below). The point is conceptual and refers to the way any right or obligation is double-sided—a creation of a treaty that is "applicable" and in substance determined through "interpretation".

[585] *Gabčíkovo-Nagymaros Project* (see footnote 119 above), p. 114 (separate opinion of Judge Weeramantry).

[586] H. Thirlway, "The law and procedure of the International Court of Justice 1960–1989 (Part Three)", *British Year Book of International Law 1991*, vol. 62, p. 1, at p. 58.

B. Article 31, paragraph 3 (*c*), of the Vienna Convention on the Law of Treaties

1. Construction

424. Article 31, paragraph 3 (*c*), is placed within part III, section 3, of the 1969 Vienna Convention, which deals with the interpretation of treaties. Article 31 provides the "general rule of interpretation" in the following terms:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (*a*) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (*b*) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (*a*) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (*b*) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (*c*) Any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

425. According to paragraph 3, three matters, not ranked in any particular order of priority, should be taken into account in treaty interpretation in addition to the context. The third of them is "any relevant rules of international law applicable in the relations between the parties". These provisions form a mandatory part of the interpretation process. Unlike the provision in article 32, on *travaux préparatoires* as a "supplementary means of interpretation", they are to be referred where the meaning of treaty terms is ambiguous, obscure, absurd or unreasonable.[587]

426. Textual analysis of article 31, paragraph 3 (*c*), reveals a number of aspects of the rule which deserve emphasis:

(*a*) It refers to "rules of international law", thus emphasizing that the reference for interpretation purposes must be to rules of law, and not to broader principles or considerations that may not be firmly established as rules;

(*b*) The formulation refers to rules of international law in general. The words cover all the sources of international law, including custom, general principles and, where applicable, other treaties;

(*c*) Those rules must be both relevant and "applicable in the relations between the parties". The sub-paragraph does not specify whether, in determining relevance and applicability, one must have regard to all parties to the treaty in question, or merely to those in dispute;

(*d*) The sub-paragraph contains no temporal provision. It does not state whether the applicable rules of international law are to be determined as at the date on which the treaty was concluded, or at the date on which the dispute arises.

427. Articles 31 and 32 of the 1969 Vienna Convention are, of course, widely assumed to reflect customary international law.[588] Their appeal may be attributable to the fact that they adopt a set of practical considerations that are familiar from the national context and at the same time general and flexible enough to provide a reasonable response to most interpretative problems. The Convention avoids taking a stand on any of the great doctrinal debates on interpretation. The articles adopt both an "ordinary meaning" and a "purposive" approach; they look for party consent, as well as what is in accordance with good faith. It is in fact hard to think of any approach to interpretation that would be excluded from articles 31 and 32.[589] Yet the Convention does not purport to be an exhaustive statement of interpretive techniques—there is no mention, for example, of *lex specialis* or *lex posterior*.

428. In State practice and the practice of international tribunals, particular approaches to interpretation have of course developed. It has become a practice of human rights bodies to adopt readings of human rights conventions that look for their *effet utile* (practical effect) in a context perhaps wider than for regular treaties. Certain treaties establishing international institutions have become interpreted in "constitutional" terms. Recent experience in WTO, where the Appellate Body has been insisting that panels take the Convention's rules seriously, shows just how exacting a proper application of its principles may be.[590] Although the Convention does not require the interpreter to apply the process in the order listed in articles 31 and 32, that order is in fact intuitively likely to represent an effective sequence in which to approach the task. But there is no reason to separate these techniques too sharply from each other. As will be seen below, sometimes external sources may usefully clarify the ordinary meaning of treaty words, or a treaty's object and purpose.

2. The International Law Commission's debates

429. The text of what now is article 31, paragraph 3 (*c*), of the 1969 Vienna Convention arose in the Commission from draft articles dealing with the interpretation of treaties. Paragraph 1 (*b*) of draft article 70, proposed by Waldock to the Commission in 1964, suggested that:

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[587] This was also confirmed by the WTO Panel in *European Communities—Measures Affecting the Approval and Marketing of Biotech Products* (see footnote 582 above), para. 7.69.

[588] See the summary of State practice, jurisprudence and doctrinal writings in Villiger (footnote 77 above), pp. 334–343. Of the more recent practice, see *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (footnote 155 above); *Kasikili/Sedudu Island (Botswana/Namibia)* (footnote 243 above), p. 1059, para. 18; *LaGrand (Germany v. United States of America)*, Judgment, *I.C.J. Reports 2001*, p. 466, at p. 501, para. 99. See also *Golder v. the United Kingdom*, European Court of Human Rights (footnote 238 above), p. 14, para. 29; *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*, Inter-American Court of Human Rights (footnote 161 above); and, for example, *United States—Standards for Reformulated and Conventional Gasoline*, WTO Appellate Body report (footnote 48 above), pp. 19 *et seq.*

[589] That the interpretative techniques cannot be firmly prioritized is discussed in Koskenniemi, *From Apology to Utopia…* (see footnote 79 above), pp. 333–345.

[590] See the cases discussed below and, more generally, Cameron and Gray, "Principles of international law…" (footnote 173 above), p. 248.

The terms of a treaty shall be interpreted in good faith in accordance with the natural and ordinary meaning to be given to each term— [and]…

(*b*) in the context of the rules of international law in force at the time of the conclusion of the treaty.[591]

430. The provision had two parts. One was the expression of the principle of systemic integration—namely that treaties should be interpreted "in the context of the rules of international law". Throughout the ensuing discussion, this principle was taken for granted. Nobody challenged the idea that treaties were to be read in the context of their normative environment. Some members did suggest that the reference therein might be to "principles" rather than "rules" or speculated about the addition of the word "general" ("general rules" or "general principles").[592] In the end, however, none of these suggestions found their way into the text.

431. All the discussion and controversy in the Commission was addressed to the second part of the provision: the suggestion that the normative environment should be constructed on the basis of the law in force at the moment of the conclusion of the treaty. This was the problem of inter-temporal law. In this regard, the provision was a synthesis of a resolution of the Institute of International Law, calling for interpretation "in the light of the principles of international law",[593] and a formulation by Fitzmaurice that emphasized the principle of contemporaneity.[594] In Waldock's original proposal, an additional rule (draft article 56, ultimately omitted from the Convention) dealt specifically with inter-temporal law as follows:

1. A treaty is to be interpreted in the light of the law in force at the time when the treaty was drawn up.

2. Subject to paragraph 1, the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied.[595]

432. Although the proposal to incorporate a provision on inter-temporal law did not find favour with the Commission in 1964, the issue continued to provoke controversy in the context of the provision on treaty interpretation. As a result, the Commission's commentary confines its discussion on the meaning and application of what is now article 31, paragraph 3 (*c*), to an account of the discussion on inter-temporality.[596] Nevertheless, it is useful to note here what is presumed in this discussion, as well as in the whole doctrine of inter-temporality. This is the view that the interpretation and application of a treaty always takes place by reference to other rules of international law and that the only question is whether these "other rules" should be conceived in terms of the normative situation at the conclusion of the treaty or at the moment of its application.[597] As some Commission members observed, this followed from the very objective of tracing party intent, for that intent was certainly influenced by the rules in force at the time when the treaty was negotiated and adopted but developed over the course of the treaty's lifespan.[598]

C. Case law

433. Until recently, there were few references to article 31, paragraph 3 (*c*), in judicial or State practice.

1. Iran–United States Claims Tribunal

434. The Tribunal has always found customary international law applicable. In an early case, it expressly confirmed that "the rules of customary law may be useful in order to fill in possible *lacunae* of the Treaty [of Amity between Iran and the United States of 1955], to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions".[599] The issue which prompted a specific reference to article 31, paragraph 3 (*c*), was the determination of the nationality requirements imposed by the Algiers Accords in order to establish who might bring a claim before the Tribunal. Thus, in *Esphahanian v. Bank Tejarat,* the question arose of whether a claimant who had dual Iran/United States nationality might bring a claim before the Tribunal.[600] The Tribunal expressly deployed article 31, paragraph 3 (*c*), of the 1969 Vienna Convention in order to justify reference to a wide range of materials on the law of diplomatic protection in international law.[601] These materials supported the Tribunal's conclusion that "the applicable rule of international law [was] that of dominant and effective nationality".[602]

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[591] Third report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur (A/CN.4/167 and Add.1–3) (see footnote 323 above), p. 52.

[592] See especially the statement by Mr. Tunkin at the Commission's 765th meeting, held on 14 July 1964, *Yearbook ... 1964*, vol. I, pp. 278–279, para. 49.

[593] Resolution of the Institute of International Law on the interpretation of treaties, *Annuaire de l'Institut de droit international*, vol. 46 (Session of Granada, 1956), pp. 364–365. Inclusion of this reference in the Institute's resolution had had a controversial history. It did not appear in Lauterpacht's original scheme in 1950 (*ibid.*, vol. 43-I (Session of Bath, 1950), p. 433). A reference to the interpretative role of general principles of customary international law was subsequently added by him in 1952 (*ibid.*, vol. 44-I (Session of Sienna, 1952), p. 223). It faced considerable opposition on grounds of uncertainty and inconsistency with the Institute's codification role (*ibid.*, vol. 44-II, pp. 384–6, remarks by Guggenheim and Rolin; see also *ibid.*, vol. 45-I (Session of Aix-en-Provence, 1954), p. 228). When Fitzmaurice was appointed to replace Lauterpacht as Rapporteur, there was no reference of this kind in his draft (*ibid.*, vol. 46, pp. 337–338). It was only added in the course of the debate, following an intervention by Basdevant (*ibid.*, p. 344).

[594] Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol. I, Cambridge, Grotius, 1986, p. 369.

[595] Third report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur (A/CN.4/167 and Add.1–3) (see footnote 323 above), pp. 8–9.

[596] Draft articles on the law of treaties with commentaries adopted by the International Law Commission at its eighteenth session, *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, part II, p. 222, para. (16) of the commentary to draft article 27.

[597] See the third report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur (A/CN.4/167 and Add.1–3) (footnote 323 above), pp. 8–10; see also the debate within the Commission in *Yearbook ... 1964*, vol. I, pp. 33–40, summary records of the Commission's 728th and 729th meetings, held on 21 and 22 May 1964, respectively.

[598] See, for example, the statement by Mr. Paredes at the Commission's 728th meeting, *Yearbook ... 1964*, vol. I, p. 34, para. 12.

[599] *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran* (see footnote 125 above), p. 222, para. 112.

[600] *Nasser Esphahanian v. Bank Tejarat*, Iran–United States Claims Tribunal, case No. 157, 29 March 1983, 2 IRAN–U.S. C.T.R., p. 157.

[601] *Ibid.*, p. 161.

[602] *Ibid.* See also, to like effect, Iran–United States Claims Tribunal, case No. A/18, 6 April 1984, 5 IRAN–U.S. C.T.R., p. 251, at p. 260. The provision was also relied upon in a dissent in *Grimm v. Iran*, case No. 71, 18 February 1983, 2 IRAN–U.S. C.T.R., p. 78, at p. 82 (dissenting opinion of Howard M. Holtzmann, on the question of whether

2. European Court of Human Rights

435. As pointed out in chapter II above, the European Court of Human Rights has routinely applied general international law. It has made specific reference to article 31, paragraph 3 (*c*), however, in construing the scope of the right to a fair trial protected by article 6 of the European Convention on Human Rights. In *Golder v. the United Kingdom,* the Court referred to article 31, paragraph 3 (*c*), when it had to determine whether article 6 guaranteed a right of access to the courts for every person wishing to commence an action to have his civil rights and obligations determined.[603] Through that route, the Court referred in turn to Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice as recognizing that the rules of international law included "general principles of law recognized by civilized nations".[604] It found that a right of access to the civil courts was one such general principle of law, and that this could be relied upon in interpreting the meaning of article 6.

436. In *Loizidou v. Turkey*, the Court had to decide whether to recognize as valid certain acts of the Turkish Republic of Northern Cyprus.[605] It invoked article 31, paragraph 3 (*c*), as a basis for referring to United Nations Security Council resolutions and evidence of State practice supporting the proposition that the Turkish Republic of Northern Cyprus was not regarded as a State under international law.[606] The Republic of Cyprus remained the sole legitimate Government in Cyprus and acts of the Turkish Republic of Northern Cyprus were not to be treated as valid.

437. In a trio of landmark decisions in 2001, the European Court of Human Rights utilized article 31, paragraph 3 (*c*), in order to decide whether the rules of State immunity might conflict with the right of access to court under article 6, paragraph 1, of the European Convention on Human Rights.[607] In each case, the Court decided by majority to give effect to State immunity. The right of access to the courts was not absolute. It could be subject to restrictions, provided that they were proportionate and pursued a legitimate aim. In making that assessment, the Court reasoned as follows:

> the Convention has to be interpreted in the light of the rules set out in the [1969] Vienna Convention … and … Article 31 § 3 (*c*) … indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account … The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.
>
> It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1.[608]

438. It is useful to note that here the Court might have simply brushed aside State immunity as not relevant to the application of the Convention. But it did not do so. The conflict between article 6 and rules of customary international law on State immunity emerged only because the Court decided to integrate article 6 into its normative environment (doubtless because that is what was claimed by the respondent). The right provided under the Convention was weighed against the general interest in the maintenance of the system of State immunity. In the end, the Court used article 31, paragraph 3 (*c*), to set aside, in this case, the rules of the Convention.[609]

3. Arbitration in the case of a mixed oxide reprocessing plant (MOX Plant) and the OSPAR Convention

439. As noted in chapter I above, this was part of the series of cases brought by Ireland against the United Kingdom concerning the operation of a nuclear reprocessing plant at Sellafield.[610] The award was rendered under the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) in proceedings dealing with access to information concerning the operation of a mixed oxide (MOX) reprocessing plant. Ireland contended that a reference to other rules of international law would affect the construction of the parties' obligations under the Convention in two ways.

440. First, Ireland submitted that the provision in article 9, paragraph 3 (*d*), of the Convention, concerning the right to refuse a request for information if commercial confidentiality is involved, which referred to "applicable international regulations", entailed a reference to

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a failure by Iran to protect an individual could constitute a measure "affecting [the] property rights" of his wife).

[603] *Golder v. the United Kingdom* (see footnote 238 above), pp. 13–14, paras. 27–31.

[604] *Ibid.*, pp. 17–18, para. 35.

[605] *Loizidou v. Turkey*, merits, judgment of 18 December 1996, European Court of Human Rights, *Reports of Judgments and Decisions* 1996-VI, p. 2231, para. 44.

[606] *Ibid*.

[607] *Al-Adsani v. the United Kingdom* (see footnote 219 above), para. 55, *Fogarty v. the United Kingdom* (see footnote 220 above), para. 35, and *McElhinney v. Ireland* (see footnote 219 above), para. 36. The European Court of Human Rights also referred to article 31, paragraph 3 (*c*), in *Banković and Others v. Belgium and Others* (see footnote 221 above), para. 57. For a critique of the Court's approach, see A. Orakhelashvili, "Restrictive interpretation of human rights treaties in the recent jurisprudence of the European Court of Human Rights", EJIL, vol. 14, No. 3 (2003), p. 529.

[608] *Al-Adsani v. the United Kingdom* (see footnote 219 above), paras. 55–56; see also *Fogarty v. the United Kingdom* (footnote 220 above), paras. 35–36, and *McElhinney v. Ireland* (footnote 219 above), paras. 36–37.

[609] The decision did not go unchallenged. The dissenting judges did not claim that State immunity was irrelevant or should be excluded from consideration in what was a "pure article 6 matter". Rather, they found that State immunity should, as a matter of international law, cede precedence to what they saw as a peremptory rule of international law (*jus cogens*) prohibiting torture. *Al-Adsani v. the United Kingdom* (see footnote 219 above), pp. 111–113, joint dissenting opinion of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić. Other dissenters wished to admit of an exception for torts committed on the territory of the State. *McElhinney v. Ireland* (see footnote 219 above), pp. 51–54, joint dissenting opinion of Judges Caflisch, Cabral Barreto and Vajić.

[610] *Dispute concerning Access to Information under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland* (see footnote 137 above). The other cases are: *MOX Plant (Ireland v. United Kingdom)*, International Tribunal for the Law of the Sea, provisional measures, order of 3 December 2001 (see footnote 15 above); *MOX Plant (Ireland v. United Kingdom)*, Permanent Court of Arbitration, order No. 3 of 24 June 2003, ILM, vol. 42 (2003), p. 1187.

international law and practice. This, Ireland alleged, included the Rio Declaration[611] and the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. The United Kingdom replied that the Rio Declaration was not a treaty and that the Aarhus Convention had not yet been ratified by either Ireland or the United Kingdom.

441. The Tribunal accepted that it was entitled to draw upon current international law and practice in construing this treaty obligation and in so doing made an express reference to article 31, paragraph 3 (*c*), of the 1969 Vienna Convention. However, it held that neither of the instruments referred to by Ireland were in fact "rules of law applicable between the parties". They were only "evolving international law" that, absent a specific authorization, a tribunal could not apply.[612] One of the arbitrators, Gavan Griffith, dissented on this point.[613] He pointed out that the Aarhus Convention was in force and that it had been signed by both Ireland and the United Kingdom. The latter had publicly stated its intention to ratify the Convention as soon as possible. At the least, this entitled the Tribunal to treat the Convention as evidence of the common views of the two parties on the definition of environmental information.

442. Second, the United Kingdom had submitted that its only obligation under the OSPAR Convention had been discharged by its application of European Community Directive 90/313[614] having to do with the same subject matter. The Tribunal did not, however, consider that following the European Community regulation would have constituted a bar to the procedure under the OSPAR Convention. Both regimes could coexist, even if they were enforcing identical legal obligations.[615] It observed:

> The primary purpose of employing the similar language is to create uniform and consistent legal standards in the field of the protection of the marine environment, and not to create precedence of one set of legal remedies over the other.[616]

4. World Trade Organization

443. As explained in detail in chapter II above, several decisions of the Appellate Body of WTO have considered the application of principles of customary and general international law in the interpretation of agreements covered by WTO. In *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (the "*Shrimp–Turtle* case"), for example, the Appellate Body made extensive reference to international environmental law texts.[617] It found that the terms "natural resources" and "exhaustible" in article XX (*g*) were "by definition evolutionary" and took account, therefore, of article 56 of the United Nations Convention on the Law of the Sea in support of the proposition that natural resources could include both living and non-living resources.[618] The Appellate Body also referred, in support of this construction, to Agenda 21[619] and to the resolution on assistance to developing countries adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals.[620] In so doing, it emphasized that the chapeau of article XX was "but one expression of the principle of good faith", which it found to be a "general principle of international law".[621] "[O]ur task here," said the Tribunal, expressly relying on article 31, paragraph 3 (*c*), "is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law."[622] In deciding the question of whether sea turtles were "exhaustible", the Appellate Body referred to the fact that all seven of the recognized species of sea turtle were listed in appendix 1 to the Convention on International Trade in Endangered Species of Wild Fauna and Flora.[623]

444. The relations between the treaties covered by WTO and multilateral environmental agreements and human rights instruments are now the subject of a growing body of scholarly literature.[624] The WTO Appellate Body has always accepted that the requirement in article 3, paragraph 2, of the Understanding on Rules and Procedures Governing the Settlement of Disputes that panels apply "customary rules of interpretation of public international law" requires rigorous application of articles 31 and 32 of the 1969 Vienna Convention to the issues before them. It has not hesitated to reverse panel decisions on the ground

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[611] *Report of the United Nations Conference on Environment and Development…* (see footnote 177 above).

[612] *Dispute concerning Access to Information under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland* (see footnote 137 above), UNRIAA, vol. XXIII, pp. 90–92, paras. 99, 101–105; ILR, vol. 126, pp. 367–369.

[613] *Dispute concerning Access to Information under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland* (see footnote 137 above), UNRIAA, vol. XXIII, pp. 119–126; ILR, vol. 126, pp. 397–405.

[614] Council Directive 90/313/EEC, of 7 June 1990, on the freedom of access to information on the environment, *Official Journal of the European Communities*, L 158, 23 June 1990, p. 56.

[615] The President of the Tribunal, Professor Michael Reisman, dissented on this issue: *Dispute concerning Access to Information under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland* (see footnote 137 above), UNRIAA, vol. XXIII, pp. 113–118; ILR, vol. 126, pp. 391–397.

[616] *Dispute concerning Access to Information under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland* (see footnote 137 above), UNRIAA, vol. XXIII, p. 100, para. 143; ILR, vol. 126, p. 378.

[617] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Appellate Body report (see footnote 223 above), paras. 126–134.

[618] *Ibid.*, para. 130, citing the 1971 advisory opinion of the International Court of Justice concerning *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (see footnote 491 above), p. 31. The Tribunal noted that, although the complainant States had ratified the United Nations Convention on the Law of the Sea, the United States had not done so but had accepted, during the course of the hearing, that the fisheries law provisions of that Convention for the most part reflected international customary law.

[619] *Report of the United Nations Conference on Environment and Development…* (see footnote 177 above).

[620] Final Act of the Conference to Conclude a Convention on the Conservation of Migratory Species of Wild Animals, ILM, vol. 19, No. 1 (January 1980), p. 11, at p. 15.

[621] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Appellate Body report (see footnote 223 above), para. 158.

[622] *Ibid.*

[623] *Ibid.*, para. 25.

[624] See, for example, Pauwelyn, "The role of public international law in the WTO…" (footnote 43 above), p. 535; Marceau, "WTO dispute settlement and human rights" (footnote 43 above); Lowenfeld (footnote 247 above), pp. 314–339; and Pauwelyn, *Conflict of Norms…* (footnote 21 above).

that they have failed to do so.[625] In carrying out its interpretative function it has made extensive reference to other rules of international law, but it has never found that those other rules would have overridden anything under agreements covered by WTO—although they have influenced the interpretation and application of those agreements.

445. For example, WTO bodies have frequently taken account of regional and bilateral trade agreements. In the *United States—FSC (Article 21.5—EC)* case (2002), the Appellate Body referred to a wide range of regional and bilateral trade agreements and found that they shared what it chose to call a "widely accepted common element" in their definition of the term "foreign-source income", which it then used to interpret that expression in the context of the Subsidies and Countervailing Measures Agreement.[626] In *EC—Poultry* (1998), the Appellate Body explained its recourse to the 1994 Oilseeds Agreement as a "*supplementary means* of interpretation [of the relevant WTO commitment] pursuant to article 32 of the *Vienna Convention*, as it is part of the historical background of the concessions of the European Communities…"[627] In the *Korea—Various Measures on Beef* case (2001), the Panel likewise made reference to various bilateral trade agreements entered into by Korea, "not with a view to 'enforcing' the content of these bilateral agreements, but strictly for the purpose of interpreting an ambiguous WTO provision".[628] It may be argued that these agreements have been used only as a "supplementary means of interpretation" and not by virtue of article 31, paragraph 3 (*c*).[629] Such recourse has often been rationalized as providing evidence of the intent of the parties or of the "ordinary meaning" of the treaty words.

446. Yet there is no reason not to seek the legal basis for "taking account" of such extraneous agreements precisely in that article, especially when such "taking account" reaches beyond a mere footnote reference. This would appear to be reasonable in cases such as the *Chile—Price Band System* case (2002), for example, where the Panel both interpreted and *applied* Economic Complementarity Agreement No. 35 between Chile and the Southern Common Market (MERCOSUR) in a way that excluded its consideration in the case in question. The Panel referred to the preamble and article 24 of that instrument (referred to as ECA 35), noting that it suggested that the parties (Chile and MERCOSUR) had not intended to exclude the possibility that different rules might be applicable in other international agreements, *i.e.* WTO agreements. The Panel, in other words, applied a non-WTO treaty in order to operate a *renvoi*, by interpreting it so as to allow a treatment in the WTO context that would not have been allowed under the treaty itself (thereby creating the presumption that, had ECA 35 not been interpreted in such a way, the WTO standard would have been inapplicable).[630]

447. One sometimes hears the claim that this might not even be permissible in view of the express prohibition in the Understanding on Rules and Procedures for the Settlement of Disputes according to which the "[r]ecommendations and rulings of the [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements" (art. 3, para. 2 *in fine*). Such a view would, however, presume that the agreements covered are "clinically isolated" in precisely the way the Appellate Body has denied. Two considerations are relevant here. First, when article 31, paragraph 3 (*c*), of the 1969 Vienna Convention is used, it is used with the specific authorization of the Understanding itself. But second, and more important, interpretation does not "add" anything to the instrument that is being interpreted. It constructs the meaning of the instrument by means of a legal technique (a technique specifically approved by the Understanding) that involves taking account of its normative environment. Here it appears immaterial whether recourse to other agreements is had under article 31, paragraph 3 (*c*), as supplementary means of interpretation or as evidence of party intent or of ordinary meaning or good faith (the presumption that States do not enter into agreements with the intention of breaching their obligations). The rationale remains that of seeing States, when acting within the WTO system, as identical with themselves as they act in other institutional and normative contexts. Interpretation *does not add or diminish rights or obligations* that would exist in some lawyers' heaven where they could be ascertained "automatically" and independently of interpretation. All instruments receive meaning through interpretation—even the conclusion that a meaning is "ordinary" is an effect of interpretation that cannot have *a priori* precedence over other interpretations.

448. Finally, significant, though limited, use of article 31, paragraph 3 (*c*), was made by a WTO Panel in the recent *European Communities—Measures Affecting the Approval and Marketing of Biotech Products* case (2006). Here the European Community had argued that its ban on the importation of genetically modified organisms could be justified, *inter alia*, by certain non-WTO rules. It had argued, in particular, that account should be taken of the 1992 Convention on Biological Diversity and the related Cartagena Protocol on Biosafety of 2000. Having first determined that the two instruments indeed established "rules of international law", the Panel then considered whether they were also "applicable in the

[625] *United States—Standards for Reformulated and Conventional Gasoline*, WTO Appellate Body report (see footnote 48 above), pp. 15–17.

[626] *United States—Tax Treatment for "Foreign Sales Corporations"—Recourse to Article 21.5 of the DSU by the European Communities*, WTO Appellate Body report, WT/DS108/AB/RW, adopted 29 January 2002, paras. 141–145 (especially footnote 123).

[627] *European Communities—Measures Affecting the Importation of Certain Poultry Products*, WTO Appellate Body report, WT/DS69/AB/R, adopted 23 July 1998, para. 83 and generally paras. 77–85. For the Agreement in the form of Agreed Minutes on certain oil seeds between the European Community and Brazil pursuant to Article XXVIII of the General Agreement on Tariffs and Trade, see *Official Journal of the European Communities*, L 47, 18 February 1994, p. 8.

[628] *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Panel report, WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by Appellate Body report WT/DS161/AB/R, WT/DS169/AB/R, para. 539.

[629] Van Damme (footnote 427 above), p. 569.

[630] *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WTO Panel report, WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body report, WT/DS207/AB/R, paras. 7.81–7.86. For Economic Complementarity Agreement No. 35 between Chile and MERCOSUR, signed at San Luis (Argentina) on 25 June 1996, see Chile, *Official Gazette*, 4 October 1996. Likewise in *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WTO Appellate Body report, WT/DS27/AB/R, adopted 25 September 1997, para. 167.

relations between the parties". It found the expression "party" there to mean "a State which has consented to be bound by the treaty and for which the treaty is in force".[631] It dismissed the view that the reference to "parties" in article 31, paragraph 3 (*c*), would have meant (merely) parties to a dispute. All the parties to a treaty to be interpreted needed to have become parties to the other treaty. The Panel, in other words, read the WTO treaty in a *non-bilateral* way so as to "ensure[ ] or enhance[ ] the consistency of the rules of international law applicable to these States and thus contribute[ ] to avoiding conflicts between the relevant rules".[632] Because the United States had not become a party to either one of these treaties (although it had signed the Convention on Biological Diversity), they could not be "taken into account".

449. The Panel also considered the argument made by the European Community that the precautionary principle might, since 1998 when the argument had been made in the *EC Measures Concerning Meat and Meat Products (Hormones)* case, have been established as a general principle of international law (the Panel's language here is slightly unclear, however, occasional reference being made to "general principles of law"). The Panel agreed that, were this to be the case, then it would become relevant under article 31, paragraph 3 (*c*). It found, however, though in a somewhat obscure way, both that "the legal status of the precautionary principle remains unsettled" and that it "need not take a position on whether or not the precautionary principle is a recognized principle of general or customary international law".[633]

450. Two aspects of this case are important. First, the Panel accepted that article 31, paragraph 3 (*c*), applied to general international law and other treaties. Second, it interpreted article 31, paragraph 3 (*c*), so that the treaty to be taken account of must be one to which all parties to the relevant WTO treaty are parties. This latter contention makes it practically impossible ever to find a multilateral context where reference to other multilateral treaties as aids to interpretation under article 31, paragraph 3 (*c*), would be allowed. The Panel buys what it calls the "consistency" of its interpretation of the WTO treaty at the cost of the consistency of the multilateral treaty system as a whole. It aims to mitigate this consequence by accepting that other treaties may nevertheless be taken into account as facts elucidating the ordinary meaning of certain terms in the relevant WTO treaty. This is, of course, always possible and, as pointed out above, has been done in the past as well. However, taking "other treaties" into account as evidence of "ordinary meaning" appears a rather contrived way of preventing the "clinical isolation" emphasized by the Appellate Body.

5. International Court of Justice

451. Very significant use of article 31, paragraph (3) (*c*), was made by the International Court of Justice in the *Oil Platforms* case.[634] Here the Court was called upon to interpret two provisions of the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran. It was requested to determine whether actions by Iran that were alleged to imperil neutral commercial shipping in the Iran–Iraq war, and the subsequent destruction by the United States Navy of three Iranian oil platforms in the Persian Gulf, were breaches of the Treaty. The Court's jurisdiction was limited to disputes arising as to the interpretation or application of the Treaty. It had no other basis for jurisdiction that might have provided an independent ground for the application of customary international law.[635] One of the operative provisions of the Treaty stipulated that:

> The present Treaty shall not preclude the application of measures:
>
> …
>
> (*d*) necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.[636]

452. According to the United States, this provision was intended simply to exclude all such measures from the scope of the Treaty. It should be interpreted in accordance with its ordinary meaning, leaving a wide margin of appreciation for each State to determine its essential security interests.[637] It submitted that there was no place to read into the Treaty rules derived from customary international law on the use of force (as Iran had argued) and that to do so would violate the limits on the Court's jurisdiction.

453. The Court approached the question of interpretation rather differently. It first asked whether such necessary measures could include the use of armed force and, if so, whether the conditions under which such force could be used under international law (including any conditions of legitimate self-defence) applied.[638] Having referred to other aids to interpretation, the Court then reasoned:

> Moreover, under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account "any relevant rules of international law applicable in the relations between the parties" (Art. 31, para. 3 (*c*)). The Court cannot accept that Article XX, paragraph 1 (*d*), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by … the 1955 Treaty.[639]

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[631] *European Communities—Measures Affecting the Approval and Marketing of Biotech Products* (see footnote 582 above), para. 7.68.

[632] *Ibid.*, para. 7.70.

[633] *Ibid.*, para. 7.89.

[634] *Oil Platforms (Islamic Republic of Iran v. United States of America)* (see footnote 128 above), p. 182, para. 41.

[635] Cf. the position in *Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgment of 27 June 1986 (footnote 51 above), in which the Court was asked to interpret very similar treaty language but also had an additional basis for its jurisdiction as a result of unilateral declarations made by both parties under Article 36, paragraph 2, of its Statute.

[636] Treaty of Amity, Economic Relations, and Consular Rights (see footnote 94 above), art. XX, para. 1 (*d*); see also *Oil Platforms (Islamic Republic of Iran v. United States of America)* (footnote 128 above), pp. 178–179, para. 32.

[637] *Oil Platforms (Islamic Republic of Iran v. United States of America)*, rejoinder of the United States, 23 March 2001, part IV, pp. 132–133, available from www.icj-cij.org/en/case/90/written-proceedings.

[638] *Oil Platforms (Islamic Republic of Iran v. United States of America)* (see footnote 128 above), pp. 181–182, para. 40.

[639] *Ibid.*, p. 182, para. 41.

454. The Court then proceeded to apply those general rules of international law to the conduct of the United States. It concluded that the measures could not be justified as necessary under the Treaty "since those actions constituted recourse to armed force not qualifying, under international law on the question, as acts of self-defence, and thus did not fall within the category of measures contemplated, upon its correct interpretation, by that provision of the Treaty".[640]

455. The Court's judgment on the merits was supported by a large majority of the judges. Different views on the question of the proper approach to interpretation were, however, expressed in separate opinions.[641] The narrowest view on article 31, paragraph 3 (*c*), was taken by Judge Buergenthal, according to whom the Court's jurisdiction was limited to only those matters which the parties had agreed to entrust to it; he opined that this also limited the extent to which the Court could refer to other sources of law in interpreting the treaty before it. In his view, this limitation excluded reliance on other rules of international law, whether customary or conventional, even if found in the Charter of the United Nations.[642] This would in practice nullify the meaning of article 31, paragraph 3 (*c*), and go against wide international judicial and arbitral practice. Moreover, it would suggest arbitrarily that a treaty's meaning to its parties is independent of the normative environment in which the parties have agreed to conclude it.

456. The opposite position was taken by Judge Simma, who considered that the Court might have taken the opportunity to declare the customary international law on the use of force and the importance of the Charter of the United Nations even more firmly than it had.[643] Following a position earlier taken by Lauterpacht and others, he advocated a wide use of general international law and other treaty rules applicable to the parties and held that this could be justified under article 31, paragraph 3 (*c*).[644] Judge Higgins was much more critical of the Court's use of article 31, paragraph 3 (*c*).[645] She pointed to the need to interpret article XX, paragraph 1 (*d*), in accordance with the ordinary meaning of its terms and in its context, as part of an economic treaty. She considered that the provision was not one that "on the face of it envisages incorporating the entire substance of international law on a topic not mentioned in the clause—at least not without more explanation than the Court provides".[646]

457. The position of Judge Kooijmans was situated somewhere in the middle. He suggested that the Court should have begun with an analysis of the text of the 1955 Treaty itself. But in order to determine whether a particular measure involving the use of force was "necessary" under that Treaty, the Court had "no choice but to rely for this purpose on the body of general international law".[647] Even as the Court had no jurisdiction under the Charter, recourse to the concept of self-defence under "general international law" could not be avoided in order to give a meaning to the treaty over which it did have jurisdiction.[648] This is, in fact, to say no more than what has been affirmed throughout this report: general international law provides the background for all application of special law. At the same time, a large number of rules about statehood, maritime passage, representation and responsibility underlay the *Oil Platforms* case and were unproblematically presumed to be applicable by all parties.

458. The *Oil Platforms* case represents a bold application of article 31, paragraph 3 (*c*), by the International Court of Justice in order to move from a technical treaty provision to what it saw as the real heart of the matter—the use of force.[649] The Court imports into its treaty analysis a substantial body of general international law, including the Charter of the United Nations. The conduct of the State in question was then assessed by reference to the position under general international law, which in turn was applied to assess its position under the treaty. For the first time, the Court acknowledged the pivotal role of article 31, paragraph 3 (*c*), in this process, but it did not give further guidance as to when and how it should be applied.

459. Recourse by the Court to article 31, paragraph 3 (*c*), of the 1969 Vienna Convention inasmuch as it was to *general international law* may in fact have been unnecessary. The treaty provision at issue contained the open-ended term "necessary", which required interpretation. Absent the possibility of using a documented party intent to elucidate it, the Court could simply have turned to what "general international law" said on the content of that standard. The rationale for this was stated by the Court in the *North Sea Continental Shelf* cases (1969). General customary law,

> by [its] very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion…[650]

460. To assume that a tribunal may not be entitled to apply general international law in the interpretation of a treaty is to hold that, once States conclude a bilateral treaty, they create a vacuum that consists precisely of this type of exclusion. As we saw in chapter II above, no support may be found from international practice for such a contention. On the contrary, an enormous amount of material supports the applicability of general international law in order to interpret any particular legal relationship, whether also addressed by a bilateral treaty, a local custom or a series of informal exchanges amounting to binding rules through acquiescence or estoppel.

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[640] *Ibid.*, p. 199, para. 78.

[641] The Court entered judgment, declining by 14 votes to 2 to uphold Iran's claim (Judges Al-Khasawneh and Elaraby dissenting) and declining by 15 votes to 1 to uphold the United States' counterclaim (Judge Simma dissenting).

[642] *Oil Platforms (Iran v. United States of America)* (see footnote 128 above), pp. 278–279 (separate opinion of Judge Buergenthal), paras. 22–23.

[643] *Ibid.*, pp. 326–334 (separate opinion of Judge Simma), paras. 5–16.

[644] *Ibid.*, pp. 329–330, para. 9.

[645] *Ibid.*, pp. 236–240 (separate opinion of Judge Higgins), paras. 40–54.

[646] *Ibid.*, p. 237, para. 46.

[647] *Ibid.*, p. 261 (separate opinion of Judge Kooijmans), para. 48.

[648] *Ibid.*, p. 262, para. 52.

[649] As highlighted in Jouannet (see footnote 126 above). The case has inspired varied reactions. For those who celebrate the Court's bold view of article 31, paragraph 3 (*c*), see P.-M. Dupuy, *Droit international public*, 7th ed., Paris, Dalloz, 2004, pp. 314–315.

[650] *North Sea Continental Shelf* (see footnote 95 above), p. 38, para. 63.

D. Special questions

461. Three special questions relate to the application of article 31, paragraph 3 (*c*). One concerns the extent of the reference therein. What are the "rules of international law applicable in the relations between the parties" to which the provision refers? The second problem concerns the normative weight of the reference. What does it mean that those rules "shall be taken into account, together with the context"? The third is the question of inter-temporality: what is critical for the rules to be taken into account—the date of the conclusion of a treaty or the law in force at the moment of its application?

1. The rules to be "taken into account"

462. That international tribunals have, until recently, rarely made any specific use of article 31, paragraph 3 (*c*), is not to say that they would not have referred to law external to the treaty to be applied. By their very nature, customary law and general principles of law (and general principles of *international* law) exist as *lex generalis* in relation to any particular agreement. They are fully applicable and often applied alongside particular treaties. Reference to article 31, paragraph 3 (*c*), has normally concerned the possibility and extent of recourse to rules that exist at the same level of generality and binding force as the treaty to be interpreted (usually other treaties), but where they might seem to conflict with it or put forward considerations that otherwise seem unorthodox in the context.

(a) *Customary law and general principles*

463. As explained in chapter II above, although there is no official hierarchy between the sources of international law, there is, nonetheless, an informal hierarchy that results from the procedure through which lawyers approach applicable law, proceeding from the *lex specialis* to the *lex generalis*, or from the more specific to the more general—that is to say, usually from the treaty text to customary law and general principles of law. Max Huber once put this illuminatingly in terms of a progression of legal reasoning through concentric circles, each one constituting a field of reference of potential assistance in treaty interpretation:

> *Il faut donc chercher la volonté des parties dans le texte conventionnel, d'abord dans les clauses relatives à la contestation, ensuite dans l'ensemble de la convention, ensuite dans le droit international général, et enfin dans les principes généraux de droit reconnus par les nations civilisées. C'est par cet encirclement concentrique que le juge arrivera dans beaucoup de cas à établir la volonté presumptive des parties "conformément aux exigences fondamentales de la plénitude du droit et de la justice internationale", ainsi que le rapporteur formule admirablement la tâche du juge.*[651]

464. Article 31, paragraph 3 (*c*), is only part of the larger interpretation process, in which the interpreter must first consider the plain meaning of the words in a treaty, if any, proceeding therefrom to the context and to considerations relating to object and purpose, subsequent practice and, eventually, *travaux préparatoires*. This is not meant as an actual description of a psychological process. The practice of interpretation cannot be captured in such neatly rational terms.[652] As Waldock himself noted, in characteristically careful fashion: "the interpretation of documents is to some extent an art, not an exact science".[653] But it is an apt account of competent public reasoning by lawyers and tribunals. In the *Oil Platforms* case, for example, the Court started with an analysis of the text of article XX, paragraph 1 (*d*), of the 1955 Treaty of Amity and proceeded from there to the intention of the parties, which, again, pointed to the need to consider the state of the general law on the use of force. The starting point is the treaty itself, with interpretation proceeding from the more concrete and obvious (dictionary, context) to the less tangible and less obvious (object and purpose, analogous treaties, *etc*.) in order to give the text a justifiable meaning.

465. To examine the interpretative process not as a psychological (thought) process but as an exercise in competent legal argument inevitably portrays it as an effort at "systemic integration", *i.e.* integration within the system of principles and presumptions that underlie the idea of an inter-State legal order and provide its argumentative materials. Among them, mention should be made of two presumptions, one positive, the other negative:

(*a*) According to the *positive presumption*, parties are taken to refer to general principles of international law for all questions which the treaty does not itself resolve in express terms or in a different way;[654]

(*b*) According to the *negative presumption*, in entering into treaty obligations, the parties intend not to act inconsistently with generally recognized principles of international law or with previous treaty obligations towards third States.[655]

466. In accordance with these presumptions, an especially significant role for customary international law and general principles of law opens up. As a WTO Panel recently put it:

> the relationship of the WTO Agreements to customary international law is broader than [the reference in article 3, paragraph 2, concerning customary rules of interpretation]. Customary international law applies generally to the economic relations between the WTO [m]embers. Such international law applies to the extent that the WTO treaty agreements do not "contract out" from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary

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[651] "The will of the parties must therefore be sought in the text of the treaty, first in the dispute provisions, then in the treaty as a whole, then in general international law, and lastly in the general principles of law recognized by civilized nations. It is by progressing through these concentric circles that a judge will, in many cases, be able to determine the presumed will of the parties 'in accordance with the fundamental requirements of international law and justice as a whole', as the rapporteur admirably describes the judge's task": *Annuaire de l'Institut de droit international*, vol. 44-I (Session of Sienna), pp. 200–201.

[652] One of the best analyses of the interpretative process in an international law context remains M. Sørensen, *Les sources du droit international: Étude sur la jurisprudence de la Cour permanente de justice internationale*, Copenhagen, Munksgaard, 1946, especially pp. 210–236.

[653] Third report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur (A/CN.4/167 and Add.1–3) (see footnote 323 above), p. 54, para. (6) of the commentary to draft article 73.

[654] *Georges Pinson (France) v. United Mexican States* (see footnote 244 above), p. 422.

[655] *Case concerning right of passage over Indian territory*, Preliminary Objections, Judgment of 26 November 1957 (see footnote 38 above), p. 142; Jennings and Watts (eds.), *Oppenheim's International Law* (see footnote 37 above), p. 1275.

rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.[656]

467. Most of the cases considered above have involved the assertion and application of principles of customary international law. This has typically been done where a treaty rule is unclear or open-textured and its meaning is determined by reference to a developed body of international law (as in the issue of dual nationality dealt with by the Iran–United States Claims Tribunal in *Esphahanian v. Bank Tejarat* or in the construction of article XX of GATT discussed in connection with the *Shrimp–Turtle case*), or where the terms used in the treaty have a recognized meaning in customary international law, to which the parties can therefore be taken to have intended to refer. This was found to be the case, for example, in the construction of the terms "fair and equitable treatment" and "full protection and security", interpreted by the North American Free Trade Agreement Free Trade Commission in *Pope and Talbot Inc. v. Canada*.[657]

468. Here it is really immaterial whether or not a tribunal expressly chooses to invoke article 31, paragraph 3 (*c*). These general rules and principles are applicable as a function of their mere "generality", and their validity is based on nothing grander than their having passed what Thomas Franck calls the "'but of course' test"—a more or less unstable "common sense of the interpretative community (governments, judges, scholars)".[658] No special reference was needed by the Permanent Court of International Justice, for example, when in the *Chorzów Factory* case it made the point that

> it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.[659]

469. The same concerns many principles identified by the International Court of Justice, such as freedom of maritime communication,[660] "good faith",[661] "estoppel",[662] *ex injuria jus non oritur*[663] and so on. Further examples include the criteria for statehood (*Loizidou*); the law of State responsibility (which has influenced both the reach of human rights obligations[664] and the law of economic counter-measures in WTO); the law of State immunity; the use of force; and the principle of good faith.[665] The general principles of law recognized by civilized nations perform a rather similar task in locating a treaty provision within a principled framework (as was done in determining the scope of the fair trial right in *Golder*). Pauwelyn lists among procedural principles regularly used by the Appellate Body of WTO those of "burden of proof, standing (*jus standi*), due process, good faith, representation before panels, the retroactive force of treaties or error in treaty formation".[666] These are not "enacted" by positive acts of States (although they may well be traceable back to State will) but are parts of the general framework of international law, or—which amounts to the same—aspects of the legal craft of justifying decisions in legal disputes.[667]

(b) *Other applicable conventional international law*

470. As pointed out above, article 31, paragraph 3 (*c*), goes beyond the truism that "general international law" is applied generally to foresee the eventuality that another rule of *conventional* international law is applicable in the relations between the parties. The main problem is this: is it necessary that *all* the parties to the treaty being interpreted are also parties to the treaty relied upon as the other source of international law for interpretation purposes?

471. The problem is particularly acute where the treaty under interpretation is a multilateral treaty of very general acceptance (such as agreements covered by WTO). As we saw, the Panel in *European Communities—Measures Affecting the Approval and Marketing of Biotech Products* concluded that only agreements to which *all* WTO members were parties could be taken into account under article 31, paragraph 3 (*c*), in the interpretation of WTO agreements.[668] Bearing in mind the unlikeliness of a precise congruence in the membership of most important multilateral conventions, it would become unlikely that *any* use of conventional international law could be made in the interpretation of such conventions. This would have the ironic effect that the more the membership of a multilateral treaty, such as the agreements covered by WTO, expanded, the more those treaties would be cut off from the rest of international law.[669] In practice, the result would be the isolation of multilateral agreements as "islands" permitting no references *inter se* in their application. It would also prohibit any use of regional or other particular implementation agreements—including *inter se* agreements—that may have been concluded under a framework treaty as interpretative aids to the latter. This would seem contrary to the legislative ethos behind most multilateral treaty-making and, presumably, the intent of most treaty-makers. Of course, some of this might be mitigated by requiring a finding that, if a treaty is not in force

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[656] *Korea—Measures Affecting Government Procurement* (see footnote 44 above), para. 7.96.

[657] *Pope and Talbot Inc. v. Government of Canada,* decision of 31 May 2002, *ICSID Reports*, vol. 7 (2005), p. 148, citing the interpretation of the Free Trade Commission; see also ILM, vol. 41, No. 6 (November 2002), p. 1347.

[658] T. M. Franck, "Non-treaty law-making: when, where and how?", in Wolfrum Röben (eds.), *Developments of International Law in Treaty Making* (see footnote 11 above), p. 417, at p. 423.

[659] *Factory at Chorzów*, Merits, Judgment, 13 September 1928, *P.C.I.J., Series A*, No. 17, p. 29.

[660] *Corfu Channel* (see footnote 449 above), p. 22.

[661] *Nuclear Tests* (see footnote 555 above), p. 268, para. 46.

[662] *Case concerning the Temple of Preah Vihear* (see footnote 135 above), pp. 31–32.

[663] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (see footnote 491 above).

[664] See, for example, *Loizidou v. Turkey*, preliminary objections, 23 March 1995 (footnote 56 above), pp. 22–24, paras. 57–64. See also the reliance on the public international law rules of jurisdiction in *Banković and Others v. Belgium and Others* (footnote 221 above), pp. 351–352, paras. 59–60.

[665] Pauwelyn, *Conflict of Norms…* (see footnote 21 above), pp. 270–271.

[666] J. Pauwelyn, "The World Trade Organization", in Huesa Vinaixa and Wellens (eds.) (see footnote 14 above), p. 211, at pp. 225–226 and footnotes.

[667] See further Koskenniemi, "General principles: reflexions on constructivist thinking in international law" (footnote 24 above).

[668] *European Communities—Measures Affecting the Approval and Marketing of Biotech Products* (see footnote 582 above), paras. 7.68–7.70.

[669] Marceau, "WTO dispute settlement and human rights" (see footnote 43 above), p. 781.

between all members to the treaty under interpretation, a rule contained in it be treated as customary international law.[670] This approach would maintain the "generality" of at least some multilateral treaties. But it would have an inappropriately restrictive effect in two situations:

(*a*) It could preclude reference to treaties that have very wide acceptance within the international community (including by the disputing States) but which are nevertheless not universally ratified and are not accepted in all respects as stating customary international law (such as the United Nations Convention on the Law of the Sea);

(*b*) It could also preclude reference to treaties which represent the most important elaboration of the content of international law on specialist subject matter, on the basis that they have not been ratified by all parties to the treaty under interpretation.

472. A better solution is to permit reference to another treaty provided that the *parties in dispute* are also parties to that other treaty. Although this creates the possibility of divergent interpretations arising (depending on which States parties are also parties to the dispute), it would simply reflect the need to respect (inherently divergent) party will, as elucidated by reference to those other treaties, as well as the bilateralist character of most treaties underpinned by practices regarding reservations, *inter se* modification and successive treaties, for example.[671] The risk of divergence—a commonplace in treaty law—would be mitigated by making the distinction between "reciprocal" or "synallagmatic" treaties (in which case mere "divergence" in interpretation creates no problem) and "integral" or "interdependent" treaties (or treaties concluded *erga omnes partes*), where the use of another treaty in interpretation should not be allowed to threaten the coherence of the treaty to be interpreted.[672] This would also respond to the precise concern of the WTO Panel in *European Communities—Measures Affecting the Approval and Marketing of Biotech Products* about consistency in treaty interpretation.[673] In addition, it might also be useful to take into account the extent to which the other treaty relied upon can be said to have been "implicitly" accepted, or at least tolerated, by the other parties "in the sense that the rule can reasonably be said to express the common intentions or understanding of all members as to what the … term means".[674] This approach has in fact been adopted in some decisions of the WTO Appellate Body.[675] It gives effect to the sense in which certain multilateral treaty notions or concepts, though perhaps not found in treaties with identical membership, are nevertheless adopted widely enough to give a good sense of a "common understanding" or the "state of the art" in a particular technical field, without necessarily reflecting formal customary law.

2. The weight of the obligations to be taken into account

473. The above considerations have also answered the question of the *weight* to be given to the law—the rights and obligations—to be taken account of under article 31, paragraph 3 (*c*). The importance of those rights and obligations does not reside in their overriding character. As we have seen, international law reserves this function for *jus cogens*. An approach that gave excessive weight to the normative environment over particular treaties would—like a generalized presumption about the precedence of *lex generalis* over *lex specialis*—stifle treaty-making: the need to react to new circumstances and to give effect to interests or needs that, for one reason or another, have been underrepresented in traditional law. Rather, the significance of the need to "take into account" lies in its performance of a systemic function in the international legal order, linking specialized parts to each other and to universal principles.[676]

474. The question of the normative weight to be given to particular rights and obligations at the moment when they appear to clash with other rights and obligations can only be argued on a case-by-case basis. There is little to be added in this regard to what Judges Higgins, Buergenthal and Kooijmans observed in considering the balance to be struck between the conflicting dictates of the rule of State immunity, on the one hand, and liability for international crimes, on the other:

> International law seeks the accommodation of this value [the prevention of unwarranted outside interference in the domestic affairs of States] with the fight against impunity, and not the triumph of one norm over another.[677]

3. Inter-temporality and general developments in international law

475. The third general issue—and the one that raised most discussion in the Commission itself—is the question of inter-temporal law, or, in other words, the question of what should be the right moment in time (critical date) for the assessment of the rules that should be "taken into account" under article 31, paragraph 3 (*c*). The traditional rule,[678] and the one proposed to the Commission by Wal-

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[670] See, for example, the emphasis placed in the *Shrimp–Turtle* case on the fact that, although the United States had not ratified the United Nations Convention on the Law of the Sea, it had accepted during the course of the argument that the relevant provisions for the most part reflected international customary law (*United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Appellate Body report (see footnote 223 above), para. 171, note 174).

[671] It cannot be emphasized too much that this risk of "divergence" is no greater than in *any* interpretation of a multilateral treaty by reference to party will.

[672] For a recent exploration of this idea in the context of agreements covered by WTO, see Pauwelyn, *Conflict of Norms…* (footnote 21 above), pp. 440–486, and J. Pauwelyn, "A typology of multilateral treaty obligations: are WTO obligations bilateral or collective in nature?", EJIL, vol. 14, No. 5 (2003), p. 907.

[673] *European Communities—Measures Affecting the Approval and Marketing of Biotech Products* (see footnote 582 above), para. 7.70.

[674] Pauwelyn supports this approach in the case of agreements covered by WTO (Pauwelyn, *Conflict of Norms…* (see footnote 21 above), pp. 257–263, especially p. 261).

[675] See, for example, the sources relied upon by the Appellate Body in *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Appellate Body report (footnote 223 above), para. 130.

[676] For an early elaboration, see especially H. Lauterpacht, *Private Law Sources and Analogies of International Law,* London, Longman, 1927 (highlighting the role of principles of private law in the construction of international legal relationships).

[677] *Arrest Warrant of 11 April 2000* (see footnote 531 above), pp. 86–87 (joint separate opinion of Judges Higgins, Kooijmans and Buergenthal), para. 79.

[678] That rule was stated by Judge Huber in the context of territorial claims, and its two parts are as follows: "a juridical fact must be

dock, consisted of two parts: one affirming "contemporaneity", the other allowing changes in the law to be taken into account. According to the former aspect, a treaty was to be interpreted "in the light of the law in force at the time when the treaty was drawn up".[679] The latter aspect required, however, that "the application of a treaty … be governed by the rules of international law in force at the time when the treaty is applied".[680]

476. The rationale of the two parts of the principle is clear, and difficult to contest. On the one hand, when States create a legal relationship, they undoubtedly do this bearing in mind the normative environment as it exists at the moment when the relationship is formed. Or, in other words, deference to the law in force at the time when a treaty is concluded best takes account of the intent of the parties. Nevertheless, no legal relationship can remain unaffected by time. This is already confirmed by the need to take into account the subsequent practice of the parties. In a similar way, the views of the parties about the meaning and application of the treaty develop in accordance with the passing of time, the accumulation of experience, and new information and novel circumstances.

477. The doctrine of inter-temporal law is essentially a reminder of these two rationales, one pointing to the past as a guide for finding party intent, the other pointing to the present for exactly the same reason. As pointed out by Jiménez de Aréchaga in the Commission in 1964:

> The intention of the parties should be controlling, and there seemed to be two possibilities so far as that intention was concerned: either they had meant to incorporate in the treaty some legal concepts that would remain unchanged, or, if they had had no such intention, the legal concepts might be subject to change and would then have to be interpreted not only in the context of the instrument, but also within the framework of the entire legal order to which they belonged. The free operation of the will of the parties should not be prevented by crystallizing every concept as it had been at the time when the treaty was drawn up…[681]

478. Because it seems pointless to try to set any general and abstract preference between the past and the present,[682] it is best, once again, to merely single out some considerations that may be relevant when deciding whether to apply article 31, paragraph 3 (*c*), so as to "take account" of the "other obligations" as they existed when the treaty was concluded or as they exist when it is being applied. The starting point must be, again, the fact that deciding this issue is a matter of interpreting the treaty itself. Does the language used give any indication? The starting point of the argument might plausibly be the "principle of contemporaneity"—with regard to the normative environment as it existed at the moment when the obligation entered into force for a relevant party.[683] When might the treaty language itself, in its context, provide for taking account of future developments? Examples of when this might be a reasonable assumption include, at least:

(*a*) Use of a term in the treaty which is "not static but evolutionary".[684] This is the case where the parties, by their choice of language, intend to key into that evolving meaning without adopting their own idiosyncratic definition (for example, use of terms such as "expropriation" or "continental shelf" in the relevant treaty).[685] This may also be the case where, by reading that language against its object and purpose, it appears that the parties have committed themselves to a programme of progressive development;[686]

(*b*) The description of obligations in very general terms, thus operating a kind of *renvoi* to the state of the law at the time of its application. Thus, the general exceptions in article XX of GATT, discussed in the *Shrimp–Turtle case*, in permitting measures "necessary to protect human, animal or plant life or health" or "relating to the conservation of exhaustible natural resources" are intended to adjust to the situation as it develops over

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appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute … arises" ("contemporaneity"); and "[t]he same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law" (*Island of Palmas (Netherlands/United States of America)*, award of 4 April 1928, UNRIAA, vol. II (Sales No. 1949.V.1), p. 829, at p. 845).

[679] Third report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur (A/CN.4/167 and Add.1–3) (see footnote 323 above), p. 8, draft article 56, para. 1.

[680] *Ibid.*, p. 9, draft article 56, para. 2.

[681] *Yearbook ... 1964*, vol. I, p. 34, summary record of the Commission's 728th meeting, held on 21 May 1964, para. 10. Thirlway suggests a rather qualified version of the doctrine: "Provided that, where it can be established that it was the intention of the parties that the meaning or scope of a term or expression used in the treaty should follow the development of the law, the treaty must be interpreted so as to give effect to that intention" (Thirlway, "The law and procedure of the International Court of Justice 1960–1989 (Part Three)" (see footnote 586 above), p. 57). See also Thirlway, "The law and procedure of the International Court of Justice 1960–1989 (Part One)" (footnote 98 above), pp. 135–143, and R. Higgins, "Time and the law: international perspectives on an old problem", *International and Comparative Law Quarterly*, vol. 46, No. 3 (July 1997), p. 501, at pp. 515–519.

[682] This was, after all, the very reason why the Commission failed to come up with an article on this question.

[683] This expresses the "primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (see footnote 491 above), p. 31, para. 53).

[684] Jennings and Watts (eds.), *Oppenheim's International Law* (see footnote 37 above), p. 1282. The standard example is the use of the notion of "sacred trust of civilization" as part of the mandate regime of the League of Nations. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (footnote 491 above), p. 31, para. 53.

[685] Thus, in the *Aegean Sea Continental Shelf* case, the International Court of Justice applied the presumption according to which a generic term is "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" (*Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3, at p. 32, para. 77).

[686] This was the situation in the *Gabčíkovo-Nagymaros* case before the International Court of Justice. "[T]he Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them [into] the Treaty. [Articles 15, 19 and 20] do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan. By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law" (*Gabčíkovo-Nagymaros Project* (see footnote 119 above), pp. 67–68, para. 112). See also the separate opinion of Judge Weeramantry, *ibid.*, pp. 113–115.

time.[687] For example, the measures necessary to protect shrimp evolve depending upon the extent to which the survival of the shrimp population is threatened. Although the broad meaning of article XX may remain the same, its actual content will change over time. In that context, reference to "other rules of international law", such as multilateral environment treaties, becomes a form of secondary evidence supporting the enquiry into science and community values and expectations that the ordinary meaning of the words, and their object and purpose, invites.

4. Conclusion

479. Article 31, paragraph 3 (*c*), of the 1969 Vienna Convention and the "principle of systemic integration" to which it gives expression summarize the results of the previous sections. They call upon a dispute settlement body—or a lawyer seeking to find out "what the law is"—to situate the rules being invoked by those concerned in the context of other rules and principles that might have a bearing upon the case. In this process, the more concrete or immediately available sources are read against each other and against the general law "in the background". What this reading of rules "against each other" might mean cannot be stated in the abstract. But what the outcome of that specific reading is may in fact, from the perspective of article 31, paragraph 3 (*c*), be less important than the fact that, whatever the outcome, the justification for that outcome refers back to the wider legal environment, indeed the "system" of international law as a whole.

480. The way in which "other law" is "taken into account" is quite crucial to the parties and to the outcome of any single case. The principle of systemic integration, however, looks beyond individual cases. By making sure that the outcome is linked to the legal environment, and that adjoining rules are considered—perhaps applied, perhaps invalidated, perhaps momentarily set aside—any decision also articulates the legal and institutional environment with regard to substantive preferences, distributionary choices and political objectives. This articulation is quite important in a decentralized and spontaneous institutional world, the priorities and objectives of which are often poorly expressed. It is also important for the critical and constructive development of international institutions, especially institutions with law-applying tasks. To hold those institutions as fully isolated from each other and as only paying attention to their own objectives and preferences is to think of law only as an instrument for attaining regime objectives. But law is also about protecting rights and enforcing obligations, above all rights and obligations that have a backing in something like a general, public interest. Without the principle of "systemic integration" it would be impossible to give expression to and keep alive any sense of the common good of humankind, not reducible to the good of any particular institution or "regime".

[687] "From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term 'natural resources' in Article XX (*g*) is not 'static' in its content or reference but is rather 'by definition, evolutionary'" (*United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Appellate Body report (see footnote 223 above), para. 130).

Chapter VI

General conclusions

A. The nature of fragmentation

481. One aspect of globalization is the emergence of technically specialized cooperation networks with a global scope: trade, the environment, human rights, diplomacy, communications, medicine, crime prevention, energy production, security, indigenous cooperation and so on—spheres of life and expert cooperation that transcend national boundaries and are difficult to regulate through traditional international law. National laws seem insufficient owing to the transnational nature of the networks, while international law but inadequately takes account of their specialized objectives and needs.

482. As a result, such networks tend to develop their own rules and rule systems. Sometimes this takes place informally, through the adoption by leading actors of forms of behaviour or standardized solutions that create expectations or are copied by others. Sometimes coordination is achieved through the harmonization of national or regional laws and regulations, for example through increasing standardization of contract forms or liability rules. But frequently specialized rules and rule systems also emerge through intergovernmental cooperation, and in particular with the assistance of (specialized) intergovernmental organizations. The result is the emergence of regimes of international law that have their basis in multilateral treaties and acts of international organizations, specialized treaties and customary patterns that are tailored to the needs and interests of each network but rarely take account of the outside world.

483. This is the background to the concern about fragmentation of international law: the rise of specialized rules and rule systems that have no clear relationship to each other. Answers to legal questions become dependent on whom you ask, what rule system your focus is on. Accordingly, this study has sought answers to questions that, though they seem quite elementary, have not often been addressed: what is the nature of specialized rule systems? How should their relations *inter se* be conceived? Which rules should govern their conflicts?

B. The perspective of this study

484. This study has not aimed to set up definite relationships of priority between international law's different rules or rule systems. To that extent, its results may seem unsatisfactory or at least inconclusive. However, such priorities cannot be justifiably attained by what is merely an elucidation of the process of legal reasoning. They should reflect the (political) preferences of international actors, above all States. Normative conflicts do not arise as technical "mistakes" that could be "avoided"

by a more sophisticated method of legal reasoning. New rules and legal regimes emerge as responses to new preferences, and sometimes out of a conscious effort to deviate from preferences as they existed under old regimes. They require a legislative response, not a response of legal technique.

485. But the absence of general hierarchies in international law does not mean that normative conflicts would lead to legal paralysis. The relevant hierarchies must only be established *ad hoc* and with a view to resolving particular problems as they arise. This is where the articles of the 1969 Vienna Convention have their relevance and where a study conducted within the confines of the Commission can make a constructive contribution. The idea has been to illustrate, by examples drawn from the practice of international courts and tribunals, techniques available to lawyers as they approach problems that appear to involve conflicts between rules or rule systems.

486. A key point made in this study is that normative conflict is endemic to international law. Because of the spontaneous, decentralized and non-hierarchical nature of international law-making—law-making by custom and by treaty—lawyers have always had to deal with heterogeneous materials at different levels of generality and with different normative force. In its very first case, the Permanent Court of International Justice was, as we have seen, faced with having to resolve the question of the conflict or overlap between two sets of rules: the Treaty of Versailles and the right of a neutral power in time of war to control access to belligerent territory. Nevertheless, by an interpretation of German sovereignty and the invocation of precedent (the Panama and Suez canals), the Court was able to establish the priority of the Treaty of Versailles.[688] Since then, it has been routine for international tribunals to establish the rights and duties of States or of other subjects by reference to many types of legal materials that are applicable, as part of the work that they are called upon to do.

487. But addressing problems at this level—conflicts as they arise—will mean that they are addressed in a formal and open-ended way, as matters of legal technique rather than substantive (politico-legal) preference. This report has, in a way, bought its acceptability by its substantive emptiness. Yet this "formalism" is not without its own agenda. The very effort to canvass coherent legal technique in a fragmented world expresses the conviction that conflicts between specialized regimes may be overcome by law, even though the law may not go much further than requiring a willingness to listen to others, take their points of view into account and find a reasoned resolution at the end. Yet this may simply express the very point for which international law has always existed. The move from a world fragmented into sovereign States to a world fragmented into specialized "regimes" may not, in fact, require a fundamental transformation of public international law at all—though it may call for imaginative uses of traditional techniques. There were always States that regarded international law as incompatible with their sovereignty. Similarly, there may today exist global regimes or rule complexes that feel international law to be an alien intrusion. There is as little reason to concede the logic of "clinical isolation" in the latter case as there was in the former. If the view of a State cannot be the last word on the international lawfulness of its activities, then neither can the viewpoint of a rule or a regime alone determine what its international legal implications are. If international law is needed as a structure for coordination and cooperation among (sovereign) States, it is no less needed in order to coordinate and organize cooperation among (autonomous) rule complexes and institutions.

488. Special rules and rule complexes are undoubtedly necessary, somewhat in the sense that different sovereignties are. The world is irreducibly pluralistic. The law cannot resolve in an abstract way any possible conflict that may arise between economic and environmental regimes, between human rights and diplomatic immunity or between a universal law of the sea regime and a regional fisheries treaty. Each has its experts and its ethos, its priorities and preferences, its structural bias. Such regimes are institutionally "programmed" to prioritize particular concerns over others. The concern over fragmentation has been about the continued viability of traditional international law—including the techniques of legal reasoning that it imports—under conditions of specialization. Do Latin maxims (*lex specialis*, *lex posterior*, *lex superior*) still have relevance in the resolution of conflicts produced in a situation of economic and technological complexity? Although this report answers this question in the positive, it also highlights the limits of the response. Public international law does not contain rules in which a global society's problems are, as it were, already resolved. Developing these is a political task.

489. Concern over the fragmentation of international law has an institutional and a substantive aspect. At an institutional level, the proliferation of implementation organs—often courts and tribunals—for specific treaty regimes has given rise to concern over deviating jurisprudence and "forum-shopping". The rights and obligations of legal subjects may depend on which body is seized to recognize them. Following decisions by the Commission in 2002 and 2003, this report set aside the institutional aspects of fragmentation. Instead, it focused on substantive problems: the emergence of "special laws", treaty regimes and functional clusters of rules and specialized branches of international law and their relationship *inter se* and to general international law. Particular attention has been given to the application of the *lex specialis* and *lex posterior* maxims and to relationships of importance and the notion of "system" in international law. The focus throughout has been provided by the 1969 Vienna Convention, with a conscious effort, nonetheless, to read that treaty itself in its systemic environment, consisting in part of the practices of international tribunals and other law-applying bodies and in part of the general international law of which it forms part. The draft operative conclusions of the work of the Study Group are set out in detail in the annex to this report.

490. Not all substantive problems have been dealt with. For example, questions about "soft law", as a special type of law with its own idiosyncratic ("soft") enforcement and dispute settlement mechanisms, have not been subjected to discussion. Nevertheless, to the extent that soft law claims to exist "in clinical isolation" from "hard

[688] *S.S. "Wimbledon"* (see footnote 150 above), pp. 25, 28–30.

law", much of what has been said about the relationships between special and general law in chapter II applies to it. Likewise, questions having to do with the emergence of patterns of constraint out of private or combined public–private activities—including *lex mercatoria* or other types of informal regulation of transnational activities—and their effects on traditional law-making have been left outside this study. A discussion of the extent to which new types of "global law" might be emerging outside the scope of traditional, State-centric international law would require quite a different type of exercise. This is not to say, however, that the 1969 Vienna Convention or indeed general international law could not be used to channel and control these patterns of informal, often private-interest-based types of regulation as well. The more complex and flexible the ways in which treaty law allows the use of framework treaties, of clusters of treaties and of regimes consisting of many types of normative materials, the more such decentralized, private regulation may be encompassed within the scope of international law.

C. Between coherence and pluralism: suggestions for further work

491. Fragmentation calls into question the coherence of international law. Coherence is valued positively owing to the connection it has with predictability and legal security. Moreover, only a coherent legal system treats legal subjects equally. Coherence is, however, a formal and abstract virtue. For a legal system that is regarded in some respects as unjust or unworkable, no added value is brought by the fact of its being coherently so. Therefore, alongside coherence, pluralism should be understood as a constitutive value of the system. Indeed, in a world of plural sovereignties, this has always been the case.

492. Even as international law's diversification may threaten its coherence, it does this by increasing its responsiveness to the regulatory context. Fragmentation moves international law in the direction of legal pluralism but does this, as the present report has sought to emphasize, by constantly using the resources of general international law, especially the rules of the 1969 Vienna Convention, customary law and "general principles of law recognized by civilized nations". *One principal conclusion of this report has been that the emergence of special treaty regimes (which should not be called "self-contained") has not seriously undermined legal security, predictability or the equality of legal subjects*. The techniques of *lex specialis* and *lex posterior*, of *inter se* agreements and of the superior position given to peremptory norms and the (so far under-elaborated) notion of "obligations owed to the international community as a whole" provide a basic professional toolbox that is able to respond in a flexible way to most substantive fragmentation problems. They can be used to give expression to concerns (*e.g.* economic development, human rights, environmental protection, security) that are legitimate and strongly felt.

493. The international legal system has never enjoyed the kind of coherence that may have characterized the legal orders of States. Nonetheless, the deepening complexity of late modern societies, tolerance and encouragement of conflicting traditions and social objectives within national societies, and the needs of technical specialization have all also undermined the homogeneity of the nation State. Today, the law of late modern States emerges from several quasi-autonomous normative sources, both internal and external. While this may have undermined the constitutional coherence of national law, it has been counterbalanced by the contextual responsiveness and functionality of the emerging (moderate) pluralism. In an analogous fashion, the emergence of conflicting rules and overlapping legal regimes will undoubtedly create problems of coordination at the international level. But—and this is the second main conclusion of this report—*no homogenous, hierarchical meta-system is realistically available to do away with such problems*. International law will need to operate within an area where the demands of coherence and reasonable pluralism will point in different directions. In order for it to do this successfully, *increasing attention will have to be given to the collision of norms and regimes and the rules, methods and techniques for dealing with such collisions*. How this might be done is explained in detail in the proposal for the conclusions of the Study Group set out in the annex. In addition, this might require at least three efforts:

(*a*) Focus on the role of the 1969 Vienna Convention as the basis for an "international law of conflicts";

(*b*) Focus on the notion and operation of "regimes";

(*c*) Examination of the notion of "general international law".

1. The Vienna Convention on the Law of Treaties as the basis for an "international law of conflicts"

494. The Commission decided to situate its work on this matter within the confines of the 1969 Vienna Convention. This report suggests that this decision was well-founded. As has been explained in detail, the Convention provides the normative basis—the "toolbox"—for dealing with fragmentation. There is no reason why it should not also provide the basis for the further development of an "international law of conflicts". Conflicts between treaties, treaty regimes and treaties and other legal sources will inevitably also emerge in the future, perhaps increasingly. In the absence of fixed hierarchies, such conflicts can only be resolved by "collision rules" that take account both of the need for coherence and of contextual sensitivity. When developing such collision rules, several aspects of the 1969 Vienna Convention might be subjected to closer scrutiny.

495. For example, the Convention's treatment of bilateral and multilateral treaties by means of identical rules seems unsatisfactory. The problems that emerge are different and should be dealt with through different techniques. In the interpretation of bilateral treaties, for example, party intent is relatively easy to identify, whereas multilateral treaties emerge as package deals or bargains and seldom have a single, clearly defined party intent. Furthermore, there is presently no recognition of the special nature of "framework treaties" and "implementation treaties", while much of this report has suggested that such treaties have special types of relations that cannot be identified with relations between just any treaties. Moreover, nothing has undermined Fitzmaurice's original

point that human rights and humanitarian law treaties, for example (as well as, for instance, environmental treaties), form a special class of non-bilateral ("integral" or "interdependent") instruments that cannot be operated through the same techniques as "ordinary" treaties creating bilateral relationships. Throughout this report we have seen how the nature of a treaty—including its object and purpose—has limited the freedom of treaty parties to deviate by way of *lex specialis* or *inter se* agreement. But in fact the conventional priority accorded to special law over general law, and the equally conventional techniques for overruling that priority, are already aspects of an informal treaty hierarchy that has often been overshadowed by the focus on the formal hierarchy expressed in the language of *jus cogens* or Article 103 of the Charter of the United Nations.

496. In general, the 1969 Vienna Convention gives insufficient recognition to special types of treaties and the special rules that might serve to interpret and apply them. More work here seems necessary. *It is proposed to develop guidelines on how the 1969 Vienna Convention provisions might give recognition to the wide variation of treaty types and normative implications of such types and whether it might be possible to set up informal guidelines on how to deal with treaty conflicts. The following themes, at least, might be part of such an effort*:

(*a*) The difference between bilateral and multilateral treaty relations should be given greater recognition;

(*b*) The process of international "legislation" through multilateral treaties adopted in order to realize specific, technical rules should be further examined. This could involve establishing a typology of treaty provisions amenable to different treatment. These typologies might, for example, contrast "programmatic" provisions with provisions that set up subjective rights and "hard law" provisions associated with formal responsibility with "soft law" provisions under special "soft responsibility" regimes;

(*c*) The notions of a "framework treaty" and an "implementation treaty" should be further elaborated, especially with a view to highlighting the special (hierarchical) relationships between them and between the institutions they set up;

(*d*) Greater recognition should be given to the distinction between multilateral conventions whose provisions are "bilateralizable" and those that are not (*i.e.* "integral" treaties or treaties setting out "interdependent" or otherwise "absolute" obligations);

(*e*) What it means for obligations to be owed "to the international community as a whole" (*erga omnes* obligations) or to the "community of States parties as a whole" (obligations *erga omnes partes*) should be further elaborated;

(*f*) Recent practice has developed a wide range of models for "conflict clauses" that seek to eliminate or deal with potential conflicts between treaties. Often, however, these clauses are unclear or ambivalent. What does it mean, for example, for two treaties to be understood in a "mutually supportive" way?

2. Into a law of regimes

497. Much of this study has pointed to the increasing importance of chains or clusters of treaties, including relationships between framework treaties and implementation treaties. In practice, fragmentation takes place through the development of networks of international rules and instruments that for all practical purposes—including the purpose of interpretation—are treated as single "wholes" or "regimes". This study has identified three types of special regime:

(*a*) Special sets of secondary rules of State responsibility;

(*b*) Special sets of rules and principles on the administration of a determined problem;

(*c*) Special branches of international law with their own principles, institutions and teleology.

498. Neither the 1969 Vienna Convention nor international arbitral and judicial practice has so far given any developed articulation to these special kinds of wholes. From this study it transpires, however, that a "regime" may function within a formal treaty, within a set of formal treaties and institutions, or in more broadly "cultural" ways. Conflicts between rules *within* a regime appear differently and should probably be treated differently from conflicts *across* regimes. "Regimes" may also have non-governmental participants and represent non-governmental interests in a fashion that might influence their interpretation and operation. Often regimes operate on the basis of administrative coordination and "mutual supportiveness", the point of which is to seek regime-optimal outcomes. While this is clearly appropriate in regard to treaty provisions that are framed in general or "programmatory" terms, it seems less proper in regard to provisions establishing subjective rights, or obligations whose purpose it is to guarantee such rights. Disputes concerning the operation of regimes may not always be properly dealt with by the same organs that have to deal with the recognition of claims of rights. Likewise, when conflicts emerge between treaty provisions that have their home in different regimes, care should be taken to guarantee that any settlement is not dictated by organs exclusively linked with one or other of the conflicting regimes.

499. It is suggested that the Commission could outline the roles of special regimes in some or several of the three senses. For this purpose, it could examine the following areas:

(*a*) The types of international and transnational regimes that have come to exist as a result of the process of globalization;

(*b*) The manner of the autonomous operation of regimes. This could involve questions such as the formation and operation of internal regime hierarchies, the principles of interpretation applicable to regime instruments, the specific types of rules or institutions needed to enable the coherent operation of regimes, and so on;

(*c*) The role of general (public) international law in regimes, including in resolving interpretative conflicts and

providing for responsibility for any violation of regime rules. The relations of public and private law, including soft law and other non-binding instruments, within such regimes could be examined;

(*d*) Many provisions in technical treaty regimes have an exhortatory, procedural or "programmatic" character. Such provisions contrast sharply with provisions providing subjective rights or obligations. While the former may easily be adjusted in the event of conflicts (or, for example, lack of resources), the latter are not so easily "balanced" or "coordinated". Any study of regime rules should take into account such contrasts in the normative power of particular regime rules;

(*e*) The conditions and consequences of regime failure. What counts as "regime failure" in the first place? When do the procedural means of redress of general law, normally suspended, become applicable?

(*f*) The whole complex of inter-regime relations is presently a legal black hole. What principles of conflict resolution might be used to deal with conflicts between two regimes or between instruments across regimes?

(*g*) The settlement of disputes within regimes may not be subject to the same rules or procedures as settlement of disputes across regimes. For the latter case, there is a particular need to ensure that impartial settlement mechanisms are available.

3. The nature and operation of "general international law"?

500. As we have seen throughout this study, fragmentation takes place against the background of and often by express reference to not only the 1969 Vienna Convention but also something called "general international law". However, there is no well-articulated or uniform understanding of what this might mean. "General international law" clearly refers to general customary law, as well as to the "general principles of law recognized by civilized nations" under Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. But it might also refer to principles of international law proper and to analogies from domestic laws, especially principles of the legal process (*audiatur et altera pars*, *in dubio mitius*, estoppel and so on). In the practice of international tribunals, including the WTO Appellate Body, the European Court of Human Rights and the Inter-American Court of Human Rights, reference is constantly made to various kinds of "principles", sometimes drawn from domestic law, sometimes from international practice, but often in a way that leaves their authority unspecified.

501. Much of the substance of "general international law" was canvassed in the study commissioned by the Secretary-General of the United Nations in 1948 from Hersch Lauterpacht so as to start off the work of the Commission in the codification and progressive development of international law.[689] In 1996, the Commission analysed the scope for progressive development and codification after nearly fifty years of work and, in order to provide a global review of the main fields of general public international law, set up a general scheme of topics of international law classified under thirteen main fields.[690] Whatever the prospects for "codification and progressive development" today, it seems clear that most of the development of international law will take place within specialized law-making conferences and organizations on the basis of specialist preparatory work and will lead to complex treaty regimes with their own institutional provisions and procedures. This is indeed part of the background from which the concern about fragmentation once arose.

502. In an increasingly specialized legal environment, few institutions are left to speak the language of general international law, with the aim of regulating, at a universal level, relationships that cannot be reduced to the realization of special interests and that go further than technical coordination. The Commission is one such institution. The codification and development work it has carried out has been precisely about elucidating the content of "general international law" as an aspect of what can only be understood as a kind of an international public realm. The fact that in this study it has been possible to develop an overarching standpoint by taking the perspective of the 1969 Vienna Convention has shown that general international law speaks to present concerns not so much in terms of substantive rules and principles—after all, a large part thereof has already been codified—but as a formal argumentative technique. In an important sense, it is that technique which represents what is "general" in a world of proliferating technical particularisms.

503. The turn to specialized treaty-making and the diminishing subjects on the Commission's agenda demonstrate that there is a limit to what can be attained in terms of codification and progressive development of universal rules. At some point, the threshold is crossed at which the necessary generality and abstraction that is the price to be paid for the universal scope of treaty law becomes unnecessarily high. Under the frame of "universal" rules, what in fact often takes place is specialist rule-making through what formally appears as only the implementation of general (but completely indeterminate) standards at a local or technically specialized level. At that point, it becomes useful to draw attention to the way "general international law" appears constantly in the practice of regional and specialized institutions. It is this general international law that provides the rudiments of an international public realm, from the perspective of which the specialized pursuits and technical operations carried out under specific treaty regimes may be evaluated.

504. Thus, it is proposed that the Commission should increasingly pursue the avenue of "restatement" of general international law in forms other than codification and progressive development—not as a substitute for but as a supplement to them. Such restatement work might focus, for example, on the following:

(*a*) What sources are covered by references to "general international law"?

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[689] Survey of International Law in Relation to the Work of Codification of the International Law Commission, memorandum submitted by the Secretary-General (A/CN.4/1/Rev.1, United Nations publication, Sales No. 48.V.1(1)), also published in Lauterpacht, *International Law: Collected Papers*, vol. I (footnote 106 above), pp. 445–530.

[690] *Yearbook ... 1996*, vol. II (Part Two), paras. 246–248 and annex II.

(*b*) How does "general international law" appear in international treaty law and in the practice of international and domestic courts and tribunals, as well as of other international law-applying bodies?

(*c*) To what extent might successful "codification and progressive development" today in fact necessitate studies—properly carried out by the Commission—on the emergence and spontaneous operation of general international law?

ANNEX

DRAFT CONCLUSIONS OF THE WORK OF THE STUDY GROUP, FINALIZED BY MR. MARTTI KOSKENNIEMI

A. Introduction

1. At its fifty-fourth session (2002), the International Law Commission established a Study Group to examine the topic "Fragmentation of international law: difficulties arising from the diversification and expansion of international law".[1] At its fifty-fifth session (2003), the Commission adopted a tentative schedule for work to be carried out during the remaining part of the quinquennium (2003–2006) and allocated to five of its members the task of preparing outlines on the following topics:

(*a*) The function and scope of the *lex specialis* rule and the question of self-contained regimes (Mr. Martti Koskenniemi);

(*b*) The interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (art. 31, para. 3 (*c*), of the 1969 Vienna Convention), in the context of general developments in international law and concerns of the international community (Mr. William Mansfield);

(*c*) The application of successive treaties relating to the same subject matter (art. 30 of the 1969 Vienna Convention) (Mr. Teodor Melescanu);

(*d*) The modification of multilateral treaties between certain of the parties only (art. 41 of the 1969 Vienna Convention) (Mr. Riad Daoudi); and

(*e*) Hierarchy in international law: *jus cogens*, obligations *erga omnes* and Article 103 of the Charter of the United Nations as conflict rules (Mr. Zdzislaw Galicki).[2]

2. During its fifty-sixth (2004) and fifty-seventh (2005) sessions, the Study Group received a number of outlines and studies on these topics. It affirmed that it was its intention to prepare, as the substantive outcome of its work, a single collective document consisting of two parts. One would be a "relatively large analytical study" that would summarize the content of the various individual reports and the discussions of the Study Group. This forms the bulk of the report prepared by the Chairperson of the Study Group in 2006. The other part would be "a condensed set of conclusions, guidelines or principles emerging from the studies and the discussions in the Study Group".[3] As the Study Group itself held, and the Commission endorsed, these should be "a concrete, practice-oriented set of brief statements that would work, on the one hand, as the summary and conclusions of the Study Group's work and, on the other hand, as a set of practical guidelines to help in thinking about and dealing with the issue of fragmentation in legal practice".[4]

3. This annex sets out a draft for those "conclusions, guidelines or principles". The draft reproduces the result of the extensive deliberations the Study Group had undertaken in 2004 and 2005. They are a collective product by the members of the Study Group.

4. It should be noted, however, that:

(*a*) Only the formulation of conclusions 1 to 23, based on the studies referred to in paragraphs 1 (*a*)–(*c*) above, have so far been provisionally agreed to by the Study Group;

(*b*) Draft conclusions 24 to 32, dealing with the topic referred to in paragraph 1 (*d*) above under the general title of "Conflicts between successive norms", have been neither presented to nor discussed in the Study Group. They have been formulated by the Chairperson of the Study Group as a proposal to be discussed during the fifty-eighth session (2006);

(*c*) Draft conclusions 33 to 43 are based on the report referred to in paragraph 1 (*e*) above. They were distributed to the Study Group in 2005 but have not been subjected to in-depth discussion. It is proposed that they be discussed and adopted in the course of the finalization of the Study Group's work during the Commission's fifty-eighth session in 2006.

5. The Chairperson of the Study Group wishes to reproduce all the draft conclusions below. The suggestion is that the conclusions would be adopted by the Study Group and submitted to the Commission for appropriate action.

B. Draft conclusions of the work of the Study Group on "Fragmentation of international law: difficulties arising from the diversification and expansion of international law"

(a) *General*

(1) *International law as a legal system*. International law is a legal system. Its rules and principles (*i.e.* its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hierarchical levels, their formulation may involve greater or lesser generality and specificity, and their validity may date back to earlier or later moments in time.

(2) In applying international law, it is often necessary to determine the precise relationship between two or more rules and principles that are both valid and applicable in respect of a situation.[5] For that purpose, the relevant relationships fall into two general types:

[1] *Yearbook … 2002*, vol. II (Part Two), paras. 492–494.

[2] *Yearbook … 2003*, vol. II (Part Two), paras. 424–428.

[3] *Yearbook … 2005*, vol. II (Part Two), para. 448.

[4] *Ibid*.

[5] That two norms are valid in regard to a situation means that they each cover the facts of which the situation consists. That two norms are applicable in a situation means that they have binding force in respect to the legal subjects finding themselves in the relevant situation.

– *Relationships of interpretation*. This is the case where one norm assists in the interpretation of another. A norm may assist in the interpretation of another norm for example as an application, clarification, updating or modification of the latter. In such situation, both norms are applied in conjunction.

– *Relationships of conflict*. This is the case where two norms that are both valid and applicable point to incompatible decisions so that a choice must be made between them. The basic rules concerning the resolution of normative conflicts are to be found in the 1969 Vienna Convention.

(3) *The Vienna Convention on the Law of Treaties*. When seeking to determine the relationship of two of more norms to each other, the norms should be interpreted in accordance with or analogously to the 1969 Vienna Convention and especially the provisions in its articles 31 to 33 having to do with the interpretation of treaties.

(4) *The principle of harmonization*. It is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as giving rise to a single set of compatible obligations.

(b) *The maxim "*lex specialis derogat legi generali*"*

(5) *General principle*. The maxim *lex specialis derogat legi generali* is a generally accepted technique of interpretation and conflict resolution in international law. It suggests that, whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific. The principle may be applicable in several contexts: between provisions within a single treaty, between provisions within two or more treaties, between a treaty and a non-treaty standard, as well as between two non-treaty standards. The source of the norm (whether treaty, custom or general principle of law) is not decisive for the determination of the more specific standard. However, in practice treaties often act as *lex specialis* by reference to the relevant customary law and general principles.

(6) *Contextual appreciation*. The relationship between the *lex specialis* maxim and other norms of interpretation or conflict solution cannot be determined in a general way. Which consideration should be predominant—*i.e.* whether it is the speciality or the time of emergence of the norm—should be decided contextually.

(7) *Rationale for the principle*. That special law has priority over general law is justified by the fact that such special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law. Its application may also often create a more equitable result and it may often better reflect the intent of the legal subjects.

(8) *Dispositive nature of most international law*. Most international law is dispositive. This means both that it may be applied, clarified, updated or modified as well as be set aside by special law.

(9) *The effect of* lex specialis *on general law*. The application of the special law does not normally extinguish the relevant general law. That general law will remain valid and applicable and will, in accordance with the principle of harmonization under paragraph (4) above, continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter.

(10) *Non-derogability*. Certain types of general law[6] may not, however, be derogated from by special law. *Jus cogens* is expressly non-derogable. Other considerations that may provide a reason for concluding that a general law is non-derogable include the following:

– Whether the general law was intended to be non-derogable;

– Whether non-derogability may be inferred from the form or the nature of the general law;

– Whether derogation might frustrate the *purpose* of the general law;

– Whether third party beneficiaries may be negatively affected by derogation; and

– Whether the balance of rights and obligations established in the general law would be negatively affected by derogation.

A norm that purports to set aside or derogate from a norm that is non-derogable will be invalid.

(c) *Special ("self-contained") regimes*

(11) *Special ("self-contained") regimes as* lex specialis. A group of rules and principles concerned with a particular subject matter may form a special regime ("self-contained regime") and be applicable as *lex specialis*. Such special regimes often have their own institutions to administer the relevant rules.

(12) Three types of special regime may be distinguished:

– Sometimes violation of a particular group of (primary) rules is accompanied by a special set of (secondary) rules concerning breach and reactions to breach. This is the main case provided for under article 55 of the Commission's draft articles on responsibility of States for internationally wrongful acts.[7]

– Sometimes, however, a special regime is formed by a set of special rules, including rights and obligations, relating to a special subject matter. Such rules may concern a geographical area (*e.g.* a treaty on the protection of a particular river) or some substantive matter (*e.g.* a treaty on the regulation of the uses of a particular weapon). Such a special regime may emerge on the basis of a single treaty, several treaties, or treaty and treaties plus non-treaty developments (subsequent practice or customary law).

[6] [The notion of "general law" may yet need to be clarified.]

[7] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 140–141.

– Finally, sometimes all the rules and principles that regulate a certain problem area are collected together so as to express a "special regime". Expressions such as "law of the sea", "humanitarian law", "human rights law", "environmental law" and "trade law", *etc.*, give expression to some such regimes. For interpretative purposes, such regimes may often be considered as wholes.

(13) *Effect of the "speciality" of a regime*. The significance of a special regime lies in the way its norms express a unified object and purpose. Thus, their interpretation and application should, to the extent possible, reflect that object and purpose.

(14) *The relationship between special regimes and general international law*. A special regime may derogate from general law under the same conditions as *lex specialis* generally (see paras. (6) and (8) above).

(15) *The role of general law in special regimes I: gap-filling*. The scope of special laws is by definition narrower than that of general laws. It will thus frequently be the case that a matter not regulated by special law will arise in the institutions charged to administer it. In such cases, the relevant general law will be applicable.

(16) *The role of general law in special regimes II: failure of special regimes*. Special regimes or the institutions set up by them may fail to operate as intended. In such case, the relevant general law becomes applicable. Failure should be inferred when the special laws have no reasonable prospect of appropriately addressing the objectives for which they were enacted. It could be manifested, for example, by the failure of the regime's institutions to fulfil the purposes allotted to them, endemic non-compliance by one or several of the parties, desuetude, withdrawal by parties instrumental for the regime, among other causes. Whether a regime has "failed" in this sense, however, needs to be decided above all by an interpretation of its constitutional instruments.

(d) *Article 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties*

(17) *Systemic integration*. Article 31, paragraph 3 (*c*), of the 1969 Vienna Convention provides one means, within the framework of the Convention, through which relationships of interpretation (referred to in para. (2) above) may be applied. It requires the interpreter of a treaty to take into account "[a]ny relevant rules of international law applicable in the relations between the parties". The article gives expression to the objective of "systemic integration", according to which, whatever their subject matter, treaties are a creation of the international legal system and their operation is predicated upon that fact.

(18) *Interpretation as integration in the system*. Systemic integration governs all treaty interpretation, the other relevant aspects of which are set out in the other paragraphs of articles 31 and 32 of the 1969 Vienna Convention. These paragraphs describe a process of legal reasoning, in which particular elements will have greater or less relevance depending upon the nature of the treaty provisions in the context of interpretation. In many cases, the issue of interpretation will be capable of resolution within the framework of the treaty itself. Article 31, paragraph 3 (*c*), deals with the case where material sources external to the treaty are relevant in its interpretation. These may include other treaties, customary rules or general principles of law.

(19) *Application of systemic integration*. Where a treaty functions in the context of other agreements, the objective of systemic integration will apply as a presumption with both positive and negative aspects:

(*a*) *Positive presumption*: The parties are taken to refer to customary international law and general principles of law for all questions which the treaty does not itself resolve in express terms.

(*b*) *Negative presumption*: In entering into treaty obligations, the parties do not intend to act inconsistently with [generally recognized] principles of international law.

Of course, if any other result is indicated by ordinary methods of treaty interpretation, that should be given effect, unless the relevant principle were part of *jus cogens.*

(20) *Application of custom and general principles of law*. Customary international law and general principles of law are of particular relevance to the interpretation of a treaty under article 31, paragraph 3 (*c*), especially where:

(*a*) The treaty rule is unclear or open-textured;

(*b*) The terms used in the treaty have a recognized meaning in customary international law or under general principles of law;

(*c*) The treaty is silent on the applicable law and it is necessary for the interpreter, applying the positive presumption in paragraph (19) (*b*) above, to look for rules developed in another part of international law to resolve the point.

(21) *Application of other treaty rules*. Article 31, paragraph 3 (*c*), also requires the interpreter to consider other treaty-based rules so as to arrive at a consistent meaning. Such other rules are of particular relevance where parties to the treaty under interpretation are also parties to the other treaty, where the treaty rule has passed into or expresses customary international law or where they provide evidence of the common understanding of the parties as to the object and purpose of the treaty under interpretation or as to the meaning of a particular term.

(22) *Inter-temporality*. International law is a dynamic legal system. Whether in applying article 31, paragraph 3 (*c*), the interpreter should refer to rules of international law in force at the time of the conclusion of the treaty or may also take into account subsequent changes in the law depends generally on the meaning of the treaty, as ascertained on the basis of articles 31 and 32 of the 1969 Vienna Convention. However, the meaning of a treaty provision may also be affected by subsequent developments irrespective of the original will of the parties, especially where these subsequent developments are reflected in customary law and general principles of law.

(23) *Open or evolving concepts*. Rules of international law subsequent to the treaty to be interpreted may be taken into account particularly where the concepts used in the treaty are open or evolving. This is the case, in particular, where (*a*) the concept is one which implies taking into account subsequent technical, economic or legal developments; (*b*) the concept sets up an obligation for further progressive development for the parties; or (*c*) the concept has a very general nature or is expressed in such general terms that it must take into account changing circumstances.

(*e*) *Conflicts between successive norms*

(24) *The basic rule*. The question of successive treaty norms covering the same subject matter is dealt with by article 30 of the 1969 Vienna Convention.

(25) *Lex posterior derogat legi priori*. According to article 30, paragraph 3, of the 1969 Vienna Convention, when all the parties to the later treaty are also parties to the earlier treaty, and the earlier treaty is not suspended or terminated, then it applies only to the extent its provisions are compatible with those of the later treaty. This is an expression of the principle according to which "later law supersedes earlier law". The same principle is also expressed in the way treaties generally speaking enjoy priority over earlier customary law.

(26) *Limits of the "lex posterior" principle*. The applicability of the *lex posterior* principle is, however, limited. It cannot, for example, be automatically extended to the case where the parties to the subsequent treaty are not identical to the parties to the earlier treaty. In such cases, as provided in article 30, paragraph 4, of the 1969 Vienna Convention, the State that is party to two incompatible treaties is bound *vis-à-vis* both of its treaty parties separately. In case it cannot fulfil its obligations under both treaties, it will remain responsible for its violation of one of them. In such case, article 60 of the 1969 Vienna Convention may also become applicable. The question of which of the incompatible treaties should be implemented and the breach of which should be sanctioned by State responsibility cannot be answered by a general rule.

(27) *The distinction between treaty provisions that belong to the same "regime" and provisions in different "regimes"*. The *lex posterior* principle is at its strongest in regard to conflicting or overlapping provisions that are part of treaties that are institutionally linked or otherwise intended to advance similar objectives. This is typically the case of the relationship between "framework treaties" and "implementation treaties". In case of conflicts or overlaps between treaties in different regimes, the question of which of them is later in time cannot be taken to express any intrinsic priority between them.

(28) *Mutual accommodation and protection of rights*. In case of conflicting or overlapping treaties within different "regimes", both of the treaties should be implemented as far as possible with a view to mutual accommodation and in accordance with the principle of harmonization. This applies above all to the procedural provisions in such treaties and to provisions set up in implementation programmes and schedules. However, this may not lead to undermining the substantive rights of treaty parties or third-party beneficiaries. The violation of rights entails State responsibility.

(29) *The case of special treaties*. Some treaty provisions enjoy a special normative character so that they shall prevail irrespective of whether they are earlier or later in time. These include:

(*a*) Provisions of the Charter of the United Nations;

(*b*) Provisions embodying *jus cogens*;

(*c*) Provisions that otherwise might be understood as non-derogable because they were so intended, because non-derogability may be inferred from their nature or from the object and purpose of the treaty or for any other reason referred to in paragraph (10) above.

(30) *Settlement of disputes within and across regimes*. Questions regarding priority between conflicting treaty provisions should be resolved by negotiation between parties to the relevant treaties. However, when no negotiated solution is available, recourse ought to be had to mechanisms of dispute settlement. When the conflict concerns provisions within a single regime (as defined in para. (4) above), then its resolution may be appropriate in the regime-specific mechanism. However, when the conflict concerns provisions in treaties that are not part of the same regime, then care should be taken to guarantee that the dispute settlement body is independent from both of the regimes.

(31) *Inter se agreements*. The case of agreements to modify multilateral treaties by certain of the parties only (*inter se* agreements) is covered by article 41 of the 1969 Vienna Convention. Such agreements are an often-used technique for the more effective implementation of the original treaty between a limited number of treaty parties that are willing to take more effective or more far-reaching measures for the realization of the object and purpose of the original treaty. *Inter se* agreements may be concluded if this is provided for by the original treaty or it is not specifically prohibited and it "(i) [d]oes not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) [d]oes not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole" (art. 41, para. 1 (*b*), of the 1969 Vienna Convention).

(32) *Conflict clauses*. It is advisable that, when States enter into treaties that might conflict with other treaties, they settle the relationship between such treaties by adopting appropriate clauses in the treaties themselves. When adopting such clauses, it should be borne in mind that:

(*a*) They may not affect the rights of third parties;

(*b*) They should be as clear and specific as possible. In particular, they should be directed to specific provisions of the treaty and they should not undermine the object and purpose of the treaty;

(*c*) For this purpose, they should not be open-ended or otherwise such that it is unclear what, in fact, the obligations parties have undertaken are;

(*d*) They should be linked with appropriate dispute settlement mechanisms.

(*f*) *Hierarchy in international law:* jus cogens*, obligations* erga omnes *and Article 103 of the Charter of the United Nations as conflict rules*

(33) *Hierarchical relations between norms of international law*. The sources of international law (treaties, custom, general principles of law) are not in a hierarchical relationship *inter se*. Drawing analogies from the hierarchical nature of domestic legal systems is not generally appropriate owing to the absence of a well-developed or authoritative hierarchy of values in international law. Nevertheless, some rules of international law are more important than other rules and for this reason enjoy a superior position or special status in the international legal system. This is sometimes expressed by the designation of some norms as "fundamental" or some breaches as "grave". What effect such designations may have is usually determined by the relevant instrument in which that designation appears.

(34) *Recognized hierarchical relations by the substance of the rules I:* jus cogens. A rule of international law may be superior to other rules on account of its content. This is the case of peremptory norms of international law (*jus cogens*, art. 53 of the 1969 Vienna Convention), that is, norms "accepted and recognized by the international community as a whole from which no derogation is permitted".

(35) *The content of* jus cogens. Accepted rules of *jus cogens* include rules prohibiting genocide and torture as well as rules protecting the basic rights of the human person. The right of self-determination as well as the prohibition of the use of force are likewise rules of *jus cogens*. Also other rules may have a *jus cogens* character inasmuch as they are "accepted and recognized by the international community … as a whole".

(36) *Recognized hierarchical relations II: Article 103 of the Charter of the United Nations*. A rule of international law may also be superior to other rules by virtue of a treaty provision. This is the case of Article 103 of the Charter of the United Nations, by virtue of which "[i]n the event of a conflict between the obligations of the Members of the United Nations under the … Charter and their obligations under any other international agreement, their obligations under the … Charter shall prevail."

(37) *Rules recognized by their scope of application: obligations* erga omnes *and the Charter of the United Nations*. Some norms enjoy a special status owing to their scope of applicability. This is the case of obligations *erga omnes*, that is, obligations of a State towards the international community as a whole. These rules concern all States and all States can be held to have a legal interest in their protection. Every State may invoke the responsibility of the State violating such norms. It is also recognized that the Charter of the United Nations itself enjoys special status owing to its virtually universal acceptance.

(38) *The content of obligations* erga omnes. Accepted *erga omnes* norms include rules concerning diplomatic relations. [See State responsibility.] Likewise the right of peoples to self-determination and the rights and duties enshrined in the Convention on the Prevention and Punishment of the Crime of Genocide.

(39) *The relationship between* jus cogens *norms and obligations* erga omnes. It is recognized that while all *jus cogens* norms also have the character of *erga omnes* obligations, the reverse is not necessarily true. Not all *erga omnes* obligations have the character of peremptory rules of international law.

(40) *The scope of Article 103 of the Charter of the United Nations*. Article 103 of the Charter provides for the priority of the obligations under the Charter *vis-à-vis* not only "any other international agreement" but also customary international law. The scope of Article 103 reaches not only to the Articles of the Charter but also to binding decisions made by United Nations bodies such as the Security Council or the International Court of Justice.

(41) *The relationship between hierarchy and fragmentation*. The purpose of normative hierarchies is to resolve conflicts between rules of international law by indicating which rule is to prevail in case of conflict. A hierarchy between two rules or norms operates in a relational and not fixed fashion. If there is a conflict between two hierarchically superior norms such as *jus cogens* and Article 103 of the Charter, their relationship can only be determined in a contextual fashion, bearing in mind, *inter alia*, the principle of harmonization, that is, that in the event of a *prima facie* conflict, the two norms should be interpreted as compatible.

(42) *The operation and effect of* jus cogens *norms and Article 103 of the Charter of the United Nations*.

(*a*) A rule conflicting with a norm of *jus cogens* becomes thereby *ipso facto* invalid;

(*b*) A rule conflicting with Article 103 of the Charter becomes inapplicable as a result of such conflict.

(43) *The principle of harmonization*. Irrespective of the special status or the designation ("fundamental") enjoyed by some norms, conflicts between rules of international law should be resolved in accordance with the principle of harmonization, that is, by bearing in mind that, in the event of a conflict, the norms should be interpreted as compatible to the extent possible. Hierarchical relations appear often in the context of other conflict resolution rules, such as those in article 30, paragraph 1, article 31, paragraph 3 (*c*), and article 41 of the 1969 Vienna Convention, or in applying the *lex specialis* or *lex posterior* principles.

Annex 12

Oxford Public International Law

Lex specialis

Dorota Marianna Banaszewska

Content type: Encyclopedia entries
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Conflict of laws — Lex specialis

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A. Legal Concept

1 The national legal systems that are in general hierarchical with regard to the relationship between legal norms have well-established relations between legal rules and principles as well as usually precise rules to decide on normative conflicts. Public international law ('PIL') is not hierarchical but horizontal, because it is based on the principle of the sovereign equality of States (→ *States, Sovereign Equality*). Although there is no single legislative will behind PIL, it is nevertheless a legal system consisting of legal principles and rules, and not just a random collection of behavioural patterns unrelated to one other, even if it does not necessarily constitute a fully coherent and comprehensive legal order. Normative conflicts are inherent to any legal system, including PIL, and as with any other legal order, PIL has its techniques of dealing with such conflicts. Some of the legal maxims known and applied within the domestic legal systems, such as *inter alia lex posterior* or *lex specialis*, enable also in PIL, the establishment of systematic and logical relationships between different norms and facilitate the finding of logical, consistent, and plausible legal conclusions. The maxim '*lex specialis derogat legi generali*' is one of the most applied techniques of dealing with a conflict between general and special legal norms. It has also recently been one of the focal points in the discussion on the → *fragmentation of international law*.

2 The maxim '*in toto iure generi per speciem derogatur et illud potissimum habetur, quod ad speciem derectum est*' ('in the whole of law, special takes precedence over genus, and anything that relates species is regarded as most important') was already to be found in Papinian's Digest in the *Corpus Iuris Civilis*. The maxim is an important part of the Western legal tradition. Hugo Grotius in his *De Iure belli ac pacis* mentioned the relationship between general and special legal norms as well as the priority of the latter. The literature, beginning with classical writers such as Pufendorf or Vattel, as well as jurisprudence, though often not mentioning its meaning, widely accept the maxim *lex specialis* as a compelling technique of solving normative conflicts within PIL (see UN ILC 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' ['Koskenniemi Report'] 61, 67, 68).

3 At the outset, it is necessary to ask what a normative conflict is. A normative conflict means that two norms are incompatible with each other, both in situations when the norms directly relate to the same subject matter, and in situations where due to the interpretation of the norms they might be applied in different ways. With regard to the logical incompatibility of legal norms two situations can be distinguished:

> (1) the norms are contradictory: that is, one norm prescribes a certain conduct, whereas the other prohibits the same conduct;
>
> (2) the norms are opposing: these are norms that have at least a partially common scope of application and prescribe actions that cannot be fulfilled at the same time (see Redelbach and others 214–15).

4 Moreover, some scholars maintain that the *lex specialis* maxim does not necessarily have to operate exclusively as a conflict-solution rule; it can also be used to resolve or prevent the simultaneous application of special and general rules when they are compatible and therefore would concur (see Zorzetto 63). However, it would be more adequate to state that the normative conflicts encompass not only the situations of incompatibility, but also the situations in which the simultaneously applicable norms concur (see, infra, three types of normative conflicts).

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5 The question of whether there is a conflict between the norms can be assessed only after the legal provisions have been interpreted and the outcome of the interpretation shows a certain level of incompatibility between the interpreted norms, or their scope of application overlaps, and although there is no antinomy, they concur. In this context a distinction can be drawn between a legal provision and a legal norm. The latter prescribes a certain conduct and has to be interpreted out of one or more legal provisions, understood as basic units of a legal text (see Redelbach and others 214–15).

6 The relationship between generality versus speciality can apply to the individual norms or to whole bodies of law. Moreover, one can distinguish conflicts within a single instrument, for example an international treaty, or between two different instruments, for instance two different applicable international treaties. Koskenniemi, while basing his conclusions on the case law, also distinguishes conflicts between a treaty and a non-treaty standard and between two non-treaty standards (see Koskenniemi Report 68). Another distinction with regard to the relationship of generality versus speciality is based on the question of how the normative conflict can be resolved. Hence, three types of normative conflicts can be distinguished:

> (1) a conflict between a general norm and a special norm that constitutes an exception to the general norm;
>
> (2) a conflict between a general norm and a special norm that constitutes an unorthodox interpretation of the general norm;
>
> (3) a conflict between two types of special norms (see Koskenniemi Report 47).

7 Although the conflict-solution techniques are assigned to several different categories by scholars, from the principles of legal logic, positive rules of law, → *general principles of law*, interpretative rules, and presumption rules to legal proverbs (see an overview in Vranes 392–93), the *lex specialis* maxim shall be understood either as a collision rule or as an interpretative rule. The maxim '*lex specialis derogat legi generali*' is a technique that deals with the aforementioned conflicts and means that if a particular matter is being regulated by a general norm and a more specific one, the special norm shall prevail over the general standard. What seems clear at first glance is somewhat more problematic on a second glance, because the exact meaning of the terms 'general' and 'specific' as well as 'prevail' is often far from clear.

8 The basic meaning of 'prevail' is a priority given to the special norm, so that the general standard is not applicable. The broader meaning, however, is that the special norm is an elaboration or specification of the more general norm, which still stays 'in the background' of the specific norm, that is: it is still applicable but constitutes only a broad framework for the specific norm. In the first understanding the maxim *lex specialis* is a classical collision rule that is intended and developed to eliminate the incompatibilities between legal norms (see Redelbach and others 195). In the second understanding, the maxim *lex specialis* has the character of either an interpretative rule (that is a rule that allows the 'translation' of a legal provision into a legal norm, see Redelbach and others 194) or a collision rule (that is a concretization or an elaboration). As regards the aforementioned concretization or elaboration, some scholars discuss this in the context of the notion *lex specialis* (see Koskenniemi Report 56). However, it is noteworthy to mention that if a general norm stays in the background of a specific norm, it would be more correct to speak of the relationship

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of complementarity between two norms, especially if they belong to two different bodies of law, which means that they complete one another.

9 The terms ‘generality’ and ‘speciality’ are features related to the contents of legal norms, but they do not themselves constitute legal rules (see Zorzetto 67). Therefore, the question of what ‘general’ and ‘specific’ mean must be answered *in concreto* while taking into account the applicability, the substantive scope, and the matter of a provision as well as the catalogue of subjects to which the norm is directed.

10 The relationship of the maxim *lex specialis* to other techniques of solving the normative conflicts has not been clarified. Nevertheless, in some situations various rules may be applicable in parallel, for instance the *lex specialis* maxim can coincide with other techniques such as the maxim *lex posterior*, according to which the later norm overrides the prior one.

B. Areas of Application and International Jurisprudence

11 A widely discussed example of the application of the *lex specialis* maxim is the relationship between → *human rights and humanitarian law*. Both Israel’s Supreme Court, sitting as the High Court of Justice, in its judgment of 11 December 2006 (*The Public Committee against Torture and others v Israel*), and the International Court of Justice (‘ICJ’) in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, stated that in situations of armed conflict, both International Humanitarian Law (‘IHL’) and International Human Rights Law (‘IHRL’) were applicable and IHL was *lex specialis* with regard to IHRL. If there is a lacuna in IHL, it can be supplemented by the rules of IHRL.

12 The ICJ came to the conclusion that the question of whether a specific loss of life constituted an arbitrary deprivation of life within the meaning of Art. 6 (1) → *International Covenant on Civil and Political Rights (1966)* could ‘only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself’ (*Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* para. 25). Therefore, both judicial bodies assume in this context that IHL and IHRL are applied in parallel or within one another, and hence the rules of IHRL on arbitrary deprivation of life, while staying in the background of IHL rules, shall be interpreted in the light of IHL targeting standards that in practice lead to the situation in which the particular IHRL rule on protection of life is set aside by a more relaxed IHL rule on the admissibility of killing under certain conditions, as defined by IHL. Although both courts label the described relationship as ‘*lex specialis*’ and, indeed, it might be understood as a *lex specialis* relationship in a very broad sense, it would be more accurate to describe it as a relationship of complementarity.

13 A normative conflict between two bodies of special law may be illustrated by the discussion on the relationship between international environmental law and international trade law. The Appellate Body Report of the WTO in the → *EC-Hormones Case* stated that whatever the status of the precautionary principle under international environmental law was, the principle was not binding for the WTO. This statement implies that the WTO, at least with regard to certain environmental law norms, concerns the applicable international trade law as *lex specialis*. From the perspective of legal logic, the consequence of such application of the *lex specialis* technique would lead to a relationship of separation and exclusivity between both bodies of law. Hence, this approach has been criticized. Whereas the aforementioned approach suggests that both bodies of law might be governed by

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different principles, it is actually extremely difficult from the practical perspective to set clear boundaries between them (see Koskenniemi Report 55).

14 The *lex specialis* rule can also be used to resolve conflicts between the general PIL and the special types of PIL, for instance Art. 55 Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001 ('ILC Articles') reads as follows:

> These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

15 Art. 55 ILC Articles constitutes, therefore, an explicit conflict-solution rule in case of a normative conflict between general PIL and secondary norms contained in special regimes of PIL (compare Simma and Pulkowski 486).

16 Given that the normative conflicts also appear within one body/regime of PIL, the *lex specialis* rule is also widely applied within one body of law in order to provide coherent internal relationships between the norms. This applies inter alia to some of the WTO provisions, such as Art. 1 (2) of Annex 2 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, which reads as follows:

> The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the Dispute Settlement Body provided for in paragraph 1 of Article 2 (referred to in this Understanding as the 'DSB'), in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.

17 Moreover, in the field of the international → *law of the sea* one can observe some attempts to establish the relationship between the specific treaties and the United Nations Convention on the Law of the Sea of 10 December 1982 ('UNCLOS') as a *lex specialis* relationship. For instance, Japan argued in the *Southern Bluefin Tuna Case (Australia and New Zealand v Japan) (Award on Jurisdiction and Admissibility*) that the Convention on the Conservation of the Southern Bluefin Tuna of 10 May 1993 was both *lex specialis* and *lex posterior* with regard to the UNCLOS and hence excluded the application of the latter. However, the Arbitration Tribunal stated that both legal instruments were applicable in parallel, because 'there is no reason why a given act of a State may not violate its obligations under more than one treaty' (at para. 38 (c)).

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18 With regard to the possible normative conflicts between treaty law and → *customary international law* that are particularly relevant within the system of PIL, it is necessary to ask what is the relationship between different sources of PIL. Art. 38 ICJ Statute contains a widely accepted list of sources of PIL but does not imply any hierarchical order between the sources. However, in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Judgment of 27 June 1986), the ICJ recognized that '[i]n 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' (at para. 274). Nevertheless, it has to be stressed that the binding force of treaty law and customary international law is identical and the priority of treaty law with regard to customary international law is rather a factual one because the States can, in principle, derogate from customary international law by establishing their mutual rights and obligations in the form of an international agreement.

19 As an example of a *lex specialis* relationship within one legal instrument, some scholars mention the relationship between Art. 2 (4) UN Charter and Art. 51 UN Charter (see Koskenniemi Report 95). If one applies a broad understanding of the *lex specialis* maxim, one might assume that Art. 51 UN Charter is an elaboration or a concretization of Art. 2 (4) UN Charter in a situation where an armed attack occurs. However, this is a rather far-reaching conclusion. The relationship between Art. 51 UN Charter and Art. 2 (4) UN Charter can be described as a simple principle-exception relationship because Art. 2 (4) UN Charter encompasses a prohibition of use of force in international relations whilst Art. 51 UN Charter contains an exception for the situations in which a State has been first a subject of an armed attack.

20 The maxim *lex specialis* is also discussed as one of the factors in the interpretation of international treaties, in particular with regard to Arts 31–33 → *Vienna Convention on the Law of Treaties (1969)* ('VCLT'). Nevertheless, it has to be recalled that although the *lex specialis* rule belongs to the widely accepted techniques of resolving conflicts between treaties, it is not explicitly mentioned in Arts 31–33 VCLT and the interpretation rules under the aforementioned provisions of the VCLT encompass a broad range of factors and collision rules that have to be taken into account.

C. Special Legal Problem: Self-Contained Regimes as *lex specialis*?

21 A matter that has been vividly discussed in the context of the fragmentation of PIL is that of self-contained regimes, that is, although there is still no general agreement on the definition thereof, legal regimes whose *lex specialis* system would in no case allow recourse to the general rules.

22 Whereas it is true that a self-contained regime that would be completely disconnected from general PIL does not exist, the notion of a self-contained regime can be understood as a particular type of *lex specialis* because the rationale is the same in both cases (see Koskenniemi Report 191–93; for a detailed outline compare Simma and Pulkowski).

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Annex 13

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

NORTH SEA CONTINENTAL SHELF CASES

(FEDERAL REPUBLIC OF GERMANY/DENMARK;
FEDERAL REPUBLIC OF GERMANY/NETHERLANDS)

JUDGMENT OF 20 FEBRUARY 1969

1969

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRES DU PLATEAU CONTINENTAL DE LA MER DU NORD

(RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE/DANEMARK;
RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE/PAYS-BAS)

ARRÊT DU 20 FÉVRIER 1969

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JUDGMENT

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(RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE/DANEMARK; RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE/PAYS-BAS)

20 FÉVRIER 1969

ARRÊT

INTERNATIONAL COURT OF JUSTICE

YEAR 1969

1969
20 February
General List:
Nos. 51 & 52

20 February 1969

NORTH SEA CONTINENTAL SHELF CASES

(FEDERAL REPUBLIC OF GERMANY/DENMARK; FEDERAL REPUBLIC OF GERMANY/NETHERLANDS)

Continental shelf areas in the North Sea—Delimitation as between adjacent States—Advantages and disadvantages of the equidistance method—Theory of just and equitable apportionment—Incompatibility of this theory with the principle of the natural appurtenance of the shelf to the coastal State—Task of the Court relates to delimitation not apportionment.

The equidistance principle as embodied in Article 6 of the 1958 Geneva Continental Shelf Convention—Non-opposability of that provision to the Federal Republic of Germany, either contractually or on the basis of conduct or estoppel.

Equidistance and the principle of natural appurtenance—Notion of closest proximity—Critique of that notion as not being entailed by the principle of appurtenance—Fundamental character of the principle of the continental shelf as being the natural prolongation of the land territory.

Legal history of delimitation—Truman Proclamation—International Law Commission—1958 Geneva Conference—Acceptance of equidistance as a purely conventional rule not reflecting or crystallizing a rule of customary international law—Effect in this respect of reservations article of Geneva Convention—Subsequent State practice insufficient to convert the conventional rule into a rule of customary international law—The opinio juris sive necessitatis, *how manifested.*

Statement of what are the applicable principles and rules of law—Delimitation by agreement, in accordance with equitable principles, taking account of all relevant circumstances, and so as to give effect to the principle of natural prolongation—Freedom of the Parties as to choice of method—Various factors relevant to the negotiation.

JUDGMENT

Present: *President* BUSTAMANTE Y RIVERO; *Vice-President* KORETSKY; *Judges* Sir Gerald FITZMAURICE, TANAKA, JESSUP, MORELLI, Sir Muhammad ZAFRULLA KHAN, PADILLA NERVO, FORSTER, GROS, AMMOUN, BENGZON, PETRÉN, LACHS, ONYEAMA; *Judges* ad hoc MOSLER, SØRENSEN; *Registrar* AQUARONE.

In the North Sea Continental Shelf cases,

between

the Federal Republic of Germany,
represented by
Dr. G. Jaenicke, Professor of International Law in the University of Frankfurt am Main,
as Agent,
assisted by
Dr. S. Oda, Professor of International Law in the University of Sendai,
as Counsel,
Dr. U. Scheuner, Professor of International Law in the University of Bonn,
Dr. E. Menzel, Professor of International Law in the University of Kiel,
Dr. Henry Herrmann, of the Massachusetts Bar, associated with Messrs. Goodwin, Procter and Hoar, Counsellors-at-Law, Boston,
Dr. H. Blomeyer-Bartenstein, Counsellor 1st Class, Ministry of Foreign Affairs,
Dr. H. D. Treviranus, Counsellor, Ministry of Foreign Affairs,
as Advisers,

and by Mr. K. Witt, Ministry of Foreign Affairs,
as Expert,

and

the Kingdom of Denmark,
represented by
Mr. Bent Jacobsen, Barrister at the Supreme Court of Denmark,
as Agent and Advocate,
assisted by
Sir Humphrey Waldock, C.M.G., O.B.E., Q.C., Professor of International Law in the University of Oxford,
as Counsel and Advocate,
H.E. Mr. S. Sandager Jeppesen, Ambassador, Ministry of Foreign Affairs,

Mr. E. Krog-Meyer, Head of The Legal Department, Ministry of Foreign Affairs,
Dr. I. Foighel, Professor in the University of Copenhagen,
Mr. E. Lauterpacht, Member of the English Bar and Lecturer in the University of Cambridge,

Mr. M. Thamsborg, Head of Department, Hydrographic Institute,

as Advisers,

and by

Mr. P. Boeg, Head of Secretariat, Ministry of Foreign Affairs,
Mr. U. Engel, Head of Section, Ministry of Foreign Affairs,

as Secretaries,

and between

the Federal Republic of Germany,

represented as indicated above,

and

the Kingdom of the Netherlands,

represented by

Professor W. Riphagen, Legal Adviser to the Ministry of Foreign Affairs, Professor of International Law at the Rotterdam School of Economics,

as Agent,

assisted by

Sir Humphrey Waldock, C.M.G., O.B.E., Q.C., Professor of International Law in the University of Oxford,

as Counsel,

Rear-Admiral W. Langeraar, Chief of the Hydrographic Department, Royal Netherlands Navy,
Mr. G. W. Maas Geesteranus, Assistant Legal Adviser to the Ministry of Foreign Affairs,
Miss F. Y. van der Wal, Assistant Legal Adviser to the Ministry of Foreign Affairs,

as Advisers,

and by

Mr. H. Rombach, Divisional Head, Hydrographic Department, Royal Netherlands Navy,

as Deputy-Adviser,

THE COURT,

composed as above,

delivers the following Judgment:

By a letter of 16 February 1967, received in the Registry on 20 February 1967, the Minister for Foreign Affairs of the Netherlands transmitted to the Registrar:

(a) an original copy, signed at Bonn on 2 February 1967 for the Governments of Denmark and the Federal Republic of Germany, of a Special Agreement for the submission to the Court of a difference between those two States concerning the delimitation, as between them, of the continental shelf in the North Sea;

(b) an original copy, signed at Bonn on 2 February 1967 for the Governments of the Federal Republic of Germany and the Netherlands, of a Special Agreement for the submission to the Court of a difference between those

two States concerning the delimitation, as between them, of the continental shelf in the North Sea;

(c) an original copy, signed at Bonn on 2 February 1967 for the three Governments aforementioned, of a Protocol relating to certain procedural questions arising from the above-mentioned Special Agreements.

Articles 1 to 3 of the Special Agreement between the Governments of Denmark and the Federal Republic of Germany are as follows:

"*Article 1*

(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?

(2) The Governments of the Kingdom of Denmark and of the Federal Republic of Germany shall delimit the continental shelf in the North Sea as between their countries by agreement in pursuance of the decision requested from the International Court of Justice.

Article 2

(1) The Parties shall present their written pleadings to the Court in the order stated below:

1. a Memorial of the Federal Republic of Germany to be submitted within six months from the notification of the present Agreement to the Court;
2. a Counter-Memorial of the Kingdom of Denmark to be submitted within six months from the delivery of the German Memorial;
3. a German Reply followed by a Danish Rejoinder to be delivered within such time-limits as the Court may order.

(2) Additional written pleadings may be presented if this is jointly proposed by the Parties and considered by the Court to be appropriate to the case and the circumstances.

(3) The foregoing order of presentation is without prejudice to any question of burden of proof which might arise.

Article 3

The present Agreement shall enter into force on the day of signature thereof."

Articles 1 to 3 of the Special Agreement between the Governments of the Federal Republic of Germany and the Netherlands are as follows:

"*Article 1*

(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 1 December 1964?

(2) The Governments of the Federal Republic of Germany and of the Kingdom of the Netherlands shall delimit the continental shelf of the North Sea as between their countries by agreement in pursuance of the decision requested from the International Court of Justice.

Article 2

(1) The Parties shall present their written pleadings to the Court in the order stated below:

1. a Memorial of the Federal Republic of Germany to be submitted within six months from the notification of the present Agreement to the Court;
2. a Counter-Memorial of the Kingdom of the Netherlands to be submitted within six months from the delivery of the German Memorial;
3. a German Reply followed by a Netherlands Rejoinder to be delivered within such time-limits as the Court may order.

(2) Additional written pleadings may be presented if this is jointly proposed by the Parties and considered by the Court to be appropriate to the case and the circumstances.

(3) The foregoing order of presentation is without prejudice to any question of burden of proof which might arise.

Article 3

The present Agreement shall enter into force on the day of signature thereof."

The Protocol between the three Governments reads as follows:

"Protocol

At the signature of the Special Agreement of today's date between the Government of the Federal Republic of Germany and the Governments of the Kingdom of Denmark and the Kingdom of the Netherlands respectively, on the submission to the International Court of Justice of the differences between the Parties concerning the delimitation of the continental shelf in the North Sea, the three Governments wish to state their agreement on the following:

1. The Government of the Kingdom of the Netherlands will, within a month from the signature, notify the two Special Agreements together with the present Protocol to the International Court of Justice in accordance with Article 40, paragraph 1, of the Statute of the Court.

2. After the notification in accordance with item 1 above the Parties will ask the Court to join the two cases.

3. The three Governments agree that, for the purpose of appointing a judge *ad hoc*, the Governments of the Kingdom of Denmark and the Kingdom of the Netherlands shall be considered parties in the same interest within the meaning of Article 31, paragraph 5, of the Statute of the Court."

Pursuant to Article 33, paragraph 2, of the Rules of Court, the Registrar at once informed the Governments of Denmark and the Federal Republic of Germany of the filing of the Special Agreements. In accordance with Article 34, paragraph 2, of the Rules of Court, copies of the Special Agreements were transmitted to the other Members of the United Nations and to other non-member States entitled to appear before the Court.

By Orders of 8 March 1967, taking into account the agreement reached between the Parties, 21 August 1967 and 20 February 1968 were fixed respectively as the time-limits for the filing of the Memorials and Counter-Memorials. These pleadings were filed within the time-limits prescribed. By Orders of 1 March 1968, 31 May and 30 August 1968 were fixed respectively as the time-limits for the filing of the Replies and Rejoinders.

Pursuant to Article 31, paragraph 3, of the Statute of the Court, the Government of the Federal Republic of Germany chose Dr. Hermann Mosler, Professor of International Law in the University of Heidelberg, to sit as Judge *ad hoc* in both cases. Referring to the agreement concluded between them according to which they should be considered parties in the same interest within the meaning of Article 31, paragraph 5, of the Statute, the Governments of Denmark and the Netherlands chose Dr. Max Sørensen, Professor of International Law in the University of Aarhus, to sit as Judge *ad hoc* in both cases.

By an Order of 26 April 1968, considering that the Governments of Denmark and the Netherlands were, so far as the choice of a Judge *ad hoc* was concerned, to be reckoned as one Party only, the Court found that those two Governments were in the same interest, joined the proceedings in the two cases and, in modification of the directions given in the Orders of 1 March 1968, fixed 30 August 1968 as the time-limit for the filing of a Common Rejoinder for Denmark and the Netherlands.

The Replies and the Common Rejoinder having been filed within the time-limits prescribed, the cases were ready for hearing on 30 August 1968.

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 Brazil, Canada, Chile, Colombia, Ecuador, Finland, France, Honduras, Iran, Norway, Sweden, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela. Pursuant to paragraph 3 of the same Article, those pleadings and annexed documents were, with the consent of the Parties, made accessible to the public as from the date of the opening of the oral proceedings.

Hearings were held from 23 to 25 October, from 28 October to 1 November, and on 4, 5, 7, 8 and 11 November 1968, in the course of which the Court heard, in the order agreed between the Parties and accepted by the Court, the oral arguments and replies of Professor Jaenicke, Agent, and Professor Oda, Counsel, on behalf of the Government of the Federal Republic of Germany; and of Mr. Jacobsen and Professor Riphagen, Agents, and Sir Humphrey Waldock, Counsel, on behalf of the Governments of Denmark and the Netherlands.

In the course of the written proceedings, the following Submissions were presented by the Parties:

On behalf of the Government of the Federal Republic of Germany,

in the Memorials:

"May it please the Court to recognize and declare:

1. The delimitation of the continental shelf between the Parties in the North Sea is governed by the principle that each coastal State is entitled to a just and equitable share.

2. The method of determining boundaries of the continental shelf in such a way that every point of the boundary is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured (equidistance method), is not a rule of customary international law and is therefore not applicable as such between the Parties.

3. The equidistance method cannot be employed for the delimitation of the continental shelf unless it is established by agreement, arbitration, or otherwise, that it will achieve a just and equitable apportionment of the continental shelf among the States concerned.

4. As to the delimitation of the continental shelf between the Parties in the North Sea, the equidistance method cannot find application, since it would not apportion a just and equitable share to the Federal Republic of Germany";

in the Replies:

"May it please the Court to recognize and declare:

1. The delimitation of the continental shelf between the Parties in the North Sea is governed by the principle that each coastal State is entitled to a just and equitable share.

2. *(a)* The method of determining boundaries of the continental shelf in such a way that every point of the boundary is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured (equidistance method) is not a rule of customary international law.

(b) The rule contained in the second sentence of paragraph 2 of Article 6 of the Continental Shelf Convention, prescribing that in the absence of agreement, and unless another boundary is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance, has not become customary international law.

(c) Even if the rule under *(b)* would be applicable between the Parties, special circumstances within the meaning of that rule would exclude the application of the equidistance method in the present case.

3. *(a)* The equidistance method cannot be used for the delimitation of the continental shelf unless it is established by agreement, arbitration, or otherwise, that it will achieve a just and equitable apportionment of the continental shelf among the States concerned.

(b) As to the delimitation of the continental shelf between the Parties in the North Sea, the Kingdom of Denmark and the Kingdom of the Netherlands cannot rely on the application of the equidistance method, since it would not lead to an equitable apportionment.

4. Consequently, the delimitation of the continental shelf in the North Sea between the Parties is a matter which has to be settled by agreement. This agreement should apportion a just and equitable share to each of the Parties in the light of all factors relevant in this respect."

On behalf of the Government of Denmark,

in its Counter-Memorial:

"Considering that, as noted in the Compromis, disagreement exists

between the Parties which could not be settled by detailed negotiations, regarding the further course of the boundary beyond the partial boundary determined by the Convention of 9 June 1965;

Considering that under the terms of Article 1, paragraph 1, of the Compromis the task entrusted to the Court is not to formulate a basis for the delimitation of the continental shelf in the North Sea as between the Parties *ex aequo et bono*, but to decide 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;

In view of the facts and arguments presented in Parts I and II of this Counter-Memorial,

May it please the Court to adjudge and declare:

1. The delimitation as between the Parties of the said areas of the continental shelf in the North Sea is governed by the principles and rules of international law which are expressed in Article 6, paragraph 2, of the Geneva Convention of 1958 on the Continental Shelf.

2. The Parties being in disagreement, unless another boundary is justified by special circumstances, the boundary between them is to be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

3. Special circumstances which justify another boundary line not having been established, the boundary between the Parties is to be determined by application of the principle of equidistance indicated in the preceding Submission."

On behalf of the Government of the Netherlands,

in its Counter-Memorial:

"Considering that, as noted in the Compromis, disagreement exists between the Parties which could not be settled by detailed negotiations, regarding the further course of the boundary beyond the partial boundary determined by the Treaty of 1 December 1964;

Considering that under the terms of Article 1, paragraph 1, of the Compromis the task entrusted to the Court is not to formulate a basis for the delimitation of the continental shelf in the North Sea as between the Parties *ex aequo et bono*, but to decide 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 Treaty of 1 December 1964;

In view of the facts and arguments presented in Parts I and II of this Counter-Memorial,

May it please the Court to adjudge and declare:

1. The delimitation as between the Parties of the said areas of the continental shelf in the North Sea is governed by the principles and rules of international law which are expressed in Article 6, paragraph 2, of the Geneva Convention of 1958 on the Continental Shelf.

2. The Parties being in disagreement, unless another boundary is justified by special circumstances, the boundary between them is to be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

3. Special circumstances which justify another boundary line not having been established, the boundary between the Parties is to be determined by application of the principle of equidistance indicated in the preceding Submission."

On behalf of the Governments of Denmark and the Netherlands,

in the Common Rejoinder:

"May it further please the Court to adjudge and declare:

4. If the principles and rules of international law mentioned in Submission 1 of the respective Counter-Memorials are not applicable as between the Parties, the boundary is to be determined between the Parties on the basis of the exclusive rights of each Party over the continental shelf adjacent to its coast and of the principle that the boundary is to leave to each Party every point of the continental shelf which lies nearer to its coast than to the coast of the other Party."

In the course of the oral proceedings, the following Submissions were presented by the Parties:

On behalf of the Government of the Federal Republic of Germany,

at the hearing on 5 November 1968:

"1. The delimitation of the continental shelf between the Parties in the North Sea is governed by the principle that each coastal State is entitled to a just and equitable share.

2. *(a)* The method of determining boundaries of the continental shelf in such a way that every point of the boundary is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured (equidistance method) is not a rule of customary international law.

(b) The rule contained in the second sentence of paragraph 2 of Article 6 of the Continental Shelf Convention, prescribing that in the absence of agreement, and unless another boundary is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance, has not become customary international law.

(c) Even if the rule under *(b)* would be applicable between the Parties, special circumstances within the meaning of that rule would exclude the application of the equidistance method in the present case.

3. *(a)* The equidistance method cannot be used for the delimitation of the continental shelf unless it is established by agreement, arbitration, or otherwise, that it will achieve a just and equitable apportionment of the continental shelf among the States concerned.

(b) As to the delimitation of the continental shelf between the Parties in the North Sea, the Kingdom of Denmark and the Kingdom of the Netherlands cannot rely on the application of the equidistance method, since it would not lead to an equitable apportionment.

4. Consequently, the delimitation of the continental shelf, on which the Parties must agree pursuant to paragraph 2 of Article 1 of the Special Agreement, is determined by the principle of the just and equitable share, based on criteria relevant to the particular geographical situation in the North Sea."

On behalf of the Government of Denmark,

at the hearing on 11 November 1968, Counsel for that Government stated that it confirmed the Submissions presented in its Counter-Memorial and in the Common Rejoinder and that those Submissions were identical *mutatis mutandis* with those of the Government of the Netherlands.

On behalf of the Government of the Netherlands,

at the hearing on 11 November 1968:

"With regard to the delimitation as between the Federal Republic of Germany and the Kingdom of the Netherlands of the boundary of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the Convention of 1 December 1964.

May it please the Court to adjudge and declare:

1. The delimitation as between the Parties of the said areas of the continental shelf in the North Sea is governed by the principles and rules of international law which are expressed in Article 6, paragraph 2, of the Geneva Convention of 1958 on the Continental Shelf.

2. The Parties being in disagreement, unless another boundary is justified by special circumstances, the boundary between them is to be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

3. Special circumstances which justify another boundary line not having been established, the boundary between the Parties is to be determined by application of the principle of equidistance indicated in the preceding Submission.

4. If the principles and rules of international law mentioned in Submission 1 are not applicable as between the Parties, the boundary is to be determined between the Parties on the basis of the exclusive rights of each Party over the continental shelf adjacent to its coast and of the principle that the boundary is to leave to each Party every point of the continental shelf which lies nearer to its coast than to the coast of the other Party."

* * * * *

1. By the two Special Agreements respectively concluded between the Kingdom of Denmark and the Federal Republic of Germany, and between the Federal Republic and the Kingdom of the Netherlands, the Parties have submitted to the Court certain differences concerning "the delimita-

tion as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them"—with the exception of those areas, situated in the immediate vicinity of the coast, which have already been the subject of delimitation by two agreements dated 1 December 1964, and 9 June 1965, concluded in the one case between the Federal Republic and the Kingdom of the Netherlands, and in the other between the Federal Republic and the Kingdom of Denmark.

2. It is in respect of the delimitation of the continental shelf areas lying beyond and to seaward of those affected by the partial boundaries thus established, that the Court is requested by each of the two Special Agreements to decide what are the applicable "principles and rules of international law". The Court is not asked actually to delimit the further boundaries which will be involved, this task being reserved by the Special Agreements to the Parties, which undertake to effect such a delimitation "by agreement in pursuance of the decision requested from the ... Court"—that is to say on the basis of, and in accordance with, the principles and rules of international law found by the Court to be applicable.

*

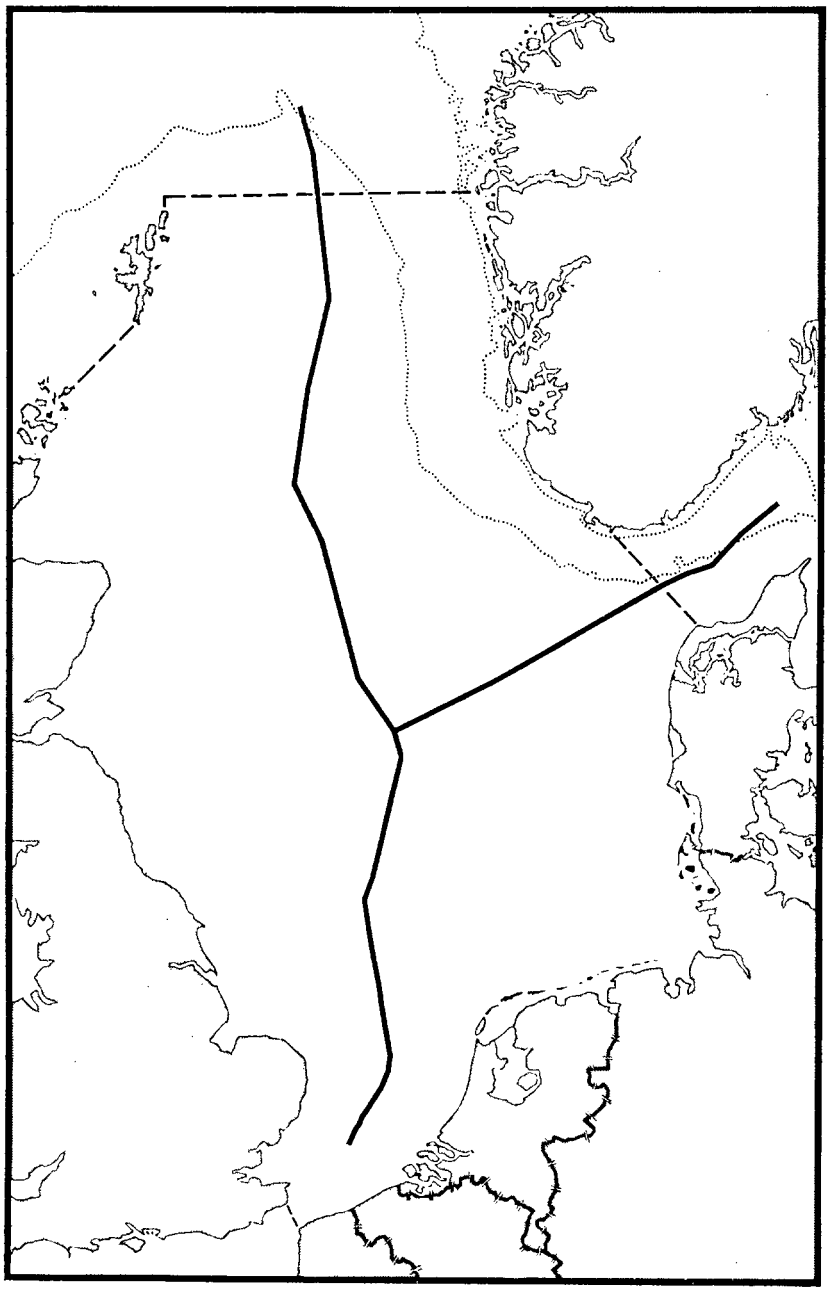
3. As described in Article 4 of the North Sea Policing of Fisheries Convention of 6 May 1882, the North Sea, which lies between continental Europe and Great Britain in the east-west direction, is roughly oval in shape and stretches from the straits of Dover northwards to a parallel drawn between a point immediately north of the Shetland Islands and the mouth of the Sogne Fiord in Norway, about 75 kilometres above Bergen, beyond which is the North Atlantic Ocean. In the extreme north-west, it is bounded by a line connecting the Orkney and Shetland island groups; while on its north-eastern side, the line separating it from the entrances to the Baltic Sea lies between Hanstholm at the north-west point of Denmark, and Lindesnes at the southern tip of Norway. Eastward of this line the Skagerrak begins. Thus, the North Sea has to some extent the general look of an enclosed sea without actually being one. Round its shores are situated, on its eastern side and starting from the north, Norway, Denmark, the Federal Republic of Germany, the Netherlands, Belgium and France; while the whole western side is taken up by Great Britain, together with the island groups of the Orkneys and Shetlands. From this it will be seen that the continental shelf of the Federal Republic is situated between those of Denmark and the Netherlands.

4. The waters of the North Sea are shallow, and the whole seabed consists of continental shelf at a depth of less than 200 metres, except for the formation known as the Norwegian Trough, a belt of water 200-650 metres deep, fringing the southern and south-western coasts of Norway to a width averaging about 80-100 kilometres. Much the greater part of this continental shelf has already been the subject of delimitation

by a series of agreements concluded between the United Kingdom (which, as stated, lies along the whole western side of it) and certain of the States on the eastern side, namely Norway, Denmark and the Netherlands. These three delimitations were carried out by the drawing of what are known as "median lines" which, for immediate present purposes, may be described as boundaries drawn between the continental shelf areas of "opposite" States, dividing the intervening spaces equally between them. These lines are shown on Map 1 on page 15, together with a similar line, also established by agreement, drawn between the shelf areas of Norway and Denmark. Theoretically it would be possible also to draw the following median lines in the North Sea, namely United Kingdom/Federal Republic (which would lie east of the present line United Kingdom/Norway-Denmark-Netherlands); Norway/Federal Republic (which would lie south of the present line Norway/Denmark); and Norway/Netherlands (which would lie north of whatever line is eventually determined to be the continental shelf boundary between the Federal Republic and the Netherlands). Even if these median lines were drawn however, the question would arise whether the United Kingdom, Norway and the Netherlands could take advantage of them as against the parties to the existing delimitations, since these lines would, it seems, in each case lie beyond (i.e., respectively to the east, south and north of) the boundaries already effective under the existing agreements at present in force. This is illustrated by Map 2 on page 15.

5. In addition to the partial boundary lines Federal Republic/Denmark and Federal Republic/Netherlands, which, as mentioned in paragraph 1 above, were respectively established by the agreements of 9 June 1965 and 1 December 1964, and which are shown as lines A-B and C-D on Map 3 on page 16, another line has been drawn in this area, namely that represented by the line E-F on that map. This line, which divides areas respectively claimed (to the north of it) by Denmark, and (to the south of it) by the Netherlands, is the outcome of an agreement between those two countries dated 31 March 1966, reflecting the view taken by them as to what are the correct boundary lines between their respective continental shelf areas and that of the Federal Republic, beyond the partial boundaries A-B and C-D already drawn. These further and unagreed boundaries to seaward, are shown on Map 3 by means of the dotted lines B-E and D-E. They are the lines, the correctness of which in law the Court is in effect, though indirectly, called upon to determine. Also shown on Map 3 are the two pecked lines B-F and D-F, representing approximately the boundaries which the Federal Republic would have wished to obtain in the course of the negotiations that took place between the Federal Republic and the other two Parties prior to the submission of the matter to the Court. The nature of these negotiations must now be described.

*



Map 1

(See paragraphs 3 and 4)

200 metres line .....

Limits fixed by the 1882 Convention — — — — — — — —

Median lines ————————

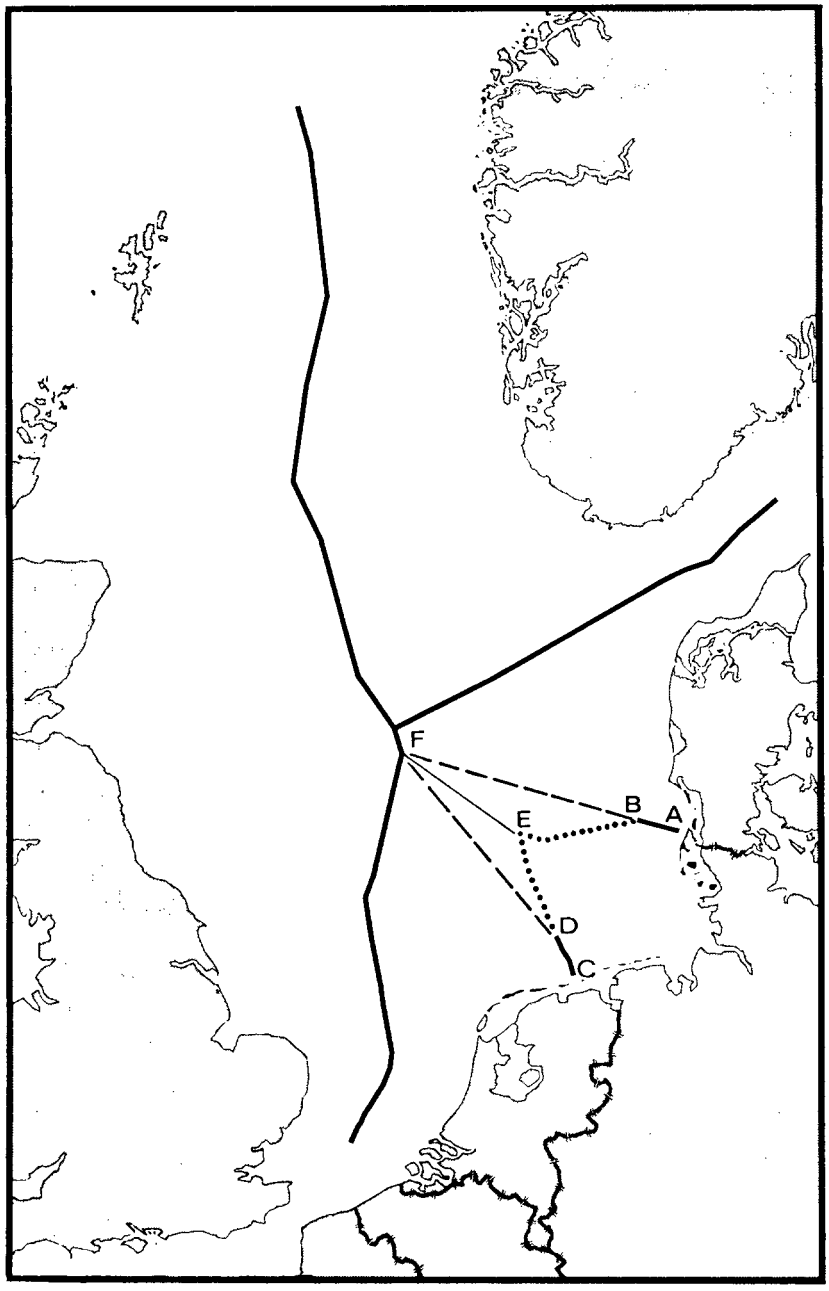
Carte 1

(Voir paragraphes 3 et 4)

Isobathe des 200 mètres

Limites définies par la convention de 1882

Lignes médianes



Map 3
(See paragraphs 5-9)

The maps in the present Judgment were prepared on the basis of documents submitted to the Court by the Parties, and their sole purpose is to provide a visual illustration of the paragraphs of the Judgment which refer to them.

Carte 3
(Voir paragraphes 5-9)

Les cartes jointes au présent arrêt ont été établies d'après les documents soumis à la Cour par les Parties et ont pour seul objet d'illustrer graphiquement les paragraphes de l'arrêt qui s'y réfèrent.

6. Under the agreements of December 1964 and June 1965, already mentioned, the partial boundaries represented by the map lines A-B and C-D had, according to the information furnished to the Court by the Parties, been drawn mainly by application of the principle of equidistance, using that term as denoting the abstract concept of equidistance. A line so drawn, known as an "equidistance line", may be described as one which leaves to each of the parties concerned all those portions of the continental shelf that are nearer to a point on its own coast than they are to any point on the coast of the other party. An equidistance line may consist either of a "median" line between "opposite" States, or of a "lateral" line between "adjacent" States. In certain geographical configurations of which the Parties furnished examples, a given equidistance line may partake in varying degree of the nature both of a median and of a lateral line. There exists nevertheless a distinction to be drawn between the two, which will be mentioned in its place.

7. The further negotiations between the Parties for the prolongation of the partial boundaries broke down mainly because Denmark and the Netherlands respectively wished this prolongation also to be effected on the basis of the equidistance principle,—and this would have resulted in the dotted lines B-E and D-E, shown on Map 3; whereas the Federal Republic considered that such an outcome would be inequitable because it would unduly curtail what the Republic believed should be its proper share of continental shelf area, on the basis of proportionality to the length of its North Sea coastline. It will be observed that neither of the lines in question, taken by itself, would produce this effect, but only both of them together—an element regarded by Denmark and the Netherlands as irrelevant to what they viewed as being two separate and self-contained delimitations, each of which should be carried out without reference to the other.

8. The reason for the result that would be produced by the two lines B-E and D-E, taken conjointly, is that in the case of a concave or recessing coast such as that of the Federal Republic on the North Sea, the effect of the use of the equidistance method is to pull the line of the boundary inwards, in the direction of the concavity. Consequently, where two such lines are drawn at different points on a concave coast, they will, if the curvature is pronounced, inevitably meet at a relatively short distance from the coast, thus causing the continental shelf area they enclose, to take the form approximately of a triangle with its apex to seaward and, as it was put on behalf of the Federal Republic, "cutting off" the coastal State from the further areas of the continental shelf outside of and beyond this triangle. The effect of concavity could of course equally be produced for a country with a straight coastline if the coasts of adjacent countries protruded immediately on either side of it. In contrast to this, the effect of coastal projections, or of convex or outwardly curving coasts such as are, to a moderate extent, those of Denmark and the Netherlands, is to cause boundary lines drawn on an equidistance basis to leave the

coast on divergent courses, thus having a widening tendency on the area of continental shelf off that coast. These two distinct effects, which are shown in sketches I-III to be found on page 16, are directly attributable to the use of the equidistance method of delimiting continental shelf boundaries off recessing or projecting coasts. It goes without saying that on these types of coasts the equidistance method produces exactly similar effects in the delimitation of the lateral boundaries of the territorial sea of the States concerned. However, owing to the very close proximity of such waters to the coasts concerned, these effects are much less marked and may be very slight,—and there are other aspects involved, which will be considered in their place. It will suffice to mention here that, for instance, a deviation from a line drawn perpendicular to the general direction of the coast, of only 5 kilometres, at a distance of about 5 kilometres from that coast, will grow into one of over 30 at a distance of over 100 kilometres.

9. After the negotiations, separately held between the Federal Republic and the other two Parties respectively, had in each case, for the reasons given in the two preceding paragraphs, failed to result in any agreement about the delimitation of the boundary extending beyond the partial one already agreed, tripartite talks between all the Parties took place in The Hague in February-March 1966, in Bonn in May and again in Copenhagen in August. These also proving fruitless, it was then decided to submit the matter to the Court. In the meantime the Governments of Denmark and the Netherlands had, by means of the agreement of 31 March 1966, already referred to (paragraph 5), proceeded to a delimitation as between themselves of the continental shelf areas lying between the apex of the triangle notionally ascribed by them to the Federal Republic (point E on Map 3) and the median line already drawn in the North Sea, by means of a boundary drawn on equidistance principles, meeting that line at the point marked F on Map 3. On 25 May 1966, the Government of the Federal Republic, taking the view that this delimitation was *res inter alios acta*, notified the Governments of Denmark and the Netherlands, by means of an aide-mémoire, that the agreement thus concluded could not "have any effect on the question of the delimitation of the German-Netherlands or the German-Danish parts of the continental shelf in the North Sea".

10. In pursuance of the tripartite arrangements that had been made at Bonn and Copenhagen, as described in the preceding paragraph, Special Agreements for the submission to the Court of the differences involved were initialled in August 1966 and signed on 2 February 1967. By a tripartite Protocol signed the same day it was provided *(a)* that the Government of the Kingdom of the Netherlands would notify the two Special Agreements to the Court, in accordance with Article 40, paragraph 1, of the Court's Statute, together with the text of the Protocol itself; *(b)* that after such notification, the Parties would ask the Court to join the two cases; and *(c)* that for the purpose of the appointment

of a judge *ad hoc*, the Kingdoms of Denmark and the Netherlands should be considered as being in the same interest within the meaning of Article 31, paragraph 5, of the Court's Statute. Following upon these communications, duly made to it in the implementation of the Protocol, the Court, by an Order dated 26 April 1968, declared Denmark and the Netherlands to be in the same interest, and joined the proceedings in the two cases.

11. Although the proceedings have thus been joined, the cases themselves remain separate, at least in the sense that they relate to different areas of the North Sea continental shelf, and that there is no *a priori* reason why the Court must reach identical conclusions in regard to them,—if for instance geographical features present in the one case were not present in the other. At the same time, the legal arguments presented on behalf of Denmark and the Netherlands, both before and since the joinder, have been substantially identical, apart from certain matters of detail, and have been presented either in common or in close co-operation. To this extent therefore, the two cases may be treated as one; and it must be noted that although two separate delimitations are in question, they involve—indeed actually give rise to—a single situation. The fact that the question of either of these delimitations might have arisen and called for settlement separately in point of time, does not alter the character of the problem with which the Court is actually faced, having regard to the manner in which the Parties themselves have brought the matter before it, as described in the two preceding paragraphs.

12. In conclusion as to the facts, it should be noted that the Federal Republic has formally reserved its position, not only in regard to the Danish-Netherlands delimitation of the line E-F (Map 3), as noted in paragraph 9, but also in regard to the delimitations United Kingdom/Denmark and United Kingdom/Netherlands mentioned in paragraph 4. In both the latter cases the Government of the Federal Republic pointed out to all the Governments concerned that the question of the lateral delimitation of the continental shelf in the North Sea between the Federal Republic and the Kingdoms of Denmark and the Netherlands was still outstanding and could not be prejudiced by the agreements concluded between those two countries and the United Kingdom.

* * *

13. Such are the events and geographical facts in the light of which the Court has to determine what principles and rules of international law are applicable to the delimitation of the areas of continental shelf involved. On this question the Parties have taken up fundamentally different positions. On behalf of the Kingdoms of Denmark and the Netherlands it is contended that the whole matter is governed by a

mandatory rule of law which, reflecting the language of Article 6 of the Convention on the Continental Shelf concluded at Geneva on 29 April 1958, was designated by them as the "equidistance-special circumstances" rule. According to this contention, "equidistance" is not merely a method of the cartographical construction of a boundary line, but the essential element in a rule of law which may be stated as follows,—namely that in the absence of agreement by the Parties to employ another method or to proceed to a delimitation on an *ad hoc* basis, all continental shelf boundaries must be drawn by means of an equidistance line, unless, or except to the extent to which, "special circumstances" are recognized to exist,—an equidistance line being, it will be recalled, a line every point on which is the same distance away from whatever point is nearest to it on the coast of each of the countries concerned—or rather, strictly, on the baseline of the territorial sea along that coast. As regards what constitutes "special circumstances", all that need be said at this stage is that according to the view put forward on behalf of Denmark and the Netherlands, the configuration of the German North Sea coast, its recessive character, and the fact that it makes nearly a right-angled bend in mid-course, would not of itself constitute, for either of the two boundary lines concerned, a special circumstance calling for or warranting a departure from the equidistance method of delimitation: only the presence of some special feature, minor in itself—such as an islet or small protuberance—but so placed as to produce a disproportionately distorting effect on an otherwise acceptable boundary line would, so it was claimed, possess this character.

14. These various contentions, together with the view that a rule of equidistance-special circumstances is binding on the Federal Republic, are founded by Denmark and the Netherlands partly on the 1958 Geneva Convention on the Continental Shelf already mentioned (preceding paragraph), and partly on general considerations of law relating to the continental shelf, lying outside this Convention. Similar considerations are equally put forward to found the contention that the delimitation on an equidistance basis of the line E-F (Map 3) by the Netherlands-Danish agreement of 31 March 1966 (paragraph 5 above) is valid *erga omnes*, and must be respected by the Federal Republic unless it can demonstrate the existence of juridically relevant "special circumstances".

15. The Federal Republic, for its part, while recognizing the utility of equidistance as a method of delimitation, and that this method can in many cases be employed appropriately and with advantage, denies its obligatory character for States not parties to the Geneva Convention, and contends that the correct rule to be applied, at any rate in such circumstances as those of the North Sea, is one according to which each of the States concerned should have a "just and equitable share" of the available continental shelf, in proportion to the length of its coastline or sea-frontage. It was also contended on behalf of the Federal Republic

that in a sea shaped as is the North Sea, the whole bed of which, except for the Norwegian Trough, consists of continental shelf at a depth of less than 200 metres, and where the situation of the circumjacent States causes a natural convergence of their respective continental shelf areas, towards a central point situated on the median line of the whole seabed —or at any rate in those localities where this is the case—each of the States concerned is entitled to a continental shelf area extending up to this central point (in effect a sector), or at least extending to the median line at some point or other. In this way the "cut-off" effect, of which the Federal Republic complains, caused, as explained in paragraph 8, by the drawing of equidistance lines at the two ends of an inward curving or recessed coast, would be avoided. As a means of giving effect to these ideas, the Federal Republic proposed the method of the "coastal front", or façade, constituted by a straight baseline joining these ends, upon which the necessary geometrical constructions would be erected.

16. Alternatively, the Federal Republic claimed that if, contrary to its main contention, the equidistance method was held to be applicable, then the configuration of the German North Sea coast constituted a "special circumstance" such as to justify a departure from that method of delimitation in this particular case.

17. In putting forward these contentions, it was stressed on behalf of the Federal Republic that the claim for a just and equitable share did not in any way involve asking the Court to give a decision *ex aequo et bono* (which, having regard to the terms of paragraph 2 of Article 38 of the Court's Statute, would not be possible without the consent of the Parties),—for the principle of the just and equitable share was one of the recognized general principles of law which, by virtue of paragraph 1 *(c)* of the same Article, the Court was entitled to apply as a matter of the *justitia distributiva* which entered into all legal systems. It appeared, moreover, that whatever its underlying motivation, the claim of the Federal Republic was, at least ostensibly, to a just and equitable share of the space involved, rather than to a share of the natural resources as such, mineral or other, to be found in it, the location of which could not in any case be fully ascertained at present. On the subject of location the Court has in fact received some, though not complete information, but has not thought it necessary to pursue the matter, since the question of natural resources is less one of delimitation than of eventual exploitation.

*

18. It will be convenient to consider first the contentions put forward on behalf of the Federal Republic. The Court does not feel able to accept them—at least in the particular form they have taken. It considers

that, having regard both to the language of the Special Agreements and to more general considerations of law relating to the régime of the continental shelf, its task in the present proceedings relates essentially to the delimitation and not the apportionment of the areas concerned, or their division into converging sectors. Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area. Delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share of a previously undelimited area, even though in a number of cases the results may be comparable, or even identical.

19. More important is the fact that the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it,—namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabe ' and exploiting its natural resources. In short, there is here an inhere t right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised. To echo the language of the Geneva Convention, it is "exclusive" in the sense that if the coastal State does not choose to explore or exploit the areas of shelf appertaining to it, that is its own affair, but no one else may do so without its express consent.

20. It follows that even in such a situation as that of the North Sea, the notion of apportioning an as yet undelimited area, considered as a whole (which underlies the doctrine of the just and equitable share), is quite foreign to, and inconsistent with, the basic concept of continental shelf entitlement, according to which the process of delimitation is essentially one of drawing a boundary line between areas which already appertain to one or other of the States affected. The delimitation itself must indeed be equitably effected, but it cannot have as its object the awarding of an equitable share, or indeed of a share, as such, at all,—for the fundamental concept involved does not admit of there being anything undivided to share out. Evidently any dispute about boundaries must involve that there is a disputed marginal or fringe area, to which both parties are laying claim, so that any delimitation of it which does not leave it wholly to one of the parties will in practice divide it between them in certain shares, or operate as if such a division had been made.

But this does not mean that there has been an apportionment of something that previously consisted of an integral, still less an undivided whole.

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21. The Court will now turn to the contentions advanced on behalf of Denmark and the Netherlands. Their general character has already been indicated in paragraphs 13 and 14: the most convenient way of dealing with them will be on the basis of the following question—namely, does the equidistance-special circumstances principle constitute a mandatory rule, either on a conventional or on a customary international law basis, in such a way as to govern any delimitation of the North Sea continental shelf areas between the Federal Republic and the Kingdoms of Denmark and the Netherlands respectively? Another and shorter way of formulating the question would be to ask whether, in any delimitation of these areas, the Federal Republic is under a legal obligation to accept the application of the equidistance-special circumstances principle.

22. Particular attention is directed to the use, in the foregoing formulations, of the terms "mandatory" and "obligation". It has never been doubted that the equidistance method of delimitation is a very convenient one, the use of which is indicated in a considerable number of cases. It constitutes a method capable of being employed in almost all circumstances, however singular the results might sometimes be, and has the virtue that if necessary,—if for instance, the Parties are unable to enter into negotiations,—any cartographer can *de facto* trace such a boundary on the appropriate maps and charts, and those traced by competent cartographers will for all practical purposes agree.

23. In short, it would probably be true to say that no other method of delimitation has the same combination of practical convenience and certainty of application. Yet these factors do not suffice of themselves to convert what is a method into a rule of law, making the acceptance of the results of using that method obligatory in all cases in which the parties do not agree otherwise, or in which "special circumstances" cannot be shown to exist. Juridically, if there is such a rule, it must draw its legal force from other factors than the existence of these advantages, important though they may be. It should also be noticed that the counterpart of this conclusion is no less valid, and that the practical advantages of the equidistance method would continue to exist whether its employment were obligatory or not.

24. It would however be ignoring realities if it were not noted at the same time that the use of this method, partly for the reasons given in paragraph 8 above and partly for reasons that are best appreciated by reference to the many maps and diagrams furnished by both sides in the course of the written and oral proceedings, can under certain circumstances produce results that appear on the face of them to be extraordinary, unnatural or unreasonable. It is basically this fact which un-

derlies the present proceedings. The plea that, however this may be, the results can never be inequitable, because the equidistance principle is by definition an equitable principle of delimitation, involves a postulate that clearly begs the whole question at issue.

* * *

25. The Court now turns to the legal position regarding the equidistance method. The first question to be considered is whether the 1958 Geneva Convention on the Continental Shelf is binding for all the Parties in this case—that is to say whether, as contended by Denmark and the Netherlands, the use of this method is rendered obligatory for the present delimitations by virtue of the delimitations provision (Article 6) of that instrument, according to the conditions laid down in it. Clearly, if this is so, then the provisions of the Convention will prevail in the relations between the Parties, and would take precedence of any rules having a more general character, or derived from another source. On that basis the Court's reply to the question put to it in the Special Agreements would necessarily be to the effect that as between the Parties the relevant provisions of the Convention represented the applicable rules of law—that is to say constituted the law for the Parties—and its sole remaining task would be to interpret those provisions, in so far as their meaning was disputed or appeared to be uncertain, and to apply them to the particular circumstances involved.

26. The relevant provisions of Article 6 of the Geneva Convention, paragraph 2 of which Denmark and the Netherlands contend not only to be applicable as a conventional rule, but also to represent the accepted rule of general international law on the subject of continental shelf delimitation. as it exists independently of the Convention, read as follows:

> "1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest point of the baselines from which the breadth of the territorial sea of each State is measured.
>
> 2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured."

The Convention received 46 signatures and, up-to-date, there have been 39 ratifications or accessions. It came into force on 10 June 1964, having received the 22 ratifications or accessions required for that purpose (Article 11), and was therefore in force at the time when the various delimitations of continental shelf boundaries described earlier (paragraphs 1 and 5) took place between the Parties. But, under the formal provisions of the Convention, it is in force for any individual State only in so far as, having signed it within the time-limit provided for that purpose, that State has also subsequently ratified it; or, not having signed within that time-limit, has subsequently acceded to the Convention. Denmark and the Netherlands have both signed and ratified the Convention, and are parties to it, the former since 10 June 1964, the latter since 20 March 1966. The Federal Republic was one of the signatories of the Convention, but has never ratified it, and is consequently not a party.

27. It is admitted on behalf of Denmark and the Netherlands that in these circumstances the Convention cannot, as such, be binding on the Federal Republic, in the sense of the Republic being contractually bound by it. But it is contended that the Convention, or the régime of the Convention, and in particular of Article 6, has become binding on the Federal Republic in another way,—namely because, by conduct, by public statements and proclamations, and in other ways, the Republic has unilaterally assumed the obligations of the Convention; or has manifested its acceptance of the conventional régime; or has recognized it as being generally applicable to the delimitation of continental shelf areas. It has also been suggested that the Federal Republic had held itself out as so assuming, accepting or recognizing, in such a manner as to cause other States, and in particular Denmark and the Netherlands, to rely on the attitude thus taken up.

28. As regards these contentions, it is clear that only a very definite, very consistent course of conduct on the part of a State in the situation of the Federal Republic could justify the Court in upholding them; and, if this had existed—that is to say if there had been a real intention to manifest acceptance or recognition of the applicability of the conventional régime—then it must be asked why it was that the Federal Republic did not take the obvious step of giving expression to this readiness by simply ratifying the Convention. In principle, when a number of States, including the one whose conduct is invoked, and those invoking it, have drawn up a convention specifically providing for a particular method by which the intention to become bound by the régime of the convention is to be manifested—namely by the carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way. Indeed if it were a question not of obligation but of rights,—if, that is to say, a State which, though entitled

to do so, had not ratified or acceded, attempted to claim rights under the convention, on the basis of a declared willingness to be bound by it, or of conduct evincing acceptance of the conventional régime, it would simply be told that, not having become a party to the convention it could not claim any rights under it until the professed willingness and acceptance had been manifested in the prescribed form.

29. A further point, not in itself conclusive, but to be noted, is that if the Federal Republic had ratified the Geneva Convention, it could have entered—and could, if it ratified now, enter—a reservation to Article 6, by reason of the faculty to do so conferred by Article 12 of the Convention. This faculty would remain, whatever the previous conduct of the Federal Republic might have been—a fact which at least adds to the difficulties involved by the Danish-Netherlands contention.

30. Having regard to these considerations of principle, it appears to the Court that only the existence of a situation of estoppel could suffice to lend substance to this contention,—that is to say if the Federal Republic were now precluded from denying the applicability of the conventional régime, by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that régime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice. Of this there is no evidence whatever in the present case.

31. In these circumstances it seems to the Court that little useful purpose would be served by passing in review and subjecting to detailed scrutiny the various acts relied on by Denmark and the Netherlands as being indicative of the Federal Republic's acceptance of the régime of Article 6;—for instance that at the Geneva Conference the Federal Republic did not take formal objection to Article 6 and eventually signed the Convention without entering any reservation in respect of that provision; that it at one time announced its intention to ratify the Convention; that in its public declarations concerning its continental shelf rights it appeared to rely on, or at least cited, certain provisions of the Geneva Convention. In this last connection a good deal has been made of the joint Minute signed in Bonn, on 4 August 1964, between the then-negotiating delegations of the Federal Republic and the Netherlands. But this minute made it clear that what the Federal Republic was seeking was an agreed division, rather than a delimitation of the central North Sea continental shelf areas, and the reference it made to Article 6 was specifically to the first sentence of paragraphs 1 and 2 of that Article, which speaks exclusively of delimitation by agreement and not at all of the use of the equidistance method.

32. In the result it appears to the Court that none of the elements invoked is decisive; each is ultimately negative or inconclusive; all are capable of varying interpretations or explanations. It would be one

thing to infer from the declarations of the Federal Republic an admission accepting the fundamental concept of coastal State rights in respect of the continental shelf: it would be quite another matter to see in this an acceptance of the rules of delimitation contained in the Convention. The declarations of the Federal Republic, taken in the aggregate, might at most justify the view that to begin with, and before becoming fully aware of what the probable effects in the North Sea would be, the Federal Republic was not specifically opposed to the equidistance principle as embodied in Article 6 of the Convention. But from a purely negative conclusion such as this, it would certainly not be possible to draw the positive inference that the Federal Republic, though not a party to the Convention, had accepted the régime of Article 6 in a manner binding upon itself.

33. The dangers of the doctrine here advanced by Denmark and the Netherlands, if it had to be given general application in the international law field, hardly need stressing. Moreover, in the present case, any such inference would immediately be nullified by the fact that, as soon as concrete delimitations of North Sea continental shelf areas began to be carried out, the Federal Republic, as described earlier (paragraphs 9 and 12), at once reserved its position with regard to those delimitations which (effected on an equidistance basis) might be prejudicial to the delimitation of its own continental shelf areas.

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34. Since, accordingly, the foregoing considerations must lead the Court to hold that Article 6 of the Geneva Convention is not, as such, applicable to the delimitations involved in the present proceedings, it becomes unnecessary for it to go into certain questions relating to the interpretation or application of that provision which would otherwise arise. One should be mentioned however, namely what is the relationship between the requirement of Article 6 for delimitation by agreement, and the requirements relating to equidistance and special circumstances that are to be applied in "the absence of" such agreement,—i.e., in the absence of agreement on the matter, is there a presumption that the continental shelf boundary between any two adjacent States consists automatically of an equidistance line,—or must negotiations for an agreed boundary prove finally abortive before the acceptance of a boundary drawn on an equidistance basis becomes obligatory in terms of Article 6, if no special circumstances exist?

35. Without attempting to resolve this question, the determination of which is not necessary for the purposes of the present case, the Court draws attention to the fact that the delimitation of the line E-F, as shown on Map 3, which was effected by Denmark and the Netherlands under the agreement of 31 March 1966 already mentioned (paragraphs 5 and 9), to which the Federal Republic was not a party, must have been based on

the tacit assumption that, no agreement to the contrary having been reached in the negotiations between the Federal Republic and Denmark and the Netherlands respectively (paragraph 7), the boundary between the continental shelf areas of the Republic and those of the other two countries must be deemed to be an equidistance one;—or in other words the delimitation of the line E-F, and its validity *erga omnes* including the Federal Republic, as contended for by Denmark and the Netherlands, presupposes both the delimitation and the validity on an equidistance basis, of the lines B-E and D-E on Map 3, considered by Denmark and the Netherlands to represent the boundaries between their continental shelf areas and those of the Federal Republic.

36. Since, however, Article 6 of the Geneva Convention provides only for delimitation between "adjacent" States, which Denmark and the Netherlands clearly are not, or between "opposite" States which, despite suggestions to the contrary, the Court thinks they equally are not, the delimitation of the line E-F on Map 3 could not in any case find its validity in Article 6, even if that provision were opposable to the Federal Republic. The validity of this delimitation must therefore be sought in some other source of law. It is a main contention of Denmark and the Netherlands that there does in fact exist such another source, furnishing a rule that validates not only this particular delimitation, but all delimitations effected on an equidistance basis,—and indeed requiring delimitation on that basis unless the States concerned otherwise agree, and whether or not the Geneva Convention is applicable. This contention must now be examined.

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37. It is maintained by Denmark and the Netherlands that the Federal Republic, whatever its position may be in relation to the Geneva Convention, considered as such, is in any event bound to accept delimitation on an equidistance-special circumstances basis, because the use of this method is not in the nature of a merely conventional obligation, but is, or must now be regarded as involving, a rule that is part of the *corpus* of general international law;—and, like other rules of general or customary international law, is binding on the Federal Republic automatically and independently of any specific assent, direct or indirect, given by the latter. This contention has both a positive law and a more fundamentalist aspect. As a matter of positive law, it is based on the work done in this field by international legal bodies, on State practice and on the influence attributed to the Geneva Convention itself,—the claim being that these various factors have cumulatively evidenced or been creative of the *opinio juris sive necessitatis*, requisite for the formation of new rules of customary international law. In its fundamentalist aspect, the view put forward derives from what might be called the natural law of the con-

tinental shelf, in the sense that the equidistance principle is seen as a necessary expression in the field of delimitation of the accepted doctrine of the exclusive appurtenance of the continental shelf to the nearby coastal State, and therefore as having an *a priori* character of so to speak juristic inevitability.

38. The Court will begin by examining this latter aspect, both because it is the more fundamental, and was so presented on behalf of Denmark and the Netherlands—i.e., as something governing the whole case; and because, if it is correct that the equidistance principle is, as the point was put in the course of the argument, to be regarded as inherent in the whole basic concept of continental shelf rights, then equidistance should constitute the rule according to positive law tests also. On the other hand, if equidistance should not possess any *a priori* character of necessity or inherency, this would not be any bar to its having become a rule of positive law through influences such as those of the Geneva Convention and State practice,—and that aspect of the matter would remain for later examination.

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39. The *a priori* argument starts from the position described in paragraph 19, according to which the right of the coastal State to its continental shelf areas is based on its sovereignty over the land domain, of which the shelf area is the natural prolongation into and under the sea. From this notion of appurtenance is derived the view which, as has already been indicated, the Court accepts, that the coastal State's rights exist *ipso facto* and *ab initio* without there being any question of having to make good a claim to the areas concerned, or of any apportionment of the continental shelf between different States. This was one reason why the Court felt bound to reject the claim of the Federal Republic (in the particular form which it took) to be awarded a "just and equitable share" of the shelf areas involved in the present proceedings. Denmark and the Netherlands, for their part, claim that the test of appurtenance must be "proximity", or more accurately "closer proximity": all those parts of the shelf being considered as appurtenant to a particular coastal State which are (but only if they are) closer to it than they are to any point on the coast of another State. Hence delimitation must be effected by a method which will leave to each one of the States concerned all those areas that are nearest to its own coast. Only a line drawn on equidistance principles will do this. Therefore, it is contended, only such a line can be valid (unless the Parties, for reasons of their own, agree on another), because only such a line can be thus consistent with basic continental shelf doctrine.

40. This view clearly has much force; for there can be no doubt that as a matter of normal topography, the greater part of a State's continental

shelf areas will in fact, and without the necessity for any delimitation at all, be nearer to its coasts than to any other. It could not well be otherwise; but *post hoc* is not *propter hoc*, and this situation may only serve to obscure the real issue, which is whether it follows that every part of the area concerned must be placed in this way, and that it should be as it were prohibited that any part should not be so placed. The Court does not consider that it does follow, either from the notion of proximity itself, or from the more fundamental concept of the continental shelf as being the natural prolongation of the land domain—a concept repeatedly appealed to by both sides throughout the case, although quite differently interpreted by them.

41. As regards the notion of proximity, the idea of absolute proximity is certainly not implied by the rather vague and general terminology employed in the literature of the subject, and in most State proclamations and international conventions and other instruments—terms such as "near", "close to its shores", "off its coast", "opposite", "in front of the coast", "in the vicinity of", "neighbouring the coast", "adjacent to", "contiguous", etc.,—all of them terms of a somewhat imprecise character which, although they convey a reasonably clear general idea, are capable of a considerable fluidity of meaning. To take what is perhaps the most frequently employed of these terms, namely "adjacent to", it is evident that by no stretch of imagination can a point on the continental shelf situated say a hundred miles, or even much less, from a given coast, be regarded as "adjacent" to it, or to any coast at all, in the normal sense of adjacency, even if the point concerned is nearer to some one coast than to any other. This would be even truer of localities where, physically, the continental shelf begins to merge with the ocean depths. Equally, a point inshore situated near the meeting place of the coasts of two States can often properly be said to be adjacent to both coasts, even though it may be fractionally closer to the one than the other. Indeed, local geographical configuration may sometimes cause it to have a closer physical connection with the coast to which it is not in fact closest.

42. There seems in consequence to be no necessary, and certainly no complete, identity between the notions of adjacency and proximity; and therefore the question of which parts of the continental shelf "adjacent to" a coastline bordering more than one State fall within the appurtenance of which of them, remains to this extent an open one, not to be determined on a basis exclusively of proximity. Even if proximity may afford one of the tests to be applied and an important one in the right conditions, it may not necessarily be the only, nor in all circumstances, the most appropriate one. Hence it would seem that the notion of adjacency, so constantly employed in continental shelf doctrine from the start, only implies proximity in a general sense, and does not imply any fundamental or inherent rule the ultimate effect of which would be to

prohibit any State (otherwise than by agreement) from exercising continental shelf rights in respect of areas closer to the coast of another State.

43. More fundamental than the notion of proximity appears to be the principle—constantly relied upon by all the Parties—of the natural prolongation or continuation of the land territory or domain, or land sovereignty of the coastal State, into and under the high seas, via the bed of its territorial sea which is under the full sovereignty of that State. There are various ways of formulating this principle, but the underlying idea, namely of an extension of something already possessed, is the same, and it is this idea of extension which is, in the Court's opinion, determinant. Submarine areas do not really appertain to the coastal State because—or not only because—they are near it. They are near it of course; but this would not suffice to confer title, any more than, according to a well-established principle of law recognized by both sides in the present case, mere proximity confers *per se* title to land territory. What confers the *ipso jure* title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion,—in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea. From this it would follow that whenever a given submarine area does not constitute a natural—or the most natural—extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of any other State, it cannot be regarded as appertaining to that State;—or at least it cannot be so regarded in the face of a competing claim by a State of whose land territory the submarine area concerned is to be regarded as a natural extension, even if it is less close to it.

44. In the present case, although both sides relied on the prolongation principle and regarded it as fundamental, they interpreted it quite differently. Both interpretations appear to the Court to be incorrect. Denmark and the Netherlands identified natural prolongation with closest proximity and therefrom argued that it called for an equidistance line: the Federal Republic seemed to think it implied the notion of the just and equitable share, although the connection is distinctly remote. (The Federal Republic did however invoke another idea, namely that of the proportionality of a State's continental shelf area to the length of its coastline, which obviously does have an intimate connection with the prolongation principle, and will be considered in its place.) As regards equidistance, it clearly cannot be identified with the notion of natural prolongation or extension, since, as has already been stated (paragraph 8), the use of the equidistance method would frequently cause areas which are the natural prolongation or extension of the territory of one State to be attributed to another, when the configuration of the latter's coast makes the equidistance line swing out laterally across the former's

coastal front, cutting it off from areas situated directly before that front.

45. The fluidity of all these notions is well illustrated by the case of the Norwegian Trough (paragraph 4 above). Without attempting to pronounce on the status of that feature, the Court notes that the shelf areas in the North Sea separated from the Norwegian coast by the 80-100 kilometres of the Trough cannot in any physical sense be said to be adjacent to it, nor to be its natural prolongation. They are nevertheless considered by the States parties to the relevant delimitations, as described in paragraph 4, to appertain to Norway up to the median lines shown on Map 1. True these median lines are themselves drawn on equidistance principles; but it was only by first ignoring the existence of the Trough that these median lines fell to be drawn at all.

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46. The conclusion drawn by the Court from the foregoing analysis is that the notion of equidistance as being logically necessary, in the sense of being an inescapable *a priori* accompaniment of basic continental shelf doctrine, is incorrect. It is said not to be possible to maintain that there is a rule of law ascribing certain areas to a State as a matter of inherent and original right (see paragraphs 19 and 20), without also admitting the existence of some rule by which those areas can be obligatorily delimited. The Court cannot accept the logic of this view. The problem arises only where there is a dispute and only in respect of the marginal areas involved. The appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not, as is shown by the case of the entry of Albania into the League of Nations (*Monastery of Saint Naoum, Advisory Opinion, 1924, P.C.I.J., Series B, No. 9*, at p. 10).

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47. A review of the genesis and development of the equidistance method of delimitation can only serve to confirm the foregoing conclusion. Such a review may appropriately start with the instrument, generally known as the "Truman Proclamation", issued by the Government of the United States on 28 September 1945. Although this instrument was not the first or only one to have appeared, it has in the opinion of the Court a special status. Previously, various theories as to the nature and extent of the rights relative to or exercisable over the continental shelf had been advanced by jurists, publicists and technicians. The Truman Proclamation however, soon came to be regarded as the starting point of the posi-

tive law on the subject, and the chief doctrine it enunciated, namely that of the coastal State as having an original, natural, and exclusive (in short a vested) right to the continental shelf off its shores, came to prevail over all others, being now reflected in Article 2 of the 1958 Geneva Convention on the Continental Shelf. With regard to the delimitation of lateral boundaries between the continental shelves of adjacent States, a matter which had given rise to some consideration on the technical, but very little on the juristic level, the Truman Proclamation stated that such boundaries "shall be determined by the United States and the State concerned in accordance with equitable principles". These two concepts, of delimitation by mutual agreement and delimitation in accordance with equitable principles, have underlain all the subsequent history of the subject. They were reflected in various other State proclamations of the period, and after, and in the later work on the subject.

48. It was in the International Law Commission of the United Nations that the question of delimitation as between adjacent States was first taken up seriously as part of a general juridical project; for outside the ranks of the hydrographers and cartographers, questions of delimitation were not much thought about in earlier continental shelf doctrine. Juridical interest and speculation was focussed mainly on such questions as what was the legal basis on which any rights at all in respect of the continental shelf could be claimed, and what was the nature of those rights. As regards boundaries, the main issue was not that of boundaries between States but of the seaward limit of the area in respect of which the coastal State could claim exclusive rights of exploitation. As was pointed out in the course of the written proceedings, States in most cases had not found it necessary to conclude treaties or legislate about their lateral sea boundaries with adjacent States before the question of exploiting the natural resources of the seabed and subsoil arose;—practice was therefore sparse.

49. In the records of the International Law Commission, which had the matter under consideration from 1950 to 1956, there is no indication at all that any of its members supposed that it was incumbent on the Commission to adopt a rule of equidistance because this gave expression to, and translated into linear terms, a principle of proximity inherent in the basic concept of the continental shelf, causing every part of the shelf to appertain to the nearest coastal State and to no other, and because such a rule must therefore be mandatory as a matter of customary international law. Such an idea does not seem ever to have been propounded. Had it been, and had it had the self-evident character contended for by Denmark and the Netherlands, the Commission would have had no alternative but to adopt it, and its long continued hesitations over this matter would be incomprehensible.

50. It is moreover, in the present context, a striking feature of the Commission's discussions that during the early and middle stages, not only was the notion of equidistance never considered from the standpoint of its having *a priori* a character of inherent necessity: it was never given any special prominence at all, and certainly no priority. The Commission discussed various other possibilities as having equal if not superior status such as delimitation by agreement, by reference to arbitration, by drawing lines perpendicular to the coast, by prolonging the dividing line of adjacent territorial waters (the principle of which was itself not as yet settled), and on occasion the Commission seriously considered adopting one or other of these solutions. It was not in fact until after the matter had been referred to a committee of hydrographical experts, which reported in 1953, that the equidistance principle began to take precedence over other possibilities: the Report of the Commission for that year (its principal report on the topic of delimitation as such) makes it clear that before this reference to the experts the Commission had felt unable to formulate any definite rule at all, the previous trend of opinion having been mainly in favour of delimitation by agreement or by reference to arbitration.

51. It was largely because of these difficulties that it was decided to consult the Committee of Experts. It is therefore instructive in the context (i.e., of an alleged inherent necessity for the equidistance principle) to see on what basis the matter was put to the experts, and how they dealt with it. Equidistance was in fact only one of four methods suggested to them, the other three being the continuation in the seaward direction of the land frontier between the two adjacent States concerned; the drawing of a perpendicular to the coast at the point of its intersection with this land frontier; and the drawing of a line perpendicular to the line of the "general direction" of the coast. Furthermore the matter was not even put to the experts directly as a question of continental shelf delimitation, but in the context of the delimitation of the lateral boundary between adjacent territorial waters, no account being taken of the possibility that the situation respecting territorial waters might be different.

52. The Committee of Experts simply reported that after a thorough discussion of the different methods—(there are no official records of this discussion)—they had decided that "the (lateral) boundary through the territorial sea—if not already fixed otherwise—should be drawn according to the principle of equidistance from the respective coastlines". They added, however, significantly, that in "a number of cases this may not lead to an equitable solution, which should be then arrived at by negotiation". Only after that did they add, as a rider to this conclusion, that they had considered it "important to find a formula for drawing the international boundaries in the territorial waters of States, which could also be used for the delimitation of the respective continental shelves of two States bordering the same continental shelf".

53. In this almost impromptu, and certainly contingent manner was the principle of equidistance for the delimitation of continental shelf boundaries propounded. It is clear from the Report of the Commission for 1953 already referred to (paragraph 50) that the latter adopted it largely on the basis of the recommendation of the Committee of Experts, and even so in a text that gave priority to delimitation by agreement and also introduced an exception in favour of "special circumstances" which the Committee had not formally proposed. The Court moreover thinks it to be a legitimate supposition that the experts were actuated by considerations not of legal theory but of practical convenience and cartography of the kind mentioned in paragraph 22 above. Although there are no official records of their discussions, there is warrant for this view in correspondence passing between certain of them and the Commission's Special Rapporteur on the subject, which was deposited by one of the Parties during the oral hearing at the request of the Court. Nor, even after this, when a decision in principle had been taken in favour of an equidistance rule, was there an end to the Commission's hesitations, for as late as three years after the adoption of the report of the Committee of Experts, when the Commission was finalizing the whole complex of drafts comprised under the topic of the Law of the Sea, various doubts about the equidistance principle were still being voiced in the Commission, on such grounds for instance as that its strict application would be open, in certain cases, to the objection that the geographical configuration of the coast would render a boundary drawn on this basis inequitable.

54. A further point of some significance is that neither in the Committee of Experts, nor in the Commission itself, nor subsequently at the Geneva Conference, does there appear to have been any discussion of delimitation in the context, not merely of two adjacent States, but of three or more States on the same coast, or in the same vicinity,—from which it can reasonably be inferred that the possible resulting situations, some of which have been described in paragraph 8 above, were never really envisaged or taken into account. This view finds some confirmation in the fact that the relevant part of paragraph 2 of Article 6 of the Geneva Convention speaks of delimiting the continental shelf of "two" adjacent States (although a reference simply to "adjacent States" would have sufficed), whereas in respect of median lines the reference in paragraph 1 of that Article is to "two or more" opposite States.

55. In the light of this history, and of the record generally, it is clear that at no time was the notion of equidistance as an inherent necessity of continental shelf doctrine entertained. Quite a different outlook was indeed manifested from the start in current legal thinking. It was, and

it really remained to the end, governed by two beliefs;—namely, first, that no one single method of delimitation was likely to prove satisfactory in all circumstances, and that delimitation should, therefore, be carried out by agreement (or by reference to arbitration); and secondly, that it should be effected on equitable principles. It was in pursuance of the first of these beliefs that in the draft that emerged as Article 6 of the Geneva Convention, the Commission gave priority to delimitation by agreement,—and in pursuance of the second that it introduced the exception in favour of "special circumstances". Yet the record shows that, even with these mitigations, doubts persisted, particularly as to whether the equidistance principle would in all cases prove equitable.

56. In these circumstances, it seems to the Court that the inherency contention as now put forward by Denmark and the Netherlands inverts the true order of things in point of time and that, so far from an equidistance rule having been generated by an antecedent principle of proximity inherent in the whole concept of continental shelf appurtenance, the latter is rather a rationalization of the former—an *ex post facto* construct directed to providing a logical juristic basis for a method of delimitation propounded largely for different reasons, cartographical and other. Given also that for the reasons already set out (paragraphs 40-46) the theory cannot be said to be endowed with any quality of logical necessity either, the Court is unable to accept it.

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57. Before going further it will be convenient to deal briefly with two subsidiary matters. Most of the difficulties felt in the International Law Commission related, as here, to the case of the lateral boundary between adjacent States. Less difficulty was felt over that of the median line boundary between opposite States, although it too is an equidistance line. For this there seems to the Court to be good reason. The continental shelf area off, and dividing, opposite States, can be claimed by each of them to be a natural prolongation of its territory. These prolongations meet and overlap, and can therefore only be delimited by means of a median line; and, ignoring the presence of islets, rocks and minor coastal projections, the disproportionally distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved. If there is a third State on one of the coasts concerned, the area of mutual natural prolongation with that of the same or another opposite State will be a separate and distinct one, to be treated in the same way. This type of case is therefore different from that of laterally adjacent States on the same coast with no immediately opposite coast in front of it, and does not give rise to the same kind of problem—a conclusion which also finds some confirmation in the dif-

ference of language to be observed in the two paragraphs of Article 6 of the Geneva Convention (reproduced in paragraph 26 above) as respects recourse in the one case to median lines and in the other to lateral equidistance lines, in the event of absence of agreement.

58. If on the other hand, contrary to the view expressed in the preceding paragraph, it were correct to say that there is no essential difference in the process of delimiting the continental shelf areas between opposite States and that of delimitations between adjacent States, then the results ought in principle to be the same or at least comparable. But in fact, whereas a median line divides equally between the two opposite countries areas that can be regarded as being the natural prolongation of the territory of each of them, a lateral equidistance line often leaves to one of the States concerned areas that are a natural prolongation of the territory of the other.

59. Equally distinct in the opinion of the Court is the case of the lateral boundary between adjacent territorial waters to be drawn on an equidistance basis. As was convincingly demonstrated in the maps and diagrams furnished by the Parties, and as has been noted in paragraph 8, the distorting effects of lateral equidistance lines under certain conditions of coastal configuration are nevertheless comparatively small within the limits of territorial waters, but produce their maximum effect in the localities where the main continental shelf areas lie further out. There is also a direct correlation between the notion of closest proximity to the coast and the sovereign jurisdiction which the coastal State is entitled to exercise and must exercise, not only over the seabed underneath the territorial waters but over the waters themselves, which does not exist in respect of continental shelf areas where there is no jurisdiction over the superjacent waters, and over the seabed only for purposes of exploration and exploitation.

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60. The conclusions so far reached leave open, and still to be considered, the question whether on some basis other than that of an *a priori* logical necessity, i.e., through positive law processes, the equidistance principle has come to be regarded as a rule of customary international law, so that it would be obligatory for the Federal Republic in that way, even though Article 6 of the Geneva Convention is not, as such, opposable to it. For this purpose it is necessary to examine the status of the principle as it stood when the Convention was drawn up, as it resulted from the effect of the Convention, and in the light of State practice subsequent to the Convention; but it should be clearly understood that in the pronouncements the Court makes on these matters it has in view solely the delimitation provisions (Article 6) of the Convention, not other parts of it, nor the Convention as such.

61. The first of these questions can conveniently be considered in the form suggested on behalf of Denmark and the Netherlands themselves in the course of the oral hearing, when it was stated that they had not in fact contended that the delimitation article (Article 6) of the Convention "embodied already received rules of customary law in the sense that the Convention was merely declaratory of existing rules". Their contention was, rather, that although prior to the Conference, continental shelf law was only in the formative stage, and State practice lacked uniformity, yet "the process of the definition and consolidation of the emerging customary law took place through the work of the International Law Commission, the reaction of governments to that work and the proceedings of the Geneva Conference"; and this emerging customary law became "crystallized in the adoption of the Continental Shelf Convention by the Conference".

62. Whatever validity this contention may have in respect of at least certain parts of the Convention, the Court cannot accept it as regards the delimitation provision (Article 6), the relevant parts of which were adopted almost unchanged from the draft of the International Law Commission that formed the basis of discussion at the Conference. The status of the rule in the Convention therefore depends mainly on the processes that led the Commission to propose it. These processes have already been reviewed in connection with the Danish-Netherlands contention of an *a priori* necessity for equidistance, and the Court considers this review sufficient for present purposes also, in order to show that the principle of equidistance, as it now figures in Article 6 of the Convention, was proposed by the Commission with considerable hesitation, somewhat on an experimental basis, at most *de lege ferenda*, and not at all *de lege lata* or as an emerging rule of customary international law. This is clearly not the sort of foundation on which Article 6 of the Convention could be said to have reflected or crystallized such a rule.

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63. The foregoing conclusion receives significant confirmation from the fact that Article 6 is one of those in respect of which, under the reservations article of the Convention (Article 12) reservations may be made by any State on signing, ratifying or acceding,—for, speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted;—whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own

favour. Consequently, it is to be expected that when, for whatever reason, rules or obligations of this order are embodied, or are intended to be reflected in certain provisions of a convention, such provisions will figure amongst those in respect of which a right of unilateral reservation is not conferred, or is excluded. This expectation is, in principle, fulfilled by Article 12 of the Geneva Continental Shelf Convention, which permits reservations to be made to all the articles of the Convention "other than to Articles 1 to 3 inclusive"—these three Articles being the ones which, it is clear, were then regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf, amongst them the question of the seaward extent of the shelf; the juridical character of the coastal State's entitlement; the nature of the rights exercisable; the kind of natural resources to which these relate; and the preservation intact of the legal status as high seas of the waters over the shelf, and the legal status of the superjacent air-space.

64. The normal inference would therefore be that any articles that do not figure among those excluded from the faculty of reservation under Article 12, were not regarded as declaratory of previously existing or emergent rules of law; and this is the inference the Court in fact draws in respect of Article 6 (delimitation), having regard also to the attitude of the International Law Commission to this provision, as already described in general terms. Naturally this would not of itself prevent this provision from eventually passing into the general *corpus* of customary international law by one of the processes considered in paragraphs 70-81 below. But that is not here the issue. What is now under consideration is whether it originally figured in the Convention as such a rule.

65. It has however been suggested that the inference drawn at the beginning of the preceding paragraph is not necessarily warranted, seeing that there are certain other provisions of the Convention, also not excluded from the faculty of reservation, but which do undoubtedly in principle relate to matters that lie within the field of received customary law, such as the obligation not to impede the laying or maintenance of submarine cables or pipelines on the continental shelf seabed (Article 4), and the general obligation not unjustifiably to interfere with freedom of navigation, fishing, and so on (Article 5, paragraphs 1 and 6). These matters however, all relate to or are consequential upon principles or rules of general maritime law, very considerably ante-dating the Convention, and not directly connected with but only incidental to continental shelf rights as such. They were mentioned in the Convention, not in order to declare or confirm their existence, which was not necessary, but simply to ensure that they were not prejudiced by the exercise of continental shelf rights as provided for in the Convention. Another method of

drafting might have clarified the point, but this cannot alter the fact that no reservation could release the reserving party from obligations of general maritime law existing outside and independently of the Convention, and especially obligations formalized in Article 2 of the contemporaneous Convention on the High Seas, expressed by its preamble to be declaratory of established principles of international law.

66. Article 6 (delimitation) appears to the Court to be in a different position. It does directly relate to continental shelf rights as such, rather than to matters incidental to these; and since it was not, as were Articles 1 to 3, excluded from the faculty of reservation, it is a legitimate inference that it was considered to have a different and less fundamental status and not, like those Articles, to reflect pre-existing or emergent customary law. It was however contended on behalf of Denmark and the Netherlands that the right of reservation given in respect of Article 6 was not intended to be an unfettered right, and that in particular it does not extend to effecting a total exclusion of the equidistance principle of delimitation,—for, so it was claimed, delimitation on the basis of that principle is implicit in Articles 1 and 2 of the Convention, in respect of which no reservations are permitted. Hence the right of reservation under Article 6 could only be exercised in a manner consistent with the preservation of at least the basic principle of equidistance. In this connection it was pointed out that, of the no more than four reservations so far entered in respect of Article 6, one at least of which was somewhat far-reaching, none has purported to effect such a total exclusion or denial.

67. The Court finds this argument unconvincing for a number of reasons. In the first place, Articles 1 and 2 of the Geneva Convention do not appear to have any direct connection with inter-State delimitation as such. Article 1 is concerned only with the outer, seaward, limit of the shelf generally, not with boundaries between the shelf areas of opposite or adjacent States. Article 2 is equally not concerned with such boundaries. The suggestion seems to be that the notion of equidistance is implicit in the reference in paragraph 2 of Article 2 to the rights of the coastal State over its continental shelf being "exclusive". So far as actual language is concerned this interpretation is clearly incorrect. The true sense of the passage is that in whatever areas of the continental shelf a coastal State has rights, those rights are exclusive rights, not exercisable by any other State. But this says nothing as to what in fact are the precise areas in respect of which each coastal State possesses these exclusive rights. This question, which can arise only as regards the fringes of a coastal State's shelf area is, as explained at the end of paragraph 20 above, exactly what falls to be settled through the process of delimitation, and this is the sphere of Article 6, not Article 2.

68. Secondly, it must be observed that no valid conclusions can be drawn from the fact that the faculty of entering reservations to Article 6 has been exercised only sparingly and within certain limits. This is the affair exclusively of those States which have not wished to exercise the faculty, or which have been content to do so only to a limited extent. Their action or inaction cannot affect the right of other States to enter reservations to whatever is the legitimate extent of the right.

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69. In the light of these various considerations, the Court reaches the conclusion that the Geneva Convention did not embody or crystallize any pre-existing or emergent rule of customary law, according to which the delimitation of continental shelf areas between adjacent States must, unless the Parties otherwise agree, be carried out on an equidistance-special circumstances basis. A rule was of course embodied in Article 6 of the Convention, but as a purely conventional rule. Whether it has since acquired a broader basis remains to be seen: *qua* conventional rule however, as has already been concluded, it is not opposable to the Federal Republic.

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70. The Court must now proceed to the last stage in the argument put forward on behalf of Denmark and the Netherlands. This is to the effect that even if there was at the date of the Geneva Convention no rule of customary international law in favour of the equidistance principle, and no such rule was crystallized in Article 6 of the Convention, nevertheless such a rule has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent State practice,—and that this rule, being now a rule of customary international law binding on all States, including therefore the Federal Republic, should be declared applicable to the delimitation of the boundaries between the Parties' respective continental shelf areas in the North Sea.

71. In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.

72. It would in the first place be necessary that the provision con-

cerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law. Considered *in abstracto* the equidistance principle might be said to fulfil this requirement. Yet in the particular form in which it is embodied in Article 6 of the Geneva Convention, and having regard to the relationship of that Article to other provisions of the Convention, this must be open to some doubt. In the first place, Article 6 is so framed as to put second the obligation to make use of the equidistance method, causing it to come after a primary obligation to effect delimitation by agreement. Such a primary obligation constitutes an unusual preface to what is claimed to be a potential general rule of law. Without attempting to enter into, still less pronounce upon any question of *jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties,—but this is not normally the subject of any express provision, as it is in Article 6 of the Geneva Convention. Secondly the part played by the notion of special circumstances relative to the principle of equidistance as embodied in Article 6, and the very considerable, still unresolved controversies as to the exact meaning and scope of this notion, must raise further doubts as to the potentially norm-creating character of the rule. Finally, the faculty of making reservations to Article 6, while it might not of itself prevent the equidistance principle being eventually received as general law, does add considerably to the difficulty of regarding this result as having been brought about (or being potentially possible) on the basis of the Convention: for so long as this faculty continues to exist, and is not the subject of any revision brought about in consequence of a request made under Article 13 of the Convention—of which there is at present no official indication—it is the Convention itself which would, for the reasons already indicated, seem to deny to the provisions of Article 6 the same norm-creating character as, for instance, Articles 1 and 2 possess.

73. With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected. In the present case however, the Court notes that, even if allowance is made for the existence of a number of States to whom participation in the Geneva Convention is not open, or which, by reason for instance of being land-locked States, would have no interest in becoming parties to it, the number of ratifications and accessions so far secured is, though respectable, hardly sufficient. That non-ratification may sometimes be due to factors other than active disapproval of the convention concerned can hardly constitute a basis on which positive acceptance of its principles can be implied: the reasons are speculative, but the facts remain.

74. As regards the time element, the Court notes that it is over ten years since the Convention was signed, but that it is even now less than five since it came into force in June 1964, and that when the present proceedings were brought it was less than three years, while less than one had elapsed at the time when the respective negotiations between the Federal Republic and the other two Parties for a complete delimitation broke down on the question of the application of the equidistance principle. Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;— and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

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75. The Court must now consider whether State practice in the matter of continental shelf delimitation has, subsequent to the Geneva Convention, been of such a kind as to satisfy this requirement. Leaving aside cases which, for various reasons, the Court does not consider to be reliable guides as precedents, such as delimitations effected between the present Parties themselves, or not relating to international boundaries, some fifteen cases have been cited in the course of the present proceedings, occurring mostly since the signature of the 1958 Geneva Convention, in which continental shelf boundaries have been delimited according to the equidistance principle—in the majority of the cases by agreement, in a few others unilaterally—or else the delimitation was foreshadowed but has not yet been carried out. Amongst these fifteen are the four North Sea delimitations United Kingdom/Norway-Denmark-Netherlands, and Norway/Denmark already mentioned in paragraph 4 of this Judgment. But even if these various cases constituted more than a very small proportion of those potentially calling for delimitation in the world as a whole, the Court would not think it necessary to enumerate or evaluate them separately, since there are, *a priori*, several grounds which deprive them of weight as precedents in the present context.

76. To begin with, over half the States concerned, whether acting unilaterally or conjointly, were or shortly became parties to the Geneva Convention, and were therefore presumably, so far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law in favour of the equidistance principle. As regards those States, on the other hand, which were not, and have not become parties to the Convention, the basis of

their action can only be problematical and must remain entirely speculative. Clearly, they were not applying the Convention. But from that no inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law. There is not a shred of evidence that they did and, as has been seen (paragraphs 22 and 23), there is no lack of other reasons for using the equidistance method, so that acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature.

77. The essential point in this connection—and it seems necessary to stress it—is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*;—for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be 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*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

78. In this respect the Court follows the view adopted by the Permanent Court of International Justice in the *Lotus* case, as stated in the following passage, the principle of which is, by analogy, applicable almost word for word, *mutatis mutandis*, to the present case (*P.C.I.J., Series A, No. 10*, 1927, at p. 28):

> "Even if the rarity of the judicial decisions to be found . . . were sufficient to prove . . . the circumstance alleged . . ., it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand, . . . there are other circumstances calculated to show that the contrary is true."

Applying this dictum to the present case, the position is simply that in certain cases—not a great number—the States concerned agreed to draw or did draw the boundaries concerned according to the principle of equidistance. There is no evidence that they so acted because they felt

legally compelled to draw them in this way by reason of a rule of customary law obliging them to do so—especially considering that they might have been motivated by other obvious factors.

79. Finally, it appears that in almost all of the cases cited, the delimitations concerned were median-line delimitations between opposite States, not lateral delimitations between adjacent States. For reasons which have already been given (paragraph 57) the Court regards the case of median-line delimitations between opposite States as different in various respects, and as being sufficiently distinct not to constitute a precedent for the delimitation of lateral boundaries. In only one situation discussed by the Parties does there appear to have been a geographical configuration which to some extent resembles the present one, in the sense that a number of States on the same coastline are grouped around a sharp curve or bend of it. No complete delimitation in this area has however yet been carried out. But the Court is not concerned to deny to this case, or any other of those cited, all evidential value in favour of the thesis of Denmark and the Netherlands. It simply considers that they are inconclusive, and insufficient to bear the weight sought to be put upon them as evidence of such a settled practice, manifested in such circumstances, as would justify the inference that delimitation according to the principle of equidistance amounts to a mandatory rule of customary international law,—more particularly where lateral delimitations are concerned.

80. There are of course plenty of cases (and a considerable number were cited) of delimitations of waters, as opposed to seabed, being carried out on the basis of equidistance—mostly of internal waters (lakes, rivers, etc.), and mostly median-line cases. The nearest analogy is that of adjacent territorial waters, but as already explained (paragraph 59) the Court does not consider this case to be analogous to that of the continental shelf.

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81. The Court accordingly concludes that if the Geneva Convention was not in its origins or inception declaratory of a mandatory rule of customary international law enjoining the use of the equidistance principle for the delimitation of continental shelf areas between adjacent States, neither has its subsequent effect been constitutive of such a rule; and that State practice up-to-date has equally been insufficient for the purpose.

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82. The immediately foregoing conclusion, coupled with that reached earlier (paragraph 56) to the effect that the equidistance principle could not be regarded as being a rule of law on any *a priori* basis of logical

necessity deriving from the fundamental theory of the continental shelf, leads to the final conclusion on this part of the case that the use of the equidistance method is not obligatory for the delimitation of the areas concerned in the present proceedings. In these circumstances, it becomes unnecessary for the Court to determine whether or not the configuration of the German North Sea coast constitutes a "special circumstance" for the purposes either of Article 6 of the Geneva Convention or of any rule of customary international law,—since once the use of the equidistance method of delimitation is determined not to be obligatory in any event, it ceases to be legally necessary to prove the existence of special circumstances in order to justify not using that method.

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83. The legal situation therefore is that the Parties are under no obligation to apply either the 1958 Convention, which is not opposable to the Federal Republic, or the equidistance method as a mandatory rule of customary law, which it is not. But as between States faced with an issue concerning the lateral delimitation of adjacent continental shelves, there are still rules and principles of law to be applied; and in the present case it is not the fact either that rules are lacking, or that the situation is one for the unfettered appreciation of the Parties. Equally, it is not the case that if the equidistance principle is not a rule of law, there has to be as an alternative some other single equivalent rule.

84. As already indicated, the Court is not called upon itself to delimit the areas of continental shelf appertaining respectively to each Party, and in consequence is not bound to prescribe the methods to be employed for the purposes of such a delimitation. The Court has to indicate to the Parties the principles and rules of law in the light of which the methods for eventually effecting the delimitation will have to be chosen. The Court will discharge this task in such a way as to provide the Parties with the requisite directions, without substituting itself for them by means of a detailed indication of the methods to be followed and the factors to be taken into account for the purposes of a delimitation the carrying out of which the Parties have expressly reserved to themselves.

85. It emerges from the history of the development of the legal régime of the continental shelf, which has been reviewed earlier, that the essential reason why the equidistance method is not to be regarded as a rule of law is that, if it were to be compulsorily applied in all situations, this would not be consonant with certain basic legal notions which, as has been observed in paragraphs 48 and 55, have from the beginning reflected the *opinio juris* in the matter of delimitation; those principles being that delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles. On a foundation of very general precepts of justice and good faith, actual rules of law are here involved which govern the

delimitation of adjacent continental shelves—that is to say, rules binding upon States for all delimitations;—in short, it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field, namely:

(a) 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 as 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;

(b) the parties are under an obligation to act in such a way that, in the particular case, and taking all the circumstances into account, equitable principles are applied,—for this purpose the equidistance method can be used, but other methods exist and may be employed, alone or in combination, according to the areas involved;

(c) for the reasons given in paragraphs 43 and 44, the continental shelf of any State must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State.

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86. It is now necessary to examine these rules more closely, as also certain problems relative to their application. So far as the first rule is concerned, the Court would recall not only that the obligation to negotiate which the Parties assumed by Article 1, paragraph 2, of the Special Agreements arises out of the Truman Proclamation, which, for the reasons given in paragraph 47, must be considered as having propounded the rules of law in this field, but also that 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. There is no need to insist upon the fundamental character of this method of settlement, except to point out that it is emphasized by the observable fact that judicial or arbitral settlement is not universally accepted.

87. As the Permanent Court of International Justice said in its Order of 19 August 1929 in the case of the *Free Zones of Upper Savoy and the District of Gex*, the judicial settlement of international disputes "is simply an alternative to the direct and friendly settlement of such disputes between the parties" (*P.C.I.J., Series A, No. 22*, at p. 13). Defining the content of the obligation to negotiate, the Permanent Court, in its

Advisory Opinion in the case of *Railway Traffic between Lithuania and Poland*, said that the obligation was "not only to enter into negotiations but also to pursue them as far as possible with a view to concluding agreements", even if an obligation to negotiate did not imply an obligation to reach agreement (*P.C.I.J., Series A/B, No. 42*, 1931, at p. 116). In the present case, it needs to be observed that whatever the details of the negotiations carried on in 1965 and 1966, they failed of their purpose because the Kingdoms of Denmark and the Netherlands, convinced that the equidistance principle alone was applicable, in consequence of a rule binding upon the Federal Republic, saw no reason to depart from that rule; and equally, given the geographical considerations stated in the last sentence of paragraph 7 above, the Federal Republic could not accept the situation resulting from the application of that rule. So far therefore the negotiations have not satisfied the conditions indicated in paragraph 85 *(a)*, but fresh negotiations are to take place on the basis of the present Judgment.

* * *

88. The Court comes next to the rule of equity. The legal basis of that rule in the particular case of the delimitation of the continental shelf as between adjoining States has already been stated. It must however be noted that the rule rests also on a broader basis. Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles. There is consequently no question in this case of any decision *ex aequo et bono*, such as would only be possible under the conditions prescribed by Article 38, paragraph 2, of the Court's Statute. Nor would this be the first time that the Court has adopted such an attitude, as is shown by the following passage from the Advisory Opinion given in the case of *Judgments of the Administrative Tribunal of the I.L.O. upon Complaints Made against Unesco* (*I.C.J. Reports 1956*, at p. 100):

> "In view of this the Court need not examine the allegation that the validity of the judgments of the Tribunal is vitiated by excess of jurisdiction on the ground that it awarded compensation *ex aequo et bono*. It will confine itself to stating that, in the reasons given by the Tribunal in support of its decision on the merits, the Tribunal said: 'That redress will be ensured *ex aequo et bono* by the granting to the complainant of the sum set forth below.' It does not appear from the context of the judgment that the Tribunal thereby intended to depart from principles of law. The apparent intention was to say

that, as the precise determination of the actual amount to be awarded could not be based on any specific rule of law, the Tribunal fixed what the Court, in other circumstances, has described as the true measure of compensation and the reasonable figure of such compensation (*Corfu Channel* case, Judgment of December 15th, 1949, *I.C.J. Reports 1949*, p. 249)."

89. It must next be observed that, in certain geographical circumstances which are quite frequently met with, the equidistance method, despite its known advantages, leads unquestionably to inequity, in the following sense:

(a) The slightest irregularity in a coastline is automatically magnified by the equidistance line as regards the consequences for the delimitation of the continental shelf. Thus it has been seen in the case of concave or convex coastlines that if the equidistance method is employed, then the greater the irregularity and the further from the coastline the area to be delimited, the more unreasonable are the results produced. So great an exaggeration of the consequences of a natural geographical feature must be remedied or compensated for as far as possible, being of itself creative of inequity.

(b) In the case of the North Sea in particular, where there is no outer boundary to the continental shelf, it happens that the claims of several States converge, meet and intercross in localities where, despite their distance from the coast, the bed of the sea still unquestionably consists of continental shelf. A study of these convergences, as revealed by the maps, shows how inequitable would be the apparent simplification brought about by a delimitation which, ignoring such geographical circumstances, was based solely on the equidistance method.

90. If for the above reasons equity excludes the use of the equidistance method in the present instance, as the sole method of delimitation, the question arises whether there is any necessity to employ only one method for the purposes of a given delimitation. There is no logical basis for this, and no objection need be felt to the idea of effecting a delimitation of adjoining continental shelf areas by the concurrent use of various methods. The Court has already stated why it considers that the international law of continental shelf delimitation does not involve any imperative rule and permits resort to various principles or methods, as may be appropriate, or a combination of them, provided that, by the application of equitable principles, a reasonable result is arrived at.

91. Equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a

State with a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy. But in the present case there are three States whose North Sea coastlines are in fact comparable in length and which, therefore, have been given broadly equal treatment by nature except that the configuration of one of the coastlines would, if the equidistance method is used, deny to one of these States treatment equal or comparable to that given the other two. Here indeed is a case where, in a theoretical situation of equality within the same order, an inequity is created. What is unacceptable in this instance is that a State should enjoy continental shelf rights considerably different from those of its neighbours merely because in the one case the coastline is roughly convex in form and in the other it is markedly concave, although those coastlines are comparable in length. It is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality as between a number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result.

92. It has however been maintained that no one method of delimitation can prevent such results and that all can lead to relative injustices. This argument has in effect already been dealt with. It can only strengthen the view that it is necessary to seek not one method of delimitation but one goal. It is in this spirit that the Court must examine the question of how the continental shelf can be delimited when it is in fact the case that the equidistance principle does not provide an equitable solution. As the operation of delimiting is a matter of determining areas appertaining to different jurisdictions, it is a truism to say that the determination must be equitable; rather is the problem above all one of defining the means whereby the delimitation can be carried out in such a way as to be recognized as equitable. Although the Parties have made it known that they intend to reserve for themselves the application of the principles and rules laid down by the Court, it would, even so, be insufficient simply to rely on the rule of equity without giving some degree of indication as to the possible ways in which it might be applied in the present case, it being understood that the Parties will be free to agree upon one method rather than another, or different methods if they so prefer.

93. In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.

94. In balancing the factors in question it would appear that various aspects must be taken into account. Some are related to the geological, others to the geographical aspect of the situation, others again to the

idea of the unity of any deposits. These criteria, though not entirely precise, can provide adequate bases for decision adapted to the factual situation.

95. The institution of the continental shelf has arisen out of the recognition of a physical fact; and the link between this fact and the law, without which that institution would never have existed, remains an important element for the application of its legal régime. The continental shelf is, by definition, an area physically extending the territory of most coastal States into a species of platform which has attracted the attention first of geographers and hydrographers and then of jurists. The importance of the geological aspect is emphasized by the care which, at the beginning of its investigation, the International Law Commission took to acquire exact information as to its characteristics, as can be seen in particular from the definitions to be found on page 131 of Volume I of the *Yearbook of the International Law Commission* for 1956. The appurtenance of the shelf to the countries in front of whose coastlines it lies, is therefore a fact, and it can be useful to consider the geology of that shelf in order to find out whether the direction taken by certain configurational features should influence delimitation because, in certain localities, they point-up the whole notion of the appurtenance of the continental shelf to the State whose territory it does in fact prolong.

96. The doctrine of the continental shelf is a recent instance of encroachment on maritime expanses which, during the greater part of history, appertained to no-one. The contiguous zone and the continental shelf are in this respect concepts of the same kind. In both instances the principle is applied that the land dominates the sea; it is consequently necessary to examine closely the geographical configuration of the coastlines of the countries whose continental shelves are to be delimited. This is one of the reasons why the Court does not consider that markedly pronounced configurations can be ignored; for, since the land is the legal source of the power which a State may exercise over territorial extensions to seaward, it must first be clearly established what features do in fact constitute such extensions. Above all is this the case when what is involved is no longer areas of sea, such as the contiguous zone, but stretches of submerged land; for the legal régime of the continental shelf is that of a soil and a subsoil, two words evocative of the land and not of the sea.

97. Another factor to be taken into consideration in the delimitation of areas of continental shelf as between adjacent States is the unity of any deposits. The natural resources of the subsoil of the sea in those parts which consist of continental shelf are the very object of the legal régime established subsequent to the Truman Proclamation. Yet it frequently occurs that the same deposit lies on both sides of the line dividing a continental shelf between two States, and since it is possible to exploit such a deposit from either side, a problem immediately arises on account of the risk of prejudicial or wasteful exploitation by one or other of the States concerned. To look no farther than the North Sea, the practice

of States shows how this problem has been dealt with, and all that is needed is to refer to the undertakings entered into by the coastal States of that sea with a view to ensuring the most efficient exploitation or the apportionment of the products extracted—(see in particular the agreement of 10 March 1965 between the United Kingdom and Norway, Article 4; the agreement of 6 October 1965 between the Netherlands and the United Kingdom relating to "the exploitation of single geological structures extending across the dividing line on the continental shelf under the North Sea"; and the agreement of 14 May 1962 between the Federal Republic and the Netherlands concerning a joint plan for exploiting the natural resources underlying the area of the Ems Estuary where the frontier between the two States has not been finally delimited.) The Court does not consider that unity of deposit constitutes anything more than a factual element which it is reasonable to take into consideration in the course of the negotiations for a delimitation. The Parties are fully aware of the existence of the problem as also of the possible ways of solving it.

98. A final factor to be taken account of is the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines,—these being measured according to their general direction in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions. The choice and application of the appropriate technical methods would be a matter for the parties. One method discussed in the course of the proceedings, under the name of the principle of the coastal front, consists in drawing a straight baseline between the extreme points at either end of the coast concerned, or in some cases a series of such lines. Where the parties wish to employ in particular the equidistance method of delimitation, the establishment of one or more baselines of this kind can play a useful part in eliminating or diminishing the distortions that might result from the use of that method.

99. In a sea with the particular configuration of the North Sea, and in view of the particular geographical situation of the Parties' coastlines upon that sea, the methods chosen by them for the purpose of fixing the delimitation of their respective areas may happen in certain localities to lead to an overlapping of the areas appertaining to them. The Court considers that such a situation must be accepted as a given fact and resolved either by an agreed, or failing that by an equal division of the overlapping areas, or by agreements for joint exploitation, the latter solution appearing particularly appropriate when it is a question of preserving the unity of a deposit.

* * *

100. The Court has examined the problems raised by the present case in its own context, which is strictly that of delimitation. Other questions relating to the general legal régime of the continental shelf, have been examined for that purpose only. This régime furnishes an example of a legal theory derived from a particular source that has secured a general following. As the Court has recalled in the first part of its Judgment, it was the Truman Proclamation of 28 September 1945 which was at the origin of the theory, whose special features reflect that origin. It would therefore not be in harmony with this history to over-systematize a pragmatic construct the developments of which have occurred within a relatively short space of time.

* * * * *

101. For these reasons,

THE COURT,

by eleven votes to six,

finds that, in each case,

(A) the use of the equidistance method of delimitation not being obligatory as between the Parties; and

(B) there being no other single method of delimitation the use of which is in all circumstances obligatory;

(C) the principles and rules of international law 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 agreements of 1 December 1964 and 9 June 1965, respectively, are as follows:

(1) delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other;

(2) if, in the application of the preceding sub-paragraph, the delimitation leaves to the Parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreement, equally, unless they decide on a régime of joint jurisdiction, user, or exploitation for the zones of overlap or any part of them;

(D) in the course of the negotiations, the factors to be taken into account are to include:

(1) the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features;
(2) so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved;
(3) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region.

Done in English and in French, the English text being authoritative at the Peace Palace, The Hague, this twentieth day of February, one thousand nine hundred and sixty-nine, in four 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, to the Government of the Kingdom of Denmark and to the Government of the Kingdom of the Netherlands, respectively.

(Signed) J. L. BUSTAMANTE R.,
President.

(Signed) S. AQUARONE,
Registrar.

Judge Sir Muhammad ZAFRULLA KHAN makes the following declaration:

I am in agreement with the Judgment throughout but would wish to add the following observations.

The essence of the dispute between the Parties is that the two Kingdoms claim that the delimitation effected between them under the Agreement of 31 March 1966 is binding upon the Federal Republic and that the Federal Republic is bound to accept the situation resulting therefrom, which would confine its continental shelf to the triangle formed by lines A-B-E and C-D-E in Map 3. The Federal Republic stoutly resists that claim.

Not only is Article 6 of the Geneva Convention of 1958 not opposable to the Federal Republic but the delimitation effected under the Agreement of 31 March 1966 does not derive from the provisions of that Article as Denmark and the Netherlands are neither States "whose coasts are opposite each other" within the meaning of the first paragraph of that Article nor are they "two adjacent States" within the meaning of the

second paragraph of that Article. The situation resulting from that delimitation, so far as it affects the Federal Republic is not, therefore, brought about by the application of the principle set out in either of the paragraphs of Article 6 of the Convention.

Had paragraph 2 of Article 6 been applicable to the delimitation of the continental shelf between the Parties to the dispute, a boundary line, determined by the application of the principle of equidistance, would have had to allow for the configuration of the coastline of the Federal Republic as a "special circumstance".

In the course of the oral pleadings the contention that the principle of equidistance *cum* special circumstances had crystallized into a rule of customary international law was not advanced on behalf of the two Kingdoms as an alternative to the claim that that principle was inherent in the very concept of the continental shelf. The Judgment has, in fairness, dealt with these two contentions as if they had been put forward in the alternative and were thus consistent with each other, and has rejected each of them on the merits. I am in agreement with the reasoning of the Judgment on both these points. But, I consider, it is worth mentioning that Counsel for the two Kingdoms summed up their position in regard to the effect of the 1958 Convention as follows:

> ". . . They have not maintained that the Convention embodied already received rules of customary law in the sense that the Convention was merely declaratory of existing rules. Their position is rather that the doctrine of the coastal State's exclusive rights over the adjacent continental shelf was in process of formation between 1945 and 1958; that the State practice prior to 1958 showed fundamental variations in the nature and scope of the rights claimed; that, in consequence, in State practice the emerging doctrine was wholly lacking in any definition of these crucial elements as it was also of the legal régime applicable to the coastal State with respect to the continental shelf; that the process of the definition and consolidation of the emerging customary law took place through the work of the International Law Commission, the reaction of governments to that work and the proceedings of the Geneva Conference; that the emerging customary law, now become more defined, both as to the rights of the coastal State and the applicable régime, crystallized in the adoption of the Continental Shelf Convention by the Conference; and that the numerous signatures and ratifications of the Convention and the other State practice based on the principles set out in the Convention had the effect of consolidating those principles as customary law."

If it were correct that the doctrine of the coastal State's exclusive rights over the adjacent continental shelf was in process of formation

between 1945 and 1958 and that in State practice prior to 1958 it was wholly lacking in any definition of crucial elements as it was also of the legal régime applicable to the coastal State with respect to the continental shelf, then it would seem to follow conclusively that the principle of equidistance was not inherent in the concept of the continental shelf.

Judge BENGZON makes the following declaration:

I regret my inability to concur with the main conclusions of the majority of the Court. I agree with my colleagues who maintain the view that Article 6 of the Geneva Convention is the applicable international law and that as between these Parties equidistance is the rule for delimitation, which rule may even be derived from the general principles of law.

President BUSTAMANTE Y RIVERO, Judges JESSUP, PADILLA NERVO and AMMOUN append Separate Opinions to the Judgment of the Court.

Vice-President KORETSKY, Judges TANAKA, MORELLI, LACHS and Judge *ad hoc* SØRENSEN append Dissenting Opinions to the Judgment of the Court.

(Initialled) J. L. B.-R.
(Initialled) S. A.

Annex 14

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

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

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FOND

27 JUIN 1986

ARRÊT

INTERNATIONAL COURT OF JUSTICE

1986
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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).

Establishment of facts — Relevant period — Powers of the Court — Press information and matters of public knowledge — Statements by representatives of States — Evidence of witnesses — Implicit admissions — Material not presented in accordance with Rules of Court.

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.

Applicable law — Customary international law — Opinio juris *and State practice — Significance of concordant views of Parties — Relationship between customary international law and treaty law — United Nations Charter — Significance of Resolutions of United Nations General Assembly and Organization of American States General Assembly.*

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.

Principles of humanitarian law – 1949 Geneva Conventions – Minimum rules applicable – Duty of States not to encourage disrespect for humanitarian law – Notification of existence and location of mines.

Respect for human rights – Right of States to choose political system, ideology and alliances.

1956 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, EVENSEN ; *Judge* ad hoc COLLIARD ; *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,*

Mr. Paul S. Reichler, Reichler and Appelbaum, Washington, D.C. ; Member of the Bar of the United States Supreme Court ; Member of the Bar of the District of Columbia,

as Counsel and Advocates,

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

Miss Judith C. Appelbaum, Reichler and Appelbaum, Washington, D.C. ; Member of the Bars of the District of Columbia and the State of California,

Mr. David Wippman, Reichler and Appelbaum, Washington, D.C.,

as Counsel,

and

the United States of America,

THE COURT,

composed as above,

delivers the following Judgment :

1. On 9 April 1984 the Ambassador of the Republic of Nicaragua to the Netherlands filed in the Registry of the Court an Application instituting proceedings against the United States of America in respect of a dispute concerning responsibility for military and paramilitary activities in and against Nicaragua. In order to found the jurisdiction of the Court the Application relied on declarations made by the Parties accepting the compulsory jurisdiction of the Court under Article 36 of the Statute.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was at once communicated to the Government of the United States of America. In accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. At the same time as the Application was filed, the Republic of Nicaragua also filed a request for the indication of provisional measures under Article 41 of the Statute. By an Order dated 10 May 1984, the Court rejected a request made by the United States for removal of the case from the list, indicated, pending its final decision in the proceedings, certain provisional measures, and decided that, until the Court delivers its final judgment in the case, it would keep the matters covered by the Order continuously under review.

4. By the said Order of 10 May 1984, the Court further decided that the written proceedings in the case should first be addressed to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application. By an Order dated 14 May 1984, the President of the Court fixed 30 June 1984 as time-limit for the filing of a Memorial by the Republic of Nicaragua and 17 August 1984 as time-limit for the filing of a Counter-Memorial by the United States of America on the questions of jurisdiction and admissibility and these pleadings were duly filed within the time-limits fixed.

5. In its Memorial on jurisdiction and admissibility, the Republic of Nicaragua contended that, in addition to the basis of jurisdiction relied on in the Application, a Treaty of Friendship, Commerce and Navigation signed by the Parties

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

6. Since the Court did not include upon the bench a judge of Nicaraguan nationality, Nicaragua, by a letter dated 3 August 1984, exercised its right under Article 31, paragraph 2, of the Statute of the Court to choose a judge *ad hoc* to sit in the case. The person so designated was Professor Claude-Albert Colliard.

7. On 15 August 1984, two days before the closure of the written proceedings on the questions of jurisdiction and admissibility, the Republic of El Salvador filed a Declaration of Intervention in the case under Article 63 of the Statute. Having been supplied with the written observations of the Parties on the Declaration pursuant to Article 83 of the Rules of Court, the Court, by an Order dated 4 October 1984, decided not to hold a hearing on the Declaration of Intervention, and decided that that Declaration was inadmissible inasmuch as it related to the phase of the proceedings then current.

8. On 8-10 October and 15-18 October 1984 the Court held public hearings at which it heard the argument of the Parties on the questions of the jurisdiction of the Court to entertain the dispute and the admissibility of the Application.

9. By a Judgment dated 26 November 1984, the Court found that it had jurisdiction to entertain the Application on the basis of Article 36, paragraphs 2 and 5, of the Statute of the Court ; that it had jurisdiction to entertain the Application in so far as it relates to a dispute concerning the interpretation or application of the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua of 21 January 1956, on the basis of Article XXIV of that Treaty ; that it had jurisdiction to entertain the case ; and that the Application was admissible.

10. By a letter dated 18 January 1985 the Agent of the United States referred to the Court's Judgment of 26 November 1984 and informed the Court as follows :

> "the United States is constrained to conclude that the judgment of the Court was clearly and manifestly erroneous as to both fact and law. The United States remains firmly of the view, for the reasons given in its written and oral pleadings that the Court is without jurisdiction to entertain the dispute, and that the Nicaraguan application of 9 April 1984 is inadmissible. Accordingly, it is my duty to inform you that the United States intends not to participate in any further proceedings in connection with this case, and reserves its rights in respect of any decision by the Court regarding Nicaragua's claims."

11. By an Order dated 22 January 1985 the President of the Court, after referring to the letter from the United States Agent, fixed 30 April 1985 as time-limit for a Memorial of Nicaragua and 31 May 1985 as time-limit for a Counter-Memorial of the United States of America on the merits of the dispute. The Memorial of Nicaragua was filed within the time-limit so fixed ; no pleading was filed by the United States of America, nor did it make any request for extension of the time-limit. In its Memorial, communicated to the United States pursuant to Article 43 of the Statute of the Court, Nicaragua invoked Article 53 of the Statute and called upon the Court to decide the case despite the failure of the Respondent to appear and defend.

12. On 10 September 1985, immediately prior to the opening of the oral proceedings, the Agent of Nicaragua submitted to the Court a number of documents referred to as "Supplemental Annexes" to the Memorial of Nicaragua. In application of Article 56 of the Rules of Court, these documents were treated as "new documents" and copies were transmitted to the United States of America, which did not lodge any objection to their production.

13. On 12-13 and 16-20 September 1985 the Court held public hearings at which it was addressed by the following representatives of Nicaragua : H.E. Mr. Carlos Argüello Gómez, Hon. Abram Chayes, Mr. Paul S. Reichler, Mr. Ian Brownlie, and Mr. Alain Pellet. The United States was not represented at the hearing. The following witnesses were called by Nicaragua and gave evidence : Commander Luis Carrión, Vice-Minister of the Interior of Nicaragua (examined by Mr. Brownlie) ; Dr. David MacMichael, a former officer of the United States Central Intelligence Agency (CIA) (examined by Mr. Chayes) ; Professor Michael John Glennon (examined by Mr. Reichler) ; Father Jean Loison (examined by Mr. Pellet) ; Mr. William Huper, Minister of Finance of Nicaragua (examined by Mr. Argüello Gómez). Questions were put by Members of the Court to the witnesses, as well as to the Agent and counsel of Nicaragua, and replies were given either orally at the hearing or subsequently in writing. On 14 October 1985 the Court requested Nicaragua to make available certain further information and documents, and one Member of the Court put a question to Nicaragua. The verbatim records of the hearings and the information and documents supplied in response to these requests were transmitted by the Registrar to the United States of America.

14. Pursuant to Article 53, paragraph 2, of the Rules of Court, the pleadings and annexed documents were made accessible to the public by the Court as from the date of opening of the oral proceedings.

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

in the Application :

"Nicaragua, reserving the right to supplement or to amend this Application and subject to the presentation to the Court of the relevant evidence and legal 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 pleading before it at the earlier stages of the procedure, those concerning the request for the indication of provisional measures and to the questions of jurisdiction and admissibility. By its Judgment of 26 November 1984, the Court found, *inter alia,* that it had jurisdiction to entertain the case ; it must however take steps to "satisfy itself" that the claims of the Applicant are "well founded in fact and law". The question of the application of Article 53 has been dealt with by the Court in a number of previous cases, referred to above, and the Court does not therefore find it necessary to recapitulate the content of these decisions. The reasoning adopted to dispose of the basic problems arising was essentially the same, although the words used may have differed slightly from case to case. Certain points of principle may however be restated here. A State which decides not to appear must accept the consequences of its decision, the first of which is that the case will continue without its participation ; the State which has chosen not to appear remains a party to the case, and is bound by the eventual judgment in accordance with Article 59 of the Statute. There is however no question of a judgment automatically in favour of the party appearing, since the Court is required, as mentioned above, to "satisfy itself" that that party's claim is well founded in fact and law.

29. The use of the term "satisfy itself" in the English text of the Statute (and in the French text the term "s'assurer") implies that the Court must attain the same degree of certainty as in any other case that the claim of the party appearing is sound in law, and, so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence. For the purpose of deciding whether the claim is well founded in law, the principle *jura novit curia* signifies that the Court is not solely dependent on the argument of the parties before it with respect to the applicable law (cf. *"Lotus", P.C.I.J., Series A, No. 10,* p. 31), so that the absence of one party has less impact. As the Court observed in the *Fisheries Jurisdiction* cases :

> "The Court . . ., as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be

> relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court." (*I.C.J. Reports 1974,* p. 9, para. 17 ; p. 181, para. 18.)

Nevertheless the views of the parties to a case as to the law applicable to their dispute are very material, particularly, as will be explained below (paragraphs 184 and 185), when those views are concordant. In the present case, the burden laid upon the Court is therefore somewhat lightened by the fact that the United States participated in the earlier phases of the case, when it submitted certain arguments on the law which have a bearing also on the merits.

30. As to the facts of the case, in principle the Court is not bound to confine its consideration to the material formally submitted to it by the parties (cf. *Brazilian Loans, P.C.I.J., Series A, No. 20/21,* p. 124 ; *Nuclear Tests, I.C.J. Reports 1974,* pp. 263-264, paras. 31, 32). Nevertheless, the Court cannot by its own enquiries entirely make up for the absence of one of the Parties ; that absence, in a case of this kind involving extensive questions of fact, must necessarily limit the extent to which the Court is informed of the facts. It would furthermore be an over-simplification to conclude that the only detrimental consequence of the absence of a party is the lack of opportunity to submit argument and evidence in support of its own case. Proceedings before the Court call for vigilance by all. The absent party also forfeits the opportunity to counter the factual allegations of its opponent. It is of course for the party appearing to prove the allegations it makes, yet as the Court has held :

> "While Article 53 thus obliges the Court to consider the submissions of the Party which appears, it does not compel the Court to examine their accuracy in all their details ; for this might in certain unopposed cases prove impossible in practice." (*Corfu Channel, I.C.J. Reports 1949,* p. 248.)

31. While these are the guiding principles, the experience of previous cases in which one party has decided not to appear shows that something more is involved. Though formally absent from the proceedings, the party in question frequently submits to the Court letters and documents, in ways and by means not contemplated by the Rules. The Court has thus to strike a balance. On the one hand, it is valuable for the Court to know the views of both parties in whatever form those views may have been expressed. Further, as the Court noted in 1974, where one party is not appearing "it is especially incumbent upon the Court to satisfy itself that it is in possession of all the available facts" (*Nuclear Tests, I.C.J. Reports 1974,* p. 263, para. 31 ; p. 468, para. 32). On the other hand, the Court has to emphasize

that the equality of the parties to the dispute must remain the basic principle for the Court. The intention of Article 53 was that in a case of non-appearance neither party should be placed at a disadvantage ; therefore the party which declines to appear cannot be permitted to profit from its absence, since this would amount to placing the party appearing at a disadvantage. The provisions of the Statute and Rules of Court concerning the presentation of pleadings and evidence are designed to secure a proper administration of justice, and a fair and equal opportunity for each party to comment on its opponent's contentions. The treatment to be given by the Court to communications or material emanating from the absent party must be determined by the weight to be given to these different considerations, and is not susceptible of rigid definition in the form of a precise general rule. The vigilance which the Court can exercise when aided by the presence of both parties to the proceedings has a counterpart in the special care it has to devote to the proper administration of justice in a case in which only one party is present.

* * *

32. Before proceeding further, the Court considers it appropriate to deal with a preliminary question, relating to what may be referred to as the 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 *Nottebohm* 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.)

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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" (*Panevezys-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 *Aegean 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-

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 State Department entitled *"Revolution Beyond Our Borders", Sandinista Intervention in Central America* intended to justify the policy of the United States towards Nicaragua. This publication was issued in September 1985, and on 6 November 1985 was circulated as an official document of the United Nations General Assembly and the Security Council, at the request of the United States (A/40/858 ; S/17612) ; Nicaragua had circulated in reply a letter to the Secretary-General, annexing *inter alia* an extract from its Memorial on the Merits and an extract from the verbatim records of the hearings in the case (A/40/907 ; S/17639). The United States publication was not submitted to the Court in any formal manner contemplated by the Statute and Rules of Court, though on 13 September 1985 the United States Information Office in The Hague sent copies to an official of the Registry to be made available to anyone at the Court interested in the subject. The representatives of Nicaragua before the Court during the hearings were aware of the existence of this publication, since it was referred to in a question put to the Agent of Nicaragua by a Member of the Court. They did not attempt to refute before the Court what was said in that publication, pointing out that materials of this kind "do not constitute evidence in this case", and going on to suggest that it "cannot properly be considered by the Court". The Court however considers that, in view of the special circumstances of this case, it may, within limits, make use of information in such a publication.

* *

74. In connection with the question of proof of facts, the Court notes that Nicaragua has relied on an alleged implied admission by the United States. It has drawn attention to the invocation of collective self-defence by the United States, and contended that "the use of the justification of

collective self-defence constitutes a major admission of direct and substantial United States involvement in the military and paramilitary operations" directed against Nicaragua. The Court would observe that the normal purpose of an invocation of self-defence is to justify conduct which would otherwise be wrongful. If advanced as a justification in itself, not coupled with a denial of the conduct alleged, it may well imply both an admission of that conduct, and of the wrongfulness of that conduct in the absence of the justification of self-defence. This reasoning would do away with any difficulty in establishing the facts, which would have been the subject of an implicit overall admission by the United States, simply through its attempt to justify them by the right of self-defence. However, in the present case the United States has not listed the facts or described the measures which it claims to have taken in self-defence ; nor has it taken the stand that it is responsible for all the activities of which Nicaragua accuses it but such activities were justified by the right of self-defence. Since it has not done this, the United States cannot be taken to have admitted all the activities, or any of them ; the recourse to the right of self-defence thus does not make possible a firm and complete definition of admitted facts. The Court thus cannot consider reliance on self-defence to be an implicit general admission on the part of the United States ; but it is certainly a recognition as to the imputability of some of the activities complained of.

* * * * *

75. Before examining the complaint of Nicaragua against the United States that the United States is responsible for the military capacity, if not the very existence, of the *contra* forces, the Court will first deal with events which, in the submission of Nicaragua, involve the responsibility of the United States in a more direct manner. These are the mining of Nicaraguan ports or waters in early 1984 ; and certain attacks on, in particular, Nicaraguan port and oil installations in late 1983 and early 1984. It is the contention of Nicaragua that these were not acts committed by members of the *contras* with the assistance and support of United States agencies. Those directly concerned in the acts were, it is claimed, not Nicaraguan nationals or other members of the FDN or ARDE, but either United States military personnel or persons of the nationality of unidentified Latin American countries, paid by, and acting on the direct instructions of, United States military or intelligence personnel. (These persons were apparently referred to in the vocabulary of the CIA as "UCLAs" – "Unilaterally Controlled Latino Assets", and this acronym will be used, purely for convenience, in what follows.) Furthermore, Nicaragua contends that such United States personnel, while they may have refrained from themselves entering Nicaraguan territory or recognized territorial waters, directed the operations and gave very close logistic, intelligence and practical support. A further complaint by Nicaragua which does not

relate to *contra* activity is that of overflights of Nicaraguan territory and territorial waters by United States military aircraft. These complaints will now be examined.

* *

76. On 25 February 1984, two Nicaraguan fishing vessels struck mines in the Nicaraguan port of El Bluff, on the Atlantic coast. On 1 March 1984 the Dutch dredger *Geoponte*, 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 Carrión 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 mother ships used for the operation were operated, it is said, by United States nationals ; they are reported to have remained outside the 12-mile limit of Nicaraguan territorial waters recognized by the United States. Other less sophisticated mines may, it appears, have been laid in ports and in Lake Nicaragua by *contras* operating separately ; a Nicaraguan military official was quoted in the press as stating that "most" of the mining activity was directed by the United States.

79. According to Nicaragua, vessels of Dutch, Panamanian, Soviet, Liberian and Japanese registry, and one *(Homin)* of unidentified 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 and official warning to international shipping of the existence and location of the mines ; and that personal and material injury was caused by the explosion of the mines, which also created risks causing a rise in marine insurance rates.

* *

81. The operations which Nicaragua attributes to the direct action of United States personnel or "UCLAs", in addition to the mining of ports, are apparently the following :

(i) 8 September 1983 : an attack was made on Sandino international airport in Managua by a Cessna aircraft, which was shot down ;
(ii) 13 September 1983 : an underwater oil pipeline and part of the oil terminal at Puerto Sandino were blown up ;
(iii) 2 October 1983 : an attack was made on oil storage facilities at Benjamin Zeledon on the Atlantic coast, causing the loss of a large quantity of fuel ;
(iv) 10 October 1983 : an attack was made by air and sea on the port of Corinto, involving the destruction of five oil storage tanks, the loss of millions of gallons of fuel, and the evacuation of large numbers of the local population ;
(v) 14 October 1983 : the underwater oil pipeline at Puerto Sandino was again blown up ;
(vi) 4/5 January 1984 : an attack was made by speedboats and helicopters using rockets against the Potosí 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 Carrión lists items (i), (ii), (iv) and (vi), and in his oral evidence before the Court he mentioned items (ii) and (iv). Items (vi) to (x) were listed in what was said to be a classified CIA internal memorandum or report, excerpts from which were published in the *Wall Street Journal* on 6 March 1985 ; according to the newspaper, "intelligence and congressional officials" had confirmed the authenticity of the document. So far as the Court is aware, no denial of the report was made by the United States administration. The affidavit of the former FDN leader Edgar Chamorro states that items (ii), (iv) and (vi) were the work of UCLAs despatched from a CIA "mother ship", though the FDN was told by the CIA to claim responsibility. It is not however clear what the source of Mr. Chamorro's information was ; since there is no suggestion that he participated in the operation (he states that the FDN "had nothing whatsoever to do" with it), his evidence is probably strictly hearsay, and at the date of his affidavit, the same allegations had been published in the press. Although he did not leave the FDN until the end of 1984, he makes no mention of the attacks listed above of January to April 1984.

85. The Court considers that it should eliminate from further consideration under this heading the following items :

- the attack of 8 September 1983 on Managua airport (item (i)) : this was claimed by the ARDE ; a press report is to the effect that the ARDE purchased the aircraft from the CIA, but there is no evidence of CIA planning, or the involvement of any United States personnel or UCLAs ;
- the attack on Benjamin Zeledon on 2 October 1983 (item (iii)) : there is no evidence of the involvement of United States personnel or UCLAs ;
- the incident of 24-25 February 1984 (item vii), already dealt with under the heading of the mining of ports.

86. On the other hand the Court finds the remaining incidents listed in paragraph 81 to be established. The general pattern followed by these attacks appears to the Court, on the basis of that evidence and of press reports quoting United States administration sources, to have been as follows. A "mother ship" was supplied (apparently leased) by the CIA ; whether it was of United States registry does not appear. Speedboats, guns and ammunition were supplied by the United States administration, and the actual attacks were carried out by "UCLAs". Helicopters piloted by Nicaraguans and others piloted by United States nationals were also involved on some occasions. According to one report the pilots were United States civilians under contract to the CIA. Although it is not proved that any United States military personnel took a direct part in the operations, agents of the United States participated in the planning, direction, support and execution of the operations. The execution was the task rather

of the "UCLAs", while United States nationals participated in the planning, direction and support. The imputability to the United States of these attacks appears therefore to the Court to be established.

* *

87. Nicaragua complains of infringement of its airspace by United States military aircraft. Apart from a minor incident on 11 January 1984 involving a helicopter, as to which, according to a press report, it was conceded by the United States that it was possible that the aircraft violated Nicaraguan airspace, this claim refers to overflights by aircraft at high altitude for intelligence reconnaissance purposes, or aircraft for supply purposes to the *contras* in the field, and aircraft producing "sonic booms". The Nicaraguan Memorial also mentions low-level reconnaissance flights by aircraft piloted by United States personnel in 1983, but the press report cited affords no evidence that these flights, along the Honduran border, involved any invasion of airspace. In addition Nicaragua has made a particular complaint of the activities of a United States SR-71 plane between 7 and 11 November 1984, which is said to have flown low over several Nicaraguan cities "producing loud sonic booms and shattering glass windows, to exert psychological pressure on the Nicaraguan Government and population".

88. The evidence available of these overflights is as follows. During the proceedings on jurisdiction and admissibility, the United States Government deposited with the Court a "Background Paper" published in July 1984, incorporating eight aerial photographs of ports, camps, an airfield, etc., in Nicaragua, said to have been taken between November 1981 and June 1984. According to a press report, Nicaragua made a diplomatic protest to the United States in March 1982 regarding overflights, but the text of such protest has not been produced. In the course of a Security Council debate on 25 March 1982, the United States representative said that

> "It is true that once we became aware of Nicaragua's intentions and actions, the United States Government undertook overflights to safeguard our own security and that of other States which are threatened by the Sandinista Government",

and continued

> "These overflights, conducted by unarmed, high-flying planes, for the express and sole purpose of verifying reports of Nicaraguan intervention, *are* no threat to regional peace and stability ; quite the contrary." (S/PV.2335, p. 48, emphasis added.)

The use of the present tense may be taken to imply that the overflights were continuing at the time of the debate. Press reports of 12 November 1984 confirm the occurrence of sonic booms at that period, and report the statement of Nicaraguan Defence Ministry officials that the plane responsible was a United States SR-71.

89. The claim that sonic booms were caused by United States aircraft in November 1984 rests on assertions by Nicaraguan Defence Ministry officials, reported in the United States press ; the Court is not however aware of any specific denial of these flights by the United States Government. On 9 November 1984 the representative of Nicaragua in the Security Council asserted that United States SR-71 aircraft violated Nicaraguan airspace on 7 and 9 November 1984 ; he did not specifically mention sonic booms in this respect (though he did refer to an earlier flight by a similar aircraft, on 31 October 1984, as having been "accompanied by loud explosions" (S/PV. 2562, pp. 8-10)). The United States representative in the Security Council did not comment on the specific incidents complained of by Nicaragua but simply said that "the allegation which is being advanced against the United States" was "without foundation" (*ibid.*, p. 28).

90. As to low-level reconnaissance flights by United States aircraft, or flights to supply the *contras* in the field, Nicaragua does not appear to have offered any more specific evidence of these ; and it has supplied evidence that United States agencies made a number of planes available to the *contras* themselves for use for supply and low-level reconnaissance purposes. According to Commander Carrión, these planes were supplied after late 1982, and prior to the *contras* receiving the aircraft, they had to return at frequent intervals to their 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 Callejas, 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 :

"Covert operations under the CIA proposal, according to the NSC records, are intended to :

'Build popular support in Central America and Nicaragua for an opposition front that would be nationalistic, anti-Cuban and anti-Somoza.

Support the opposition front through formation and training of action teams to collect intelligence and engage in paramilitary and political operations in Nicaragua and elsewhere.

Work primarily through non-Americans'

to achieve these covert objectives . . ."

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 suppport 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 those 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 Carrión, 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* "constitute[d] an independent force" and that the "only element of control that could be exercised by the United States" was "cessation of aid". Paradoxically this assessment serves to underline, *a contrario,* the potential for control inherent in the degree of the *contras'* dependence on aid. Yet despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf.

110. So far as the potential control constituted by the possibility of cessation of United States military aid is concerned, it may be noted that after 1 October 1984 such aid was no longer authorized, though the sharing of intelligence, and the provision of "humanitarian assistance" as defined in the above-cited legislation (paragraph 97) may continue. Yet, according to Nicaragua's own case, and according to press reports, *contra* activity has continued. In sum, the evidence available to the Court indicates that the various forms of assistance provided to the *contras* by the United States have been crucial to the pursuit of their activities, but is insufficient to demonstrate their complete dependence on United States aid. On the other hand, it indicates that in the initial years of United States assistance the *contra* force was so dependent. However, whether the United States Government at any stage devised the strategy and directed the tactics of the *contras* depends on the extent to which the United States made use of the potential for control inherent in that dependence. The Court already indicated that it has insufficient evidence to reach a finding on this point. It is *a fortiori* unable to determine that the *contra* force may be equated for

legal purposes with the forces of the United States. This conclusion, however, does not of course suffice to resolve the entire question of the responsibility incurred by the United States through its assistance to the *contras*.

111. In the view of the Court it is established that the *contra* force has, at least at one period, been so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the United States. This finding is fundamental in the present case. Nevertheless, adequate direct proof that all or the great majority of *contra* activities during that period received this support has not been, and indeed probably could not be, advanced in every respect. It will suffice the Court to stress that a degree of control by the United States Government, as described above, is inherent in the position in which the *contra* force finds itself in relation to that Government.

112. To show the existence of this control, the Applicant argued before the Court that the political leaders of the *contra* force had been selected, installed and paid by the United States ; it also argued that the purpose herein was both to guarantee United States control over this force, and to excite sympathy for the Government's policy within Congress and among the public in the United States. According to the affidavit of Mr. Chamorro, who was directly concerned, when the FDN was formed "the name of the organization, the members of the political junta, and the members of the general staff were all chosen or approved by the CIA" ; later the CIA asked that a particular person be made head of the political directorate of the FDN, and this was done. However, the question of the selection, installation and payment of the leaders of the *contra* force is merely one aspect among others of the degree of dependency of that force. This partial dependency on the United States authorities, the exact extent of which the Court cannot establish, may certainly be inferred *inter alia* from the fact that the leaders were selected by the United States. But it may also be inferred from other factors, some of which have been examined by the Court, such as the organization, training and equipping of the force, the planning of operations, the choosing of targets and the operational support provided.

* *

113. The question of the degree of control of the *contras* by the United States Government is relevant to the claim of Nicaragua attributing responsibility to the United States for activities of the *contras* whereby the United States has, it is alleged, violated an obligation of international law not to kill, wound or kidnap citizens of Nicaragua. The activities in question are said to represent a tactic which includes "the spreading of terror and danger to non-combatants as an end in itself with no attempt to

observe humanitarian standards and no reference to the concept of military necessity". In support of this, Nicaragua has catalogued numerous incidents, attributed to "CIA-trained mercenaries" or "mercenary forces", of kidnapping, assassination, torture, rape, killing of prisoners, and killing of civilians not dictated by military necessity. The declaration of Commander Carrión annexed to the Memorial lists the first such incident in December 1981, and continues up to the end of 1984. Two of the witnesses called by Nicaragua (Father Loison and Mr. Glennon) gave oral evidence as to events of this kind. By way of examples of evidence to provide "direct proof of the tactics adopted by the *contras* under United States guidance and control", the Memorial of Nicaragua offers a statement, reported in the press, by the ex-FDN leader Mr. Edgar Chamorro, repeated in the latter's affidavit, of assassinations in Nicaraguan villages ; the alleged existence of a classified Defence Intelligence Agency report of July 1982, reported in the *New York Times* on 21 October 1984, disclosing that the *contras* were carrying out assassinations ; and the preparation by the CIA in 1983 of a manual of psychological warfare. At the hearings, reliance was also placed on the affidavit of Mr. Chamorro.

114. In this respect, the Court notes that according to Nicaragua, the *contras* are no more than bands of mercenaries which have been recruited, organized, paid and commanded by the Government of the United States. This would mean that they have no real autonomy in relation to that Government. Consequently, any offences which they have committed would be imputable to the Government of the United States, like those of any other forces placed under the latter's command. In the view of Nicaragua, "*stricto sensu,* the military and paramilitary attacks launched by the United States against Nicaragua do not constitute a case of civil strife. They are essentially the acts of the United States." If such a finding of the imputability of the acts of the *contras* to the United States were to be made, no question would arise of mere complicity in those acts, or of incitement of the *contras* to commit them.

115. The Court has taken the view (paragraph 110 above) that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras,* the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United

States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.

116. The Court does not consider that the assistance given by the United States to the *contras* warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that State. It takes the view that the *contras* remain responsible for their acts, and that the United States is not responsible for the acts of the *contras*, but for its own conduct vis-à-vis Nicaragua, including conduct related to the acts of the *contras*. What the Court has to investigate is not the complaints relating to alleged violations of humanitarian law by the *contras*, regarded by Nicaragua as imputable to the United States, but rather unlawful acts for which the United States may be responsible directly in connection with the activities of the *contras*. The lawfulness or otherwise of such acts of the United States is a question different from the violations of humanitarian law of which the *contras* may or may not have been guilty. It is for this reason that the Court does not have to determine whether the violations of humanitarian law attributed to the *contras* were in fact committed by them. At the same time, the question whether the United States Government was, or must have been, aware at the relevant time that allegations of breaches of humanitarian law were being made against the *contras* is relevant to an assessment of the lawfulness 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 Congress, First Session,* 1981, p. B.114.)

The manual was written, according to press reports, by "a low-level contract employee" of the CIA ; the Report of the Intelligence Committee concluded :

> "The Committee believes that the manual has caused embarrassment to the United States and should never have been released in any of its various forms. Specific actions it describes are repugnant to American values.
>
> The original purpose of the manual was to provide training to moderate FDN behavior in the field. Yet, the Committee believes that the manual was written, edited, distributed and used without adequate supervision. No one but its author paid much attention

> to the manual. Most CIA officials learned about it from news accounts.
>
> The Committee was told that CIA officers should have reviewed the manual and did not. The Committee was told that all CIA officers should have known about the Executive Order's ban on assassination . . . but some did not. The entire publication and distribution of the manual was marked within the Agency by confusion about who had authority and responsibility for the manual. The incident of the manual illustrates once again to a majority of the Committee that the CIA did not have adequate command and control of the entire Nicaraguan covert action . . .
>
> CIA officials up the chain of command either never read the manual or were never made aware of it. Negligence, not intent to violate the law, marked the manual's history.
>
> The Committee concluded that there was no intentional violation of Executive Order 12333."

When the existence of the manual became known at the level of the United States Congress, according to one press report, "the CIA urged rebels to ignore all its recommendations and 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 sem-

blance of trial in the presence of the population. The text supplied to the *contras* also advised the use of professional criminals to perform unspecified "jobs", and the use of provocation at mass demonstrations to produce violence on the part of the authorities so as to make "martyrs".

* *

123. Nicaragua has complained to the Court of certain measures of an economic nature taken against it by the Government of the United States, beginning with the cessation of economic aid in April 1981, which it regards as an indirect form of intervention in its internal affairs. According to information published by the United States Government, it provided more than $100 million in economic aid to Nicaragua between July 1979 and January 1981 ; however, concern in the United States Congress about certain activities attributed to the Nicaraguan Government led to a requirement that, before disbursing assistance to Nicaragua, the President certify that Nicaragua was not "aiding, abetting or supporting acts of violence or terrorism in other countries" (Special Central American Assistance Act, 1979, Sec. 536 *(g)*). Such a certification was given in September 1980 (45 Federal Register 62779), to the effect that

> "on the basis of an evaluation of the available evidence, that the Government of Nicaragua 'has not co-operated with or harbors any international terrorist organization or is aiding, abetting or supporting acts of violence or terrorism in other countries' ".

An official White House press release of the same date stated that

> "The certification is based upon a careful consideration and evaluation of all the relevant evidence provided by the intelligence community and by our Embassies in the field . . . Our intelligence agencies as well as our Embassies in Nicaragua and neighboring countries were fully consulted, and the diverse information and opinions from all sources were carefully weighed."

On 1 April 1981 however a determination was made to the effect that the United States could no longer certify that Nicaragua was not engaged in support for "terrorism" abroad, and economic assistance, which had been suspended in January 1981, was thereby terminated. According to the Nicaraguan Minister of Finance, this also affected loans previously contracted, and its economic impact was more than $36 million per annum. Nicaragua also claims that, at the multilateral level, the United States has

acted in the Bank for International Reconstruction and Development and the Inter-American Development Bank to oppose or block loans to Nicaragua.

124. On 23 September 1983, the President of the United States made a proclamation modifying the system of quotas for United States imports of sugar, the effect of which was to reduce the quota attributed to Nicaragua by 90 per cent. The Nicaraguan Finance Minister assessed the economic impact of the measure at between $15 and $18 million, due to the preferential system of prices that sugar has in the market of the United States.

125. On 1 May 1985, the President of the United States made an Executive Order, which contained a finding that "the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States" and declared a "national emergency". According to the President's message to Congress, this emergency situation had been created by "the Nicaraguan Government's aggressive activities in Central America". The Executive Order declared a total trade embargo on Nicaragua, prohibiting all imports from and exports to that country, barring Nicaraguan vessels from United States ports and excluding Nicaraguan aircraft from air transportation to and from the United States.

* * *

126. The Court has before it, in the Counter-Memorial on jurisdiction and admissibility filed by the United States, the assertion that the United States, pursuant to the inherent right of individual and collective self-defence, and in accordance with the Inter-American Treaty of Reciprocal Assistance, has responded to requests from El Salvador, Honduras and Costa Rica, for assistance in their self-defence against aggression by Nicaragua. The Court has therefore to ascertain, so far as possible, the facts on which this claim is or may be based, in order to determine whether collective self-defence constitutes a justification of the activities of the United States here complained of. Furthermore, it has been suggested that, as a result of certain assurances given by the Nicaraguan "Junta of the Government of National Reconstruction" in 1979, the Government of Nicaragua is bound by international obligations as regards matters which would otherwise be matters of purely domestic policy, that it is in breach of those obligations, and that such breach might justify the action of the United States. The Court will therefore examine the facts underlying this suggestion also.

127. Nicaragua claims that the references made by the United States to the justification of collective self-defence are merely "pretexts" for the activities of the United States. It has alleged that the true motive for the conduct of the United States is unrelated to the support which it accuses

Nicaragua of giving to the armed opposition in El Salvador, and that the real objectives of United States policy are to impose its will upon Nicaragua and force it to comply with United States demands. In the Court's view, however, if Nicaragua has been giving support to the armed opposition in El Salvador, and if this constitutes an armed attack on El Salvador and the other appropriate conditions are met, collective self-defence could be legally invoked by the United States, even though there may be the possibility of an additional motive, one perhaps even more decisive for the United States, drawn from the political orientation of the present Nicaraguan Government. The existence of an additional motive, other than that officially proclaimed by the United States, could not deprive the latter of its right to resort to collective self-defence. The conclusion to be drawn is that special caution is called for in considering the allegations of the United States concerning conduct by Nicaragua which may provide a sufficient basis for self-defence.

128. In its Counter-Memorial on jurisdiction and admissibility, the United States claims that Nicaragua has "promoted and supported guerrilla violence in neighboring countries", particularly in El Salvador ; and has openly conducted cross-border military attacks on its neighbours, Honduras and Costa Rica. In support of this, it annexed to the Counter-Memorial an affidavit by Secretary of State George P. Shultz. In his affidavit, Mr. Shultz declares, *inter alia*, that:

> "The United States has abundant evidence that the Government of Nicaragua has actively supported armed groups engaged in military and paramilitary activities in and against El Salvador, providing such groups with sites in Nicaragua for communications facilities, command and control headquarters, training and logistics support. The Government of Nicaragua is directly engaged with these armed groups in planning ongoing military and paramilitary activities conducted in and against El Salvador. The Government of Nicaragua also participates directly in the procurement, and transshipment through Nicaraguan territory, of large quantities of ammunition, supplies and weapons for the armed groups conducting military and paramilitary activities in and against El Salvador.
>
> In addition to this support for armed groups operating in and against El Salvador, the Government of Nicaragua has engaged in similar support, albeit on a smaller scale, for armed groups engaged, or which have sought to engage, in military or paramilitary activities in and against the Republic of Costa Rica, the Republic of Honduras, and the Republic of Guatemala. The regular military forces of Nicaragua have engaged in several direct attacks on Honduran and Costa Rican territory, causing casualties among the armed forces and civilian populations of those States."

In connection with this declaration, the Court would recall the observa-

tions it has already made (paragraphs 69 and 70) as to the evidential value of declarations by ministers of the government of a State engaged in litigation concerning an armed conflict.

129. In addition, the United States has quoted Presidents Magaña and Duarte of El Salvador, press reports, and United States Government publications. With reference to the claim as to cross-border military attacks, the United States has quoted a statement of the Permanent Representative of Honduras to the Security Council, and diplomatic protests by the Governments of Honduras and Costa Rica to the Government of Nicaragua. In the subsequent United States Government publication *"Revolution Beyond Our Borders"*, referred to in paragraph 73 above, these claims are brought up to date with further descriptive detail. Quoting "Honduran government records", this publication asserts that there were 35 border incursions by the Sandinista People's Army in 1981 and 68 in 1982.

130. In its pleading at the jurisdictional stage, the United States asserted the justification of collective self-defence in relation to alleged attacks on El Salvador, Honduras and Costa Rica. It is clear from the material laid before the Court by Nicaragua that, outside the context of the present judicial proceedings, the United States administration has laid the greatest stress on the question of arms supply and other forms of support to opponents of the Government in El Salvador. In 1983, on the proposal of the Intelligence Committee, the covert programme of assistance to the *contras* "was to be directed only at the interdiction of arms to El Salvador". Nicaragua's other neighbours have not been lost sight of, but the emphasis has continued to be on El Salvador : the United States Continuing Appropriations Act 1985, Section 8066 *(b)* (1) (A), provides for aid for the military or paramilitary activities in Nicaragua to be resumed if the President reports *inter alia* that

> "the Government of Nicaragua is providing material or monetary support to anti-government forces engaged in military or paramilitary operations in El Salvador or other Central American countries".

131. In the proceedings on the merits, Nicaragua has addressed itself primarily to refuting the claim that it has been supplying arms and other assistance to the opponents of the Government of El Salvador ; it has not specifically referred to the allegations of attacks on Honduras or Costa Rica. In this it is responding to what is, as noted above, the principal justification announced by the United States for its conduct. In ascertaining whether the conditions for the exercise by the United States of the right of collective self-defence are satisfied, the Court will accordingly first consider the activities of Nicaragua in relation to El Salvador, as established by the evidence and material available to the Court. It will then consider whether Nicaragua's conduct in relation to Honduras or Costa

Rica may justify the exercise of that right ; in that respect it will examine only the allegations of direct cross-border attacks, since the affidavit of Mr. Shultz claims only that there was support by the provision of arms and supplies for military and paramilitary activities "on a smaller scale" in those countries than in El Salvador.

132. In its Declaration of Intervention dated 15 August 1984, the Government of El Salvador stated that : "The reality is that we are the victims of aggression and armed attack from Nicaragua and have been since at least 1980." (Para. IV.) The statements of fact in that Declaration are backed by a declaration by the Acting Minister for Foreign Affairs of El Salvador, similar in form to the declarations by Nicaraguan Ministers annexed to its pleadings. The Declaration of Intervention asserts that "terrorists" seeking the overthrow of the Government of El Salvador were "directed, armed, supplied and trained by Nicaragua" (para. III) ; that Nicaragua provided "houses, hideouts and communication facilities" (para. VI), and training centres managed by Cuban and Nicaraguan military personnel (para. VII). On the question of arms supply, the Declaration states that

> "Although the quantities of arms and supplies, and the routes used, vary, there has been a continuing flow of arms, ammunition, medicines, and clothing from Nicaragua to our country." (Para. VIII.)

133. In its observations, dated 10 September 1984, on the Declaration of Intervention of El Salvador, Nicaragua stated as follows :

> "The Declaration includes a series of paragraphs alleging activities by Nicaragua that El Salvador terms an 'armed attack'. The Court should know that this is the first time El Salvador has asserted it is under armed attack from Nicaragua. None of these allegations, which are properly addressed to the merits phase of the case, is supported by proof or evidence of any kind. Nicaragua denies each and every one of them, and stands behind the affidavit of its Foreign Minister, Father Miguel d'Escoto 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 Salvadorian rebels from Nicaragua at any time ?

A. : Yes, I did.

Q. : When was that ?

A. : Late 1980 to very early 1981."

Mr. MacMichael indicated the sources of the evidence he was referring to, and his examination continued :

"*[Question :]* Does the evidence establish that the Government of Nicaragua was involved during this period ?

[Answer :] No, it does not establish it, but I could not rule it out."

135. After counsel for Nicaragua had completed his examination of the witness, Mr. MacMichael was questioned from the bench, and in this context he stated *(inter alia)* as follows :

"*[Question :]* Thus if the Government of Nicaragua had shipped arms to El Salvador before March 1981, for example in 1980 and early 1981, in order to arm the big January offensive of the insurgents in El

Salvador, you would not be in a position to know that ; is that correct ?

[Answer :] I think I have testified, your honour, that I reviewed the immediate past intelligence material at that time, that dealt with that period, and I have stated today that there was credible evidence and that on the basis of my reading of it I could not rule out a finding that the Nicaraguan Government had been involved during that period.

Q. : Would you rule it 'in' ?

A. : I prefer to stay with my answer that I could not rule it out, but to answer you as directly as I can my inclination would be more towards ruling 'in' than ruling 'out'.

. . . . . .

Q. : I understand you to be saying, Mr. MacMichael, that you believe that it could be taken as a fact that at least in late 1980/early 1981 the Nicaraguan Government was involved in the supply of arms to the Salvadorian insurgency. Is that the conclusion I can draw from your remarks ?

A. : I hate to have it appear that you are drawing this from me like a nail out of a block of wood but, yes, that is my opinion."

In short, the Court notes that the evidence of a witness called by Nicaragua in order to negate the allegation of the United States that the Government of Nicaragua had been engaged in the supply of arms to the armed opposition in El Salvador only partly contradicted that allegation.

136. Some confirmation of the situation in 1981 is afforded by an internal Nicaraguan Government report, made available by the Government of Nicaragua in response to a request by the Court, of a meeting held in Managua on 12 August 1981 between Commander Ortega, Co-ordinator of the Junta of the Government of Nicaragua and Mr. Enders, Assistant Secretary of State for Inter-American Affairs of the United States. According to this report, the question of the flow of "arms, munitions and other forms of military aid" to El Salvador, was raised by Mr. Enders as one of the "major problems" *(problemas principales).* At one point he is reported to have said :

"On your part, you could take the necessary steps to ensure that the flow of arms to El Salvador is again halted as in March of this year. We do not seek to involve ourselves in deciding how and with whom this object should be achieved, but we may well monitor the results."

Later in the course of the discussion, the following exchange is recorded :

> "*[Ortega :]* As for the flow of arms to El Salvador, what must be stated is that as far as we have been informed by you, efforts have been made to stop it ; however, I want to make clear that there is a great desire here to collaborate with the Salvadorian people, also among members of our armed forces, although our Junta and the National Directorate have a decision that activities of this kind should not be permitted. We would ask you to give us reports about that flow to help us control it.
>
> *[Enders :]* You have succeeded in doing so in the past and I believe you can do so now. We are not in a position to supply you with intelligence reports. We would compromise our sources, and our nations have not yet reached the necessary level to exchange intelligence reports."

137. As regards the question, raised in this discussion, of the picture given by United States intelligence sources, further evidence is afforded by the 1983 Report of the Intelligence Committee (paragraphs 95, 109 above). In that Report, dated 13 May 1983, it was stated that

> "The Committee has regularly reviewed voluminous intelligence material on Nicaraguan and Cuban support for leftist insurgencies since the 1979 Sandinista victory in Nicaragua."

The Committee continued :

> "At the time of the filing of this report, the Committee believes that the intelligence available to it continues to support the following judgments with certainty :
>
> A major portion of the arms and other material sent by Cuba and other communist countries to the Salvadorian insurgents transits Nicaragua with the permission and assistance of the Sandinistas.
>
> The Salvadorian insurgents rely on the use of sites in Nicaragua, some of which are located in Managua itself, for communications, command-and-control, and for the logistics to conduct their financial, material and propaganda activities.
>
> The Sandinista leadership sanctions and directly facilitates all of the above functions.
>
> Nicaragua provides a range of other support activities, including secure transit of insurgents to and from Cuba, and assistance to the insurgents in planning their activities in El Salvador.
>
> In addition, Nicaragua and Cuba have provided – and appear to continue providing – training to the Salvadorian insurgents."

The Court is not aware of the contents of any analogous report of a body with access to United States intelligence material covering a more recent

period. It notes however that the Resolution adopted by the United States Congress on 29 July 1985 recorded the expectation of Congress from the Government of Nicaragua of :

> "the end to Sandinista support for insurgencies in other countries in the region, including the cessation of military supplies to the rebel forces fighting the democratically elected government in El Salvador".

138. In its Declaration of Intervention, El Salvador alleges that "Nicaraguan officials have publicly admitted their direct involvement in waging war on us" (para. IX). It asserts that the Foreign Minister of Nicaragua admitted such support at a meeting of the Foreign Ministers of the 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 otra 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 Salvadoreans at a base near Managua. While the Court is not prepared totally to discount this material, it cannot find that it is of any great weight in itself. Still less can statements attributed in the press to unidentified diplomats stationed in Managua be regarded as evidence that the Nicaraguan Government was continuing to supply aid to the opposition in El Salvador.

147. The evidence or material offered by Nicaragua in connection with the allegation of arms supply has to be assessed bearing in mind the fact that, in responding to that allegation, Nicaragua has to prove a negative. Annexed to the Memorial was a declaration dated 21 April 1984 of Miguel d'Escoto Brockmann, the Foreign Minister of Nicaragua. In this respect the Court has, as in the case of the affidavit of the United States Secretary of State, to recall the observations it has already made (paragraphs 69 and 70) as to the evidential value of such declarations. In the declaration, the Foreign Minister states that the allegations made by the United States, that the Nicaraguan Government "is sending arms, ammunition, communications equipment and medical supplies to rebels conducting a civil war against the Government of El Salvador, are false". He continues :

> "In truth, my government is not engaged, and has not been engaged, in the provision of arms or other supplies to either of the factions engaged in the civil war in El Salvador . . . Since my government came to power on July 19, 1979, its policy and practice has been to prevent our national territory from being used as a conduit for arms or other military supplies intended for other governments or rebel groups. In fact, on numerous occasions the security forces of my government have intercepted clandestine arms shipments, apparently destined for El Salvador, and confiscated them."

The Foreign Minister explains the geographical difficulty of patrolling Nicaragua's frontiers :

"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 this latter conclusion is at all valid with regard to El Salvador and the United States it must therefore be at least equally valid with regard to Nicaragua.

155. Secondly, even supposing it well established that military aid is

reaching the armed opposition in El Salvador from the territory of Nicaragua, it still remains to be proved that this aid is imputable to the authorities of the latter country. Indeed, the applicant State has in no way sought to conceal the possibility of weapons en route to the armed opposition in El Salvador crossing its territory but it denies that this is the result of any deliberate official policy on its part. As the Court observed in 1949 :

> "it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof." (*Corfu Channel, I.C.J. Reports 1949*, p. 18.)

Here it is relevant to bear in mind that there is reportedly a strong will for collaboration and mutual support between important elements of the populations of both El Salvador and Nicaragua, not least among certain members of the armed forces in Nicaragua. The Court sees no reason to dismiss these considerations, especially since El Salvador itself recognizes the existence in Nicaraguan coastal areas of "traditional smugglers" (Declaration, para. VIII, H), because Nicaragua is accused not so much of delivering weapons itself as of allowing them to transit through its territory ; and finally because evidence has been provided, in the report of the meeting of 12 August 1981 referred to in paragraph 136 above, of a degree of co-operation between the United States and Nicaragua for the purpose of putting a stop to these arms deliveries. The continuation of this co-operation does not seem to have depended solely on the Government of Nicaragua, for the Government of the United States, which in 1981 again raised with it the question of this traffic, this time refused to provide the Nicaraguan authorities, as it had on previous occasions, with the specific information and details that would have enabled them to call a halt to it. Since the Government of the United States has justified its refusal by claiming that any disclosure would jeopardize its sources of information, the Court has no means of assessing the reality or cogency of the undivulged 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 in the exercise of the right of collective self-defence. If, on the other hand, this evidence does not exist, that, as the Court has pointed out, implies that the arms traffic is so insignificant and

casual that it escapes detection even by the sophisticated techniques employed for the purpose, and that, *a fortiori*, it could also have been carried on unbeknown to the Government of Nicaragua, as that Government claims. These two conclusions mutually support each other.

157. This second hypothesis would provide the Court with a further reason for taking Nicaragua's affirmation into consideration, in that, if the flow of arms is in fact reaching El Salvador without either Honduras or El Salvador or the United States succeeding in preventing it, it would clearly be unreasonable to demand of the Government of Nicaragua a higher degree of diligence than is achieved by even the combined efforts of the other three States. In particular, when Nicaragua is blamed for allowing consignments of arms to cross its territory, this is tantamount, where El Salvador is concerned, to an admission of its inability to stem the flow. This is revealing as to the predicament of any government, including that of Nicaragua, faced with this arms traffic : its determination to put a stop to it would be likely to fail. More especially, to the extent that some of this aid is said to be successfully routed through Honduras, this accusation against Nicaragua would also signify that Honduras, which is not suspected of seeking to assist the armed opposition in El Salvador, is providing involuntary proof that it is by no means certain that Nicaragua can combat this clandestine traffic any better than Honduras. As the means at the disposal of the governments in the region are roughly comparable, the geographical obstacles, and the intrinsic character of any clandestine arms traffic, simply show that this traffic may be carried on successfully without any complicity from governmental authorities, and even when they seek to put a stop to it. Finally, if it is true that the exceptionally extensive resources deployed by the United States have been powerless to prevent this traffic from keeping the Salvadorian armed opposition supplied, this suggests even more clearly how powerless Nicaragua must be with the much smaller resources at its disposal for subduing this traffic if it takes place on its territory and the authorities endeavour to put a stop to it.

158. Confining itself to the regional States concerned, the Court accordingly considers that it is scarcely possible for Nicaragua's responsibility for an arms traffic taking place on its territory to be automatically assumed while the opposite assumption is adopted with regard to its neighbours in respect of similar traffic. Having regard to the circumstances characterizing this part of Central America, the Court considers it more realistic, and consistent with the probabilities, to recognize that an activity of that nature, if on a limited scale, may very well be pursued unbeknown to the territorial government.

159. It may be objected that the Nicaraguan authorities are alleged to have declared on various occasions that military assistance to the armed opposition in El Salvador was part of their official policy. The Court has already indicated that it is unable to give weight to alleged statements to that effect of which there is insufficient evidence. In the report of the diplomatic talks held on 12 August 1981 at Managua, Commander Ortega

did not in any sense promise to cease sending arms, but, on the contrary, said on the one hand that Nicaragua had taken immediate steps to put a stop to it once precise information had been given and, on the other hand, expressed inability to take such steps where Nicaragua was not provided with information enabling that traffic to be located. The Court would further observe that the four draft treaties submitted by Nicaragua within the Contadora process in 1983 (quoted in paragraph 139 above) do not constitute an admission by Nicaragua of the supply of assistance to the armed opposition in El Salvador, but simply make provision for the future in the context of the inter-American system, in which a State is prohibited from assisting the armed opposition within another State.

160. On the basis of the foregoing, the Court is satisfied that, between July 1979, the date of the fall of the Somoza régime in Nicaragua, and the early months of 1981, an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition in El Salvador. On the other hand, the evidence is insufficient to satisfy the Court that, since the early months of 1981, assistance has continued to reach the Salvadorian 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 "Resumé 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 1983 and July 1984. The Court has no information as to whether Nicaragua replied to these communications, and if so in what terms.

162. With regard to Costa Rica, the United States has supplied the text of diplomatic Notes of protest from Costa Rica to Nicaragua concerning incidents in September 1983, February 1984 and April 1984, and a Note from Costa Rica to the Foreign Ministers of Colombia, Mexico, Panama and Venezuela, referring to an incident of 29 April 1984, and requesting the sending of a mission of observers. Again, the Court has no information as

to the contemporary reaction of Nicaragua to these allegations ; from press reports it appears that the matter was later amicably settled.

163. As the Court has already observed (paragraphs 130 to 131 above), both the Parties have addressed themselves primarily to the question of aid by the Government of Nicaragua to the armed opposition in El Salvador, and the question of aggression directed against Honduras and Costa Rica has fallen somewhat into the background. Nevertheless the allegation that such aggression affords a basis for the exercise by the United States of the right of collective self-defence remains on the record ; and the Court has to note that Nicaragua has not taken the opportunity during the proceedings of expressly refuting the assertion that it has made cross-border military attacks on the territory of those two States. At the opening of the hearings in 1984 on the questions of jurisdiction and admissibility, the Agent of Nicaragua referred to the "supposed armed attacks of Nicaragua against its neighbours", and proceeded to "reiterate our denial of these accusations which in any case we will amply address in the merits phase of these proceedings". However, the declaration of the Nicaraguan Foreign Minister annexed to the Memorial on the merits filed on 30 April 1985, while repudiating the accusation of support for the armed opposition in El Salvador, did not refer at all to the allegation of border incidents involving Honduras and Costa Rica.

164. The Court, while not as fully informed on the question as it would wish to be, therefore considers as established the fact that certain trans-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 defence, makes no express mention of any request for assistance by the three States named. El Salvador, in its Declaration of Intervention in the present proceedings of 15 August 1984, stated that, faced with Nicaraguan aggression,

> "we have been called upon to defend ourselves, but our own economic and military capability is not sufficient to face any international apparatus that has unlimited resources at its disposal, and we have, therefore, requested support and assistance from abroad. It is our natural, inherent right under Article 51 of the Charter of the United Nations to have recourse to individual and collective acts of self-defence. It was with this in mind that President Duarte, during a recent visit to the United States and in discussions with United States congressmen, reiterated the importance of this assistance for our defence from the United States and the democratic nations of the world." (Para. XII.)

Again, no dates are given, but the Declaration continues "This was also done by the Revolutionary Junta of Government and the Government of President Magaña", i.e., between October 1979 and December 1980, and between April 1982 and June 1984.

166. The Court however notes that according to the report, supplied by the Agent of Nicaragua, of the meeting on 12 August 1981 between President Ortega of Nicaragua and Mr. Enders, the latter is reported to have referred to action which the United States might take

> "if the arms race in Central America is built up to such a point that some of your [sc. Nicaragua's] neighbours in Central America seek protection from us under the Inter-American Treaty [of Reciprocal Assistance]".

This remark might be thought to carry the implication that no such request had yet been made. Admittedly, the report of the meeting is a unilateral one, and its accuracy cannot be assumed as against the United States. In conjunction with the lack of direct evidence of a formal request for assistance from any of the three States concerned to the United States, the Court considers that this report is not entirely without significance.

* * *

167. Certain events which occurred at the time of the fall of the régime of President Somoza have next to be mentioned, since reliance has been placed on them to support a contention that the present Government of Nicaragua is in violation of certain alleged assurances given by its imme-

diate predecessor, the Government of National Reconstruction, in 1979. From the documents made available to the Court, at its request, by Nicaragua, it appears that what occurred was as follows. On 23 June 1979, the Seventeenth Meeting of Consultation of Ministers of Foreign Affairs of the Organization of American States adopted by majority, over the negative vote of, *inter alios,* the representative of the Somoza government of Nicaragua, a resolution on the subject of Nicaragua. By that resolution after declaring that "the solution of the serious problem is exclusively within the jurisdiction of the people of Nicaragua", the Meeting of Consultation declared

> "That in the view of the Seventeenth Meeting of Consultation of Ministers of Foreign Affairs this solution should be arrived at on the basis of the following :
>
> 1. Immediate and definitive replacement of the Somoza régime.
> 2. Installation in Nicaraguan territory of a democratic government, the composition of which should include the principal representative groups which oppose the Somoza régime and which reflects the free will of the people of Nicaragua.
> 3. Guarantee of the respect for human rights of all Nicaraguans without exception.
> 4. The holding of free elections as soon as possible, that will lead to the establishment of a truly democratic government that guarantees peace, freedom, and justice."

On 12 July 1979, the five members of the Nicaraguan "Junta of the Government of National Reconstruction" sent from Costa Rica a telegram to the Secretary-General of the Organization of American States, communicating the "Plan of the Government of National Reconstruction to Secure Peace". The telegram explained that the plan had been developed on the basis of the Resolution of the Seventeenth Meeting of Consultation ; in connection with that plan, the Junta members stated that they wished to "ratify" *(ratificar)* some of the "goals that have inspired their government". These included, first

> "our firm intention to establish full observance of human rights in our country in accordance with the United Nations Universal Declaration of the Rights of Man *[sic]*, and the Charter on Human Rights of the Organization of American States" ;

the Inter-American Commission on Human Rights was invited "to visit our country as soon as we are installed in our national territory". A further goal was

> "the plan to call the first free elections our country has known in this century, so that Nicaraguans can elect their representatives to the city councils and to a constituent assembly, and later elect the country's highest authorities".

The Plan to Secure Peace provided for the Government of National Reconstruction, as soon as established, to decree a Fundamental Statute and an Organic Law, and implement the Program of the Government of National Reconstruction. Drafts of these texts were appended to the Plan ; they were enacted into law on 20 July 1979 and 21 August 1979.

168. In this connection, the Court notes that, since thus announcing its objectives in 1979, the Nicaraguan Government has in fact ratified a number of international instruments on human rights. At the invitation of the Government of Nicaragua, the Inter-American Commission on Human Rights visited Nicaragua and compiled two reports (OEA/Ser.L/V/11.53 and 62). A state of emergency was declared by the Nicaraguan Government (and notified to the United Nations Secretary-General) in July 1979, and was re-declared or extended on a number of subsequent occasions. On 4 November 1984, presidential and legislative elections were held, in the presence of foreign observers ; seven political parties took part in the election, while three parties abstained from taking part on the ground that the conditions were unsatisfactory.

169. The view of the United States as to the legal effect of these events is reflected in, for example, a Report submitted to Congress by President Reagan on 10 April 1985 in connection with finance for the *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 either to other treaties or to the other sources of law enumerated in Article 38 of the Statute. The first stage in its determination of the law actually to be applied to this dispute is to ascertain the consequences of the exclusion of the applicability of the multilateral treaties for the definition of the content of the customary international law which remains applicable.

173. According to the United States, these consequences are extremely wide-ranging. The United States has argued that :

> "Just as Nicaragua's claims allegedly based on 'customary and general international law' cannot be determined without recourse to the United Nations Charter as the principal source of that law, they also cannot be determined without reference to the 'particular international law' established by multilateral conventions in force among the parties."

The United States contends that the only general and customary international law on which Nicaragua can base its claims is that of the Charter : in particular, the Court could not, it is said, consider the lawfulness of an alleged use of armed force without referring to the "principal source of the

relevant international law", namely, Article 2, paragraph 4, of the United Nations Charter. In brief, in a more general sense "the provisions of the United Nations Charter relevant here subsume and supervene related principles of customary and general international law". The United States concludes that "since the multilateral treaty reservation bars adjudication of claims based on those treaties, it bars all of Nicaragua's claims". Thus the effect of the reservation in question is not, it is said, merely to prevent the Court from deciding upon Nicaragua's claims by applying the multilateral treaties in question ; it further prevents it from applying in its decision any rule of customary international law the content of which is also the subject of a provision in those multilateral treaties.

174. In its Judgment of 26 November 1984, the Court has already commented briefly on this line of argument. Contrary to the views advanced by the United States, it affirmed that it

> "cannot dismiss the claims of Nicaragua under principles of customary and general international law, simply because such principles have been enshrined in the texts of the conventions relied upon by Nicaragua. The fact that the above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions. Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated." (*I.C.J. Reports 1984*, p. 424, para. 73.)

Now that the Court has reached the stage of a decision on the merits, it must develop and refine upon these initial remarks. The Court would observe that, according to the United States argument, it should refrain from applying the rules of customary international law because they have been "subsumed" and "supervened" by those of international treaty law, and especially those of the United Nations Charter. Thus the United States apparently takes the view that the existence of principles in the United Nations Charter precludes the possibility that similar rules might exist independently in customary international law, either because existing customary rules had been incorporated into the Charter, or because the Charter influenced the later adoption of customary rules with a corresponding content.

175. The Court does not consider that, in the areas of law relevant to the present dispute, it can be claimed that all the customary rules which may be invoked have a content exactly identical to that of the rules contained in

the treaties which cannot be applied by virtue of the United States reservation. On a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content. But in addition, even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability. Nor can the multilateral treaty reservation be interpreted as meaning that, once applicable to a given dispute, it would exclude the application of any rule of customary international law the content of which was the same as, or analogous to, that of the treaty-law rule which had caused the reservation to become effective.

176. As regards the suggestion that the areas covered by the two sources of law are identical, the Court observes that the United Nations Charter, the convention to which most of the United States argument is directed, by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law ; this reference to customary law is contained in the actual text of Article 51, which mentions the "inherent right" (in the French text the "droit naturel") of individual or collective self-defence, which "nothing in the present Charter shall impair" and which applies in the event of an armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of the "armed attack" which, if found to exist, authorizes the exercise of the "inherent right" of self-defence, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which "subsumes and supervenes" customary international law. It rather demonstrates that in the field in question, the importance of which for the present dispute need hardly be stressed, customary international law continues to exist alongside treaty law. The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content. This could also be demonstrated for other subjects, in particular for the principle of non-intervention.

177. But as observed above (paragraph 175), even if the customary norm and the treaty norm were to have exactly the same content, this

would not be a reason for the Court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of the treaty norm. The existence of identical rules in international treaty law and customary law has been clearly recognized by the Court in the *North Sea Continental Shelf* cases. To a large extent, those cases turned on the question whether a rule enshrined in a treaty also existed as a customary rule, either because the treaty had merely codified the custom, or caused it to "crystallize", or because it had influenced its subsequent adoption. The Court found that this identity of content in treaty law and in customary international law did not exist in the case of the rule invoked, which appeared in one article of the treaty, but did not suggest that such identity was 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 upon customary international law notwithstanding the exclusion from its jurisdiction of disputes "arising under" the United Nations and Organization of American States Charters.

* * *

183. In view of this conclusion, the Court has next to consider what are the rules of customary international law applicable to the present dispute. For this purpose, it has to direct its attention to the practice and *opinio juris* of States ; as the Court recently observed,

> "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them." (*Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985*, pp. 29-30, para. 27.)

In this respect the Court must not lose sight of the Charter of the United Nations and that of the Organization of American States, notwithstanding the operation of the multilateral treaty reservation. Although the Court has no jurisdiction to determine whether the conduct of the United States constitutes a breach of those conventions, it can and must take them into account in ascertaining the content of the customary international law which the United States is also alleged to have infringed.

184. The Court notes that there is in fact evidence, to be examined below, of a considerable degree of agreement between the Parties as to the content of the customary international law relating to the non-use of force and non-intervention. This concurrence of their views does not however dispense the Court from having itself to ascertain what rules of customary international law are applicable. The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States. Bound as it is by Article 38 of its Statute to apply, *inter alia*,

international custom "as evidence of a general practice accepted as law", the Court may not disregard the essential role played by general practice. Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them ; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.

185. In the present dispute, the Court, while exercising its jurisdiction only in respect of the application of the customary rules of non-use of force and non-intervention, cannot disregard the fact that the Parties are bound by these rules as a matter of treaty law and of customary international law. Furthermore, in the present case, apart from the treaty commitments binding the Parties to the rules in question, there are various instances of their having expressed recognition of the validity thereof as customary international law in other ways. It is therefore in the light of this "subjective element" – the expression used by the Court in its 1969 Judgment in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 44) – that the Court has to appraise the relevant practice.

186. It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.

* *

187. The Court must therefore determine, first, the substance of the customary rules relating to the use of force in international relations, applicable to the dispute submitted to it. The United States has argued that, on this crucial question of the lawfulness of the use of force in inter-State relations, the rules of general and customary international law, and those of the United Nations Charter, are in fact identical. In its view this identity is so complete that, as explained above (paragraph 173), it constitutes an argument to prevent the Court from applying this customary law, because it is indistinguishable from the multilateral treaty law which it may not apply. In its Counter-Memorial on jurisdiction and

admissibility the United States asserts that "Article 2 (4) of the Charter *is* customary and general international law". It quotes with approval an observation by the International Law Commission to the effect that

> "the great majority of international lawyers today unhesitatingly hold that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force" (*ILC Yearbook*, 1966, Vol. II, p. 247).

The United States points out that Nicaragua has endorsed this view, since one of its counsel asserted that "indeed it is generally considered by publicists that Article 2, paragraph 4, of the United Nations Charter is in this respect an embodiment of existing general principles of international law". And the United States concludes :

> "In sum, the provisions of Article 2 (4) with respect to the lawfulness of the use of force *are* 'modern customary law' (International Law Commission, *loc. cit.*) and the 'embodiment of general principles of international law' (counsel for Nicaragua, Hearing of 25 April 1984, morning, *loc. cit.*). There is no other 'customary and general international law' on which Nicaragua can rest its claims."

> "It is, in short, inconceivable that this Court could consider the lawfulness of an alleged use of armed force without referring to the principal source of the relevant international law – Article 2 (4) of the United Nations Charter."

As for Nicaragua, the only noteworthy shade of difference in its view lies in Nicaragua's belief that

> "in certain cases the rule of customary law will not necessarily be identical in content and mode of application to the conventional rule".

188. The Court thus finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law. The Parties thus both take the view that the fundamental principle in this area is expressed in the terms employed in Article 2, paragraph 4, of the United Nations Charter. They therefore accept a treaty-law obligation to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. The Court has however to be satisfied that there exists in customary international law an *opinio juris* as to the binding character of such abstention. This *opinio juris* may, though with all due caution, be deduced

from, *inter alia,* the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. The principle of non-use of force, for example, may thus be regarded as a principle of customary international law, not as such conditioned by provisions relating to collective security, or to the facilities or armed contingents to be provided under Article 43 of the Charter. It would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such rule (or set of rules), to be thenceforth treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter.

189. As regards the United States in particular, the weight of an expression of *opinio juris* can similarly be attached to its support of the resolution of the Sixth International Conference of American States condemning aggression (18 February 1928) and ratification of the Montevideo Convention on Rights and Duties of States (26 December 1933), Article 11 of which imposes the obligation not to recognize territorial acquisitions or special advantages which have been obtained by force. Also significant is United States acceptance of the principle of the prohibition of the use of force which is contained in the declaration on principles governing the mutual relations of States participating in the Conference on Security and Co-operation in Europe (Helsinki, 1 August 1975), whereby the participating States undertake to "refrain in their mutual relations, *as well as in their international relations in general,*" (emphasis added) from the threat or use of force. Acceptance of a text in these terms confirms the existence of an *opinio juris* of the participating States prohibiting the use of force in international relations.

190. A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*" (paragraph (1) of the commentary of the Commission to Article 50 of its draft Articles on the Law of Treaties, *ILC Yearbook,* 1966-II, p. 247). Nicaragua in its

Memorial on the Merits submitted in the present case states that the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations "has come to be recognized as *jus cogens*". The United States, in its Counter-Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this principle is a "universal norm", a "universal international law", a "universally recognized principle of international law", and a "principle of *jus cogens*".

191. As regards certain particular aspects of the principle in question, it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms. In determining the legal rule which applies to these latter forms, the Court can again draw on the formulations contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), referred to above). As already observed, the adoption by States of this text affords an indication of their *opinio juris* as to customary international law on the question. Alongside certain descriptions which may refer to aggression, this text includes others which refer only to less grave forms of the use of force. In particular, according to this resolution :

> "Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.
>
> . . . . . .
>
> States have a duty to refrain from acts of reprisal involving the use of force.
>
> . . . . . .
>
> Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of that 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, 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 Co-operation among States in accordance with the Charter of the United Nations, the reference to the prohibition of force is followed by a paragraph stating that :

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

This resolution demonstrates that the States represented in the General Assembly regard the exception to the prohibition of force constituted by the right of individual or collective self-defence as already a matter of customary international law.

194. With regard to the characteristics governing the right of self-defence, since the Parties consider the existence of this right to be established as a matter of customary international law, they have concentrated on the conditions governing its use. In view of the circumstances in which the dispute has arisen, reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised. Accordingly the Court expresses no view on that issue. The Parties also agree in holding that whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence. Since the existence of the right of collective self-defence is established in customary international law, the Court must define the specific conditions which may have to be met for its exercise, in addition to the conditions of necessity and proportionality to which the Parties have referred.

195. In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this. There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" *(inter alia)* an actual armed attack conducted by regular forces, "or its substantial involvement therein". This description, contained in Article 3, paragraph *(g)*, of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the

Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States. It is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.

196. The question remains whether the lawfulness of the use of collective self-defence by the third State for the benefit of the attacked State also depends on a request addressed by that State to the third State. A provision of the Charter of the Organization of American States is here in point : and while the Court has no jurisdiction to consider that instrument as applicable to the dispute, it may examine it to ascertain what light it throws on the content of customary international law. The Court notes that the Organization of American States Charter includes, in Article 3 *(f)*, the principle that : "an act of aggression against one American State is an act of aggression against all the other American States" and a provision in Article 27 that :

> "Every act of aggression by a State against the territorial integrity or the inviolability of the territory or against the sovereignty or political independence of an American State shall be considered an act of aggression against the other American States."

197. Furthermore, by Article 3, paragraph 1, of the Inter-American Treaty of Reciprocal Assistance, signed at Rio de Janeiro on 2 September 1947, the High-Contracting Parties

> "agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations" ;

and under paragraph 2 of that Article,

> "On the request of the State or States directly attacked and until the decision of the Organ of Consultation of the Inter-American System, each one of the Contracting Parties may determine the immediate

measures which it may individually take in fulfilment of the obligation contained in the preceding paragraph and in accordance with the principle of continental solidarity."

(The 1947 Rio Treaty was modified by the 1975 Protocol of San José, Costa Rica, but that Protocol is not yet in force.)

198. The Court observes that the Treaty of Rio de Janeiro provides that measures of collective self-defence taken by each State are decided "on the request of the State or States directly attacked". It is significant that this requirement of a request on the part of the attacked State appears in the treaty particularly devoted to these matters of mutual assistance ; it is not found in the more general text (the Charter of the Organization of American States), but Article 28 of that Charter provides for the application of the measures and procedures laid down in "the special treaties on the subject".

199. At all events, the Court finds that in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack. The Court concludes that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked.

200. At this point, the Court may consider whether in customary international law there is any requirement corresponding to that found in the treaty law of the United Nations Charter, by which the State claiming to use the right of individual or collective self-defence must report to an international body, empowered to determine the conformity with international law of the measures which the State is seeking to justify on that basis. Thus Article 51 of the United Nations Charter requires that measures taken by States in exercise of this right of self-defence must be "immediately reported" to the Security Council. As the Court has observed above (paragraphs 178 and 188), a principle enshrined in a treaty, if reflected in customary international law, may well be so unencumbered with the conditions and modalities surrounding it in the treaty. Whatever influence the Charter may have had on customary international law in these matters, it is clear that in customary international law it is not a condition of the lawfulness of the use of force in self-defence that a procedure so closely dependent on the content of a treaty commitment and of the institutions established by it, should have been followed. On the other hand, if self-defence is advanced as a justification for measures which would otherwise be in breach both of the principle of customary international law and of that contained in the Charter, it is to be expected that the conditions of the Charter should be respected. Thus for the purpose of enquiry into the customary law position, the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence.

201. To justify certain activities involving the use of force, the United States has relied solely on the exercise of its right of collective self-defence. However the Court, having regard particularly to the non-participation of the United States in the merits phase, considers that it should enquire whether customary international law, applicable to the present dispute, may contain other rules which may exclude the unlawfulness of such activities. It does not, however, see any need to reopen the question of the conditions governing the exercise of the right of individual self-defence, which have already been examined in connection with collective self-defence. On the other hand, the Court must enquire whether there is any justification for the activities in question, to be found not in the right of collective self-defence against an armed attack, but in the right to take counter-measures in response to conduct of Nicaragua which is not alleged to constitute an armed attack. It will examine this point in connection with an analysis of the principle of non-intervention in customary international law.

* *

202. The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference ; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law. As the Court has observed : "Between independent States, respect for territorial sovereignty is an essential foundation of international relations" (*I.C.J. Reports 1949*, p. 35), and international law requires political integrity also to be respected. Expressions of an *opinio juris* regarding the existence of the principle of non-intervention in customary international law are numerous and not difficult to find. Of course, statements whereby States avow their recognition of the principles of international law set forth in the United Nations Charter cannot strictly be interpreted as applying to the principle of non-intervention by States in the internal and external affairs of other States, since this principle is not, as such, spelt out in the Charter. But it was never intended that the Charter should embody written confirmation of every essential principle of international law in force. The existence in the *opinio juris* of States of the principle of non-intervention is backed by established and substantial practice. It has moreover been presented as a corollary of the principle of the sovereign equality of States. A particular instance of this is General Assembly resolution 2625 (XXV), the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States. In the *Corfu Channel* case, when a State claimed a right of intervention in order to secure evidence in the territory of another State for submission to an international tribunal (*I.C.J. Reports 1949*, p. 34), the Court observed that :

> "the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here ; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself." (*I.C.J. Reports 1949,* p. 35.)

203. The principle has since been reflected in numerous declarations adopted by international organizations and conferences in which the United States and Nicaragua have participated, e.g., General Assembly resolution 2131 (XX), the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty. It is true that the United States, while it voted in favour of General Assembly resolution 2131 (XX), also declared at the time of its adoption in the First Committee that it considered the declaration in that resolution to be "only a statement of political intention and not a formulation of law" (*Official Records of the General Assembly, Twentieth Session,* First Committee, A/C.1/SR.1423, p. 436). However, the essentials of resolution 2131 (XX) are repeated in the Declaration approved by resolution 2625 (XXV), which set out principles which the General Assembly declared to be "basic principles" of international law, and on the adoption of which no analogous statement was made by the United States representative.

204. As regards inter-American relations, attention may be drawn to, for example, the United States reservation to the Montevideo Convention on Rights and Duties of States (26 December 1933), declaring the opposition of the United States Government to "interference with the freedom, the sovereignty or other internal affairs, or processes of the Governments of other nations" ; or the ratification by the United States of the Additional Protocol relative to Non-Intervention (23 December 1936). Among more recent texts, mention may be made of resolutions AG/RES.78 and AG/RES.128 of the General Assembly of the Organization of American States. In a different context, the United States expressly accepted the principles set forth in the declaration, to which reference has already been made, appearing in the Final Act of the Conference on Security and Co-operation in Europe (Helsinki, 1 August 1975), including an elaborate statement of the principle of non-intervention ; while these principles were presented as applying to the mutual relations among the participating States, it can be inferred that the text testifies to the existence, and the acceptance by the United States, of a customary principle which has universal application.

205. Notwithstanding the multiplicity of declarations by States accepting the principle of non-intervention, there remain two questions : first,

what is the exact content of the principle so accepted, and secondly, is the practice sufficiently in conformity with it for this to be a rule of customary international law ? As regards the first problem – that of the content of the principle of non-intervention – the Court will define only those aspects of the principle which appear to be relevant to the resolution of the dispute. In this respect it notes that, in view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State. As noted above (paragraph 191), General Assembly resolution 2625 (XXV) equates assistance of this kind with the use of force by the assisting State when the acts committed in another State "involve a threat or use of force". These forms of action are therefore wrongful in the light of both the principle of non-use of force, and that of non-intervention. In view of the nature of Nicaragua's complaints against the United States, and those expressed by the United States in regard to Nicaragua's conduct towards El Salvador, it is primarily acts of intervention of this kind with which the Court is concerned in the present case.

206. However, before reaching a conclusion on the nature of prohibited intervention, the Court must be satisfied that State practice justifies it. There have been in recent years a number of instances of foreign intervention for the benefit of forces opposed to the government of another State. The Court is not here concerned with the process of decolonization ; this question is not in issue in the present case. It has to consider whether there might be indications of a practice illustrative of belief in a kind of general right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified. For such a general right to come into existence would involve a fundamental modification of the customary law principle of non-intervention.

207. In considering the instances of the conduct above described, the Court has to emphasize that, as was observed in the *North Sea Continental Shelf* cases, for a new customary rule to be formed, not only must the acts concerned "amount to a settled practice", but they must be accompanied

by the *opinio juris sive necessitatis.* Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is

> "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis.*" (*I.C.J. Reports 1969,* p. 44, para. 77.)

The Court has no jurisdiction to rule upon the conformity with international law of any conduct of States not parties to the present dispute, or of conduct of the Parties unconnected with the dispute ; nor has it authority to ascribe to States legal views which they do not themselves advance. The significance for the Court of cases of State conduct prima facie inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law. In fact however the Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition. The United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign State for reasons connected with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy. But these were statements of international policy, and not an assertion of rules of existing international law.

208. In particular, as regards the conduct towards Nicaragua which is the subject of the present case, the United States has not claimed that its intervention, which it justified in this way on the political level, was also justified on the legal level, alleging the exercise of a new right of intervention regarded by the United States as existing in such circumstances. As mentioned above, the United States has, on the legal plane, justified its intervention expressly and solely by reference to the "classic" rules involved, namely, collective self-defence against an armed attack. Nicaragua, for its part, has often expressed its solidarity and sympathy with the opposition in various States, especially in El Salvador. But Nicaragua too has not argued that this was a legal basis for an intervention, let alone an intervention involving the use of force.

209. The Court therefore finds that no such general right of intervention, in support of an opposition within another State, exists in contemporary international law. The Court concludes that acts constituting a breach of the customary principle of non-intervention will also, if they

directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations.

* *

210. When dealing with the rule of the prohibition of the use of force, the Court considered the exception to it constituted by the exercise of the right of collective self-defence in the event of armed attack. Similarly, it must now consider the following question : if one State acts towards another State in breach of the principle of non-intervention, may a third State lawfully take such action by way of counter-measures against the first State as would otherwise constitute an intervention in its internal affairs ? A right to act in this way in the case of intervention would be analogous to the right of collective self-defence in the case of an armed attack, but both the act which gives rise to the reaction, and that reaction itself, would in principle be less grave. Since the Court is here dealing with a dispute in which a wrongful use of force is alleged, it has primarily to consider whether a State has a right to respond to intervention with intervention going so far as to justify a use of force in reaction to measures which do not constitute an armed attack but may nevertheless involve a use of force. The question is itself undeniably relevant from the theoretical viewpoint. However, since the Court is bound to confine its decision to those points of law which are essential to the settlement of the dispute before it, it is not for the Court here to determine what direct reactions are lawfully open to a State which considers itself the victim of another State's acts of intervention, possibly involving the use of force. Hence it has not to determine whether, in the event of Nicaragua's having committed any such acts against El Salvador, the latter was lawfully entitled to take any particular counter-measure. It might however be suggested that, in such a situation, the United States might have been permitted to intervene in Nicaragua in the exercise of some right analogous to the right of collective self-defence, one which might be resorted to in a case of intervention short of armed attack.

211. The Court has recalled above (paragraphs 193 to 195) that for one State to use force against another, on the ground that that State has committed a wrongful act of force against a third State, is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack. Thus the lawfulness of the use of force by a State in response to a wrongful act of which it has not itself been the victim is not admitted when this wrongful act is not an armed attack. In the view of the Court, under international law in force today – whether customary international law or that of the United Nations system – States do not have a right of "collective" armed response to acts which do not constitute an "armed attack". Furthermore, the Court has to recall that the United States itself is relying on the "inherent right of self-defence" (paragraph 126 above), but apparently does not claim that any such right exists

as would, in respect of intervention, operate in the same way as the right of collective self-defence in respect of an armed attack. In the discharge of its duty under Article 53 of the Statute, the Court has nevertheless had to consider whether such a right might exist ; but in doing so it may take note of the absence of any such claim by the United States as an indication of *opinio juris*.

* *

212. The Court should now mention the principle of respect for State sovereignty, which in international law is of course closely linked with the principles of the prohibition of the use of force and of non-intervention. The basic legal concept of State sovereignty in customary international law, expressed in, *inter alia*, Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory. As to superjacent air space, the 1944 Chicago Convention on International Civil Aviation (Art. 1) reproduces the established principle of the complete and exclusive sovereignty of a State over the air space above its territory. That convention, in conjunction with the 1958 Geneva Convention on the Territorial Sea, further specifies that the sovereignty of the coastal State extends to the territorial sea and to the air space above it, as does the United Nations Convention on the Law of the Sea adopted on 10 December 1982. The Court has no doubt that these prescriptions of treaty-law merely respond to firmly established and longstanding tenets of customary international law.

213. The duty of every State to respect the territorial sovereignty of others is to be considered for the appraisal to be made of the facts relating to the mining which occurred along Nicaragua's coasts. The legal rules in the light of which these acts of mining should be judged depend upon where they took place. The laying of mines within the ports of another State is governed by the law relating to internal waters, which are subject to the sovereignty of the coastal State. The position is similar as regards mines placed in the territorial sea. It is therefore the sovereignty of the coastal State which is affected in such cases. It is also by virtue of its sovereignty that the coastal State may regulate access to its ports.

214. On the other hand, it is true that in order to enjoy access to ports, foreign vessels possess a customary right of innocent passage in territorial waters for the purposes of entering or leaving internal waters ; Article 18, paragraph 1 *(b)*, of the United Nations Convention on the Law of the Sea of 10 December 1982, does no more than codify customary international law on this point. Since freedom of navigation is guaranteed, first in the exclusive economic zones which may exist beyond territorial waters (Art. 58 of the Convention), and secondly, beyond territorial waters and on the high seas (Art. 87), it follows that any State which enjoys a right of access to ports for its ships also enjoys all the freedom necessary for

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 seised of the dispute, that dispute could be considered not to "arise", to use the wording of the United States multilateral treaty reservation, under any of these Geneva Conventions. The Court did not therefore have to consider whether that reservation might be a bar to the Court treating the relevant provisions of these Conventions as applicable. However, if the Court were on its own initiative to find it appropriate to apply these Conventions, as such, for the settlement of the dispute, it could be argued that the Court would be treating it as a dispute "arising" under them ; on that basis, it would have to consider whether any State party to those Conventions would be "affected" by the decision, for the purposes of the United States multilateral treaty reservation.

218. The Court however sees no need to take a position on that matter, since in its view the conduct of the United States may be judged according to the fundamental general principles of humanitarian law ; in its view, the Geneva Conventions are in some respects 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 1 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, I), 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 governmental financial year 1985, namely 1 October 1984, the United States Congress has restricted the use of the funds appropriated for assistance to the *contras* to "humanitarian assistance" (paragraph 97 above). There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law. The characteristics of such aid were indicated in the first

and second of the fundamental principles declared by the Twentieth International Conference of the Red Cross, that

> "The Red Cross, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours – in its international and national capacity – to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, co-operation and lasting peace amongst all peoples"

and that

> "It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours only to relieve suffering, giving priority to the most urgent cases of distress."

243. The United States legislation which limited aid to the *contras* to humanitarian assistance however also defined what was meant by such assistance, namely :

> "the provision of food, clothing, medicine, and other humanitarian assistance, and it does not include the provision of weapons, weapons systems, ammunition, or other equipment, vehicles, or material which can be used to inflict serious bodily harm or death" (paragraph 97 above).

It is also to be noted that, while the United States Congress has directed that the CIA and Department of Defense are not to administer any of the funds voted, it was understood that intelligence information might be "shared" with the *contras*. Since the Court has no information as to the interpretation in fact given to the Congress decision, or as to whether intelligence information is in fact still being supplied to the *contras*, it will limit itself to a declaration as to how the law applies in this respect. An essential feature of truly humanitarian aid is that it is given "without discrimination" of any kind. In the view of the Court, if the provision of "humanitarian assistance" is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely "to prevent and alleviate human suffering", and "to protect life and health and to ensure respect for the human being" ; it must also, and above all, be given without discrimination to all in need in Nicaragua, not merely to the *contras* and their dependents.

* *

244. As already noted, Nicaragua has also asserted that the United States is responsible for an "indirect" form of intervention in its internal

affairs inasmuch as it has taken, to Nicaragua's disadvantage, certain action of an economic nature. The Court's attention has been drawn in particular to the cessation of economic aid in April 1981 ; the 90 per cent reduction in the sugar quota for United States imports from Nicaragua in April 1981 ; and the trade embargo adopted on 1 May 1985. While admitting in principle that some of these actions were not unlawful in themselves, counsel for Nicaragua argued that these measures of economic constraint add up to a systematic violation of the principle of non-intervention.

245. The Court does not here have to concern itself with possible breaches of such international economic instruments as the General Agreement on Tariffs and Trade, referred to in passing by counsel for Nicaragua ; any such breaches would appear to fall outside the Court's jurisdiction, particularly in view of the effect of the multilateral treaty reservation, nor has Nicaragua seised the Court of any complaint of such breaches. The question of the compatibility of the actions complained of with the 1956 Treaty of Friendship, Commerce and Navigation will be examined below, in the context of the Court's examination of the provisions of that Treaty. At this point, the Court has merely to say that it is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention.

* *

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 trans-border 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 XVIIth Meeting of Consultation of Ministers for Foreign Affairs of the Organization of American States, and the communications of 12 July 1979 from the Junta of the Government of National Reconstruction of Nicaragua to the Secretary-General of the Organization, accompanied by a "Plan to secure peace". The letter contained *inter alia* a list of the objectives of the Nicaraguan Junta and stated in particular its intention of installing the new régime by a peaceful, orderly transition and of respecting human rights under the supervision of the Inter-American Commission on Human Rights, which the Junta invited to visit Nicaragua "as soon as we are installed". In this way, before its installation in Managua, the new régime soothed apprehensions as desired and expressed its intention of governing the country democratically.

261. However, the Court is unable to find anything in these documents, whether the resolution or the communication accompanied by the "Plan to secure peace", from which it can be inferred that any legal undertaking was intended to exist. Moreover, the Junta made it plain in one of these documents that its invitation to the Organization of American States to supervise Nicaragua's political life should not be allowed to obscure the fact that it was the Nicaraguans themselves who were to decide upon and conduct the country's domestic policy. The resolution of 23 June 1979 also declares that the solution of their problems is a matter "exclusively" for the Nicaraguan people, while stating that that solution was to be based (in Spanish, *debería inspirarse*) on certain foundations which were put forward merely as recommendations to the future government. This part of the resolution is a mere statement which does not comprise any formal offer which if accepted would constitute a promise in law, and hence a legal obligation. Nor can the Court take the view that Nicaragua actually undertook a commitment to organize free elections, and that this commitment was of a legal nature. The Nicaraguan Junta of National Reconstruction planned the holding of free elections as part of its political programme of government, following the recommendation of the XVIIth Meeting of Consultation of Foreign Ministers of the Organization of American States. This was an essentially political pledge, made not only to the Organization, but also to the people of Nicaragua, intended to be its first beneficiaries. But the Court cannot find an instrument with legal force, whether unilateral or synallagmatic, whereby Nicaragua has committed itself in respect of the principle or methods of holding elections. The Organization of American States Charter has already been mentioned, with its respect for the political independence of the member States ; in the field of domestic policy, it goes no further than to list the social standards to the application of which the Members "agree to dedicate every effort", including :

> "The incorporation and increasing participation of the marginal sectors of the population, in both rural and urban areas, in the economic, social, civic, cultural, and political life of the nation, in order to achieve the full integration of the national community, acceleration of the process of social mobility, and the consolidation of the democratic system." (Art. 43 *(f)*.)

It is evident that provisions of this kind are far from being a commitment as to the use of particular political mechanisms.

262. Moreover, even supposing that such a political pledge had had the force of a legal commitment, it could not have justified the United States insisting on the fulfilment of a commitment made not directly towards the United States, but towards the Organization, the latter being alone empowered to monitor its implementation. The Court can see no legal basis for the "special responsibility regarding the implementation of the

commitments made" by the Nicaraguan Government which the United States considers itself to have assumed in view of "its role in the installation of the current Government of Nicaragua" (see paragraph 170 above). Moreover, even supposing that the United States were entitled to act in lieu of the Organization, it could hardly make use for the purpose of methods which the Organization could not use itself ; in particular, it could not be authorized to use force in that event. Of its nature, a commitment like this is one of a category which, if violated, cannot justify the use of force against a sovereign State.

263. The finding of the United States Congress also expressed the view that the Nicaraguan Government had taken "significant steps towards establishing a totalitarian Communist dictatorship". However the régime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law ; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State. Consequently, Nicaragua's domestic policy options, even assuming that they correspond to the description given of them by the Congress finding, cannot justify on the legal plane the various actions of the Respondent complained of. The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.

264. The Court has also emphasized the importance to be attached, in other respects, to a text such as the Helsinki Final Act, or, on another level, to General Assembly resolution 2625 (XXV) which, as its name indicates, is a declaration on "Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". Texts like these, in relation to which the Court has pointed to the customary content of certain provisions such as the principles of the non-use of force and non-intervention, envisage the relations among States having different political, economic and social systems on the basis of coexistence among their various ideologies ; the United States not only voiced no objection to their adoption, but took an active part in bringing it about.

265. Similar considerations apply to the criticisms expressed by the United States of the external policies and alliances of Nicaragua. Whatever the impact of individual alliances on regional or international political-military balances, the Court is only competent to consider such questions from the standpoint of international law. From that aspect, it is sufficient to say that State sovereignty evidently extends to the area of its foreign policy, and that there is no rule of customary international law to prevent a State from choosing and conducting a foreign policy in co-ordination with that of another State.

266. The Court also notes that these justifications, advanced solely in a political context which it is naturally not for the Court to appraise, were not advanced as legal arguments. The respondent State has always confined itself to the classic argument of self-defence, and has not attempted to introduce a legal argument derived from a supposed rule of "ideological intervention", which would have been a striking innovation. The Court would recall that one of the accusations of the United States against Nicaragua is violation of "the 1965 General Assembly Declaration on Intervention" (paragraph 169 above), by its support for the armed opposition to the Government in El Salvador. It is not aware of the United States having officially abandoned reliance on this principle, substituting for it a new principle "of ideological intervention", the definition of which would be discretionary. As stated above (paragraph 29), the Court is not solely dependent for its decision on the argument of the Parties before it with respect to the applicable law : it is required to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute even if these rules have not been invoked by a party. The Court is however not entitled to ascribe to States legal views which they do not themselves formulate.

267. The Court also notes that Nicaragua is accused by the 1985 finding of the United States Congress of violating human rights. This particular point requires to be studied independently of the question of the existence of a "legal commitment" by Nicaragua towards the Organization of American States to respect these rights ; the absence of such a commitment would not mean that Nicaragua could with impunity violate human rights. However, where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves. The political pledge by Nicaragua was made in the context of the Organization of American States, the organs of which were consequently entitled to monitor its observance. The Court has noted above (paragraph 168) that the Nicaraguan Government has since 1979 ratified a number of international instruments on human rights, and one of these was the American Convention on Human Rights (the Pact of San José, Costa Rica). The mechanisms provided for therein have functioned. The Inter-American Commission on Human Rights in fact took action and compiled two reports (OEA/Ser.L/V/11.53 and 62) following visits by the Commission to Nicaragua at the Government's invitation. Consequently, the Organization was in a position, if it so wished, to take a decision on the basis of these reports.

268. In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of

ports, the destruction of oil installations, or again with the training, arming and equipping of the *contras*. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States, and cannot in any event be reconciled with the legal strategy of the respondent State, which is based on the right of collective self-defence.

269. The Court now turns to another factor which bears both upon domestic policy and foreign policy. This is the militarization of Nicaragua, which the United States deems excessive and such as to prove its aggressive intent, and in which it finds another argument to justify its activities with regard to Nicaragua. It is irrelevant and inappropriate, in the Court's opinion, to pass upon this allegation of the United States, since in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception.

* * *

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" (*I.C.J. Reports 1984*, p. 428).

The point now at issue is different, since the claim of conduct impeding the operation of the Treaty is not advanced on the basis of the compromissory 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 "equi-

table treatment" to the nationals of the other. Nicaragua suggests that whatever meaning given to the expression "equitable treatment"

> "it necessarily precludes the Government of the United States from . . . killing, wounding or kidnapping citizens of Nicaragua, and, more generally from threatening Nicaraguan citizens in the integrity of their persons or the safety of their property".

It is Nicaragua's claim that the treatment of Nicaraguan citizens complained of was inflicted by the United States or by forces controlled by the United States. The Court is however not satisfied that the evidence available demonstrates that the *contras* were "controlled" by the United States when committing such acts. As the Court has indicated (paragraph 110 above), the exact extent of the control resulting from the financial dependence of the *contras* on the United States authorities cannot be established ; and it has not been able to conclude that the *contras* are subject to the United States to such an extent that any acts they have committed are imputable to that State (paragraph 115 above). Even if the provision for "equitable treatment" in the Treaty is read as involving an obligation not to kill, wound or kidnap Nicaraguan citizens in Nicaragua – as to which the Court expresses no opinion – those acts of the *contras* performed in the course of their military or paramilitary activities in Nicaragua are not conduct attributable to the United States.

278. Secondly, Nicaragua claims that the United States has violated the provisions of the Treaty relating to freedom of communication and commerce. For the reasons indicated in paragraph 253 above, the Court must uphold the contention that the mining of the Nicaraguan ports by the United States is in manifest contradiction with the freedom of navigation and commerce guaranteed by Article XIX, paragraph 1, of the 1956 Treaty ; there remains the question whether such action can be justified under Article XXI (see paragraphs 280 to 282 below). In the commercial context of the Treaty, Nicaragua's claim is justified not only as to the physical damage to its vessels, but also the consequential damage to its trade and commerce. Nicaragua however also contended that all the activities of the United States in and against Nicaragua are "violative of the 1956 Treaty" :

> "Since the word 'commerce' in the 1956 Treaty must be understood in its broadest sense, all of the activities by which the United States has deliberately inflicted on Nicaragua physical damage and economic losses of all types, violate the principle of freedom of commerce which the Treaty establishes in very general terms."

It is clear that considerable economic loss and damage has been inflicted

on Nicaragua by the actions of the *contras* : apart from the economic impact of acts directly attributable to the United States, such as the loss of fishing boats blown up by mines, the Nicaraguan Minister of Finance estimated loss of production in 1981-1984 due to inability to collect crops, etc., at some US$ 300 million. However, as already noted (paragraph 277 above) the Court has not found the relationship between the *contras* and the United States Government to have been proved to be such that the United States is responsible for all acts of the *contras*.

279. The trade embargo declared by the United States Government on 1 May 1985 has already been referred to in the context of Nicaragua's contentions as to acts tending to defeat the object and purpose of the 1956 FCN Treaty. The question also arises of its compatibility with the letter and the spirit of Article XIX of the Treaty. That Article provides that "Between the territories of the two Parties there shall be freedom of commerce and navigation" (para. 1) and continues

> "3. Vessels of either Party shall have liberty, on equal terms with vessels of the other Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of such other Party open to foreign commerce and navigation . . ."

By the Executive Order dated 1 May 1985 the President of the United States declared "I hereby prohibit vessels of Nicaraguan registry from entering into United States ports, and transactions relating thereto". The Court notes that on the same day the United States gave notice to Nicaragua to terminate the Treaty under Article XXV, paragraph 3, thereof ; but that Article requires "one year's written notice" for the termination to take effect. The freedom of Nicaraguan vessels, under Article XIX, paragraph 3, "to come with their cargoes to all ports, places and waters" of the United States could not therefore be interfered with during that period of notice, let alone terminated abruptly by the declaration of an embargo. The Court accordingly finds that the embargo constituted a measure in contradiction with Article XIX of the 1956 FCN Treaty.

280. The Court has thus found that the United States is in breach of a duty not to deprive the 1956 FCN Treaty of its object and purpose, and has committed acts which are in contradiction with the terms of the Treaty, subject to the question whether the exceptions in Article XXI, paragraphs 1 *(c)* and 1 *(d)*, concerning respectively "traffic in arms" and "measures . . . necessary to fulfill" obligations "for the maintenance or restoration of international peace and security" or necessary to protect the "essential security interests" of a party, may be invoked to justify the acts complained of. In its Counter-Memorial on jurisdiction and admissibility,

the United States relied on paragraph 1 *(c)* as showing the inapplicability of the 1956 FCN Treaty to Nicaragua's claims. This paragraph appears however to be relevant only in respect of the complaint of supply of arms to the *contras*, and since the Court does not find that arms supply to be a breach of the Treaty, or an act calculated to deprive it of its object and purpose, paragraph 1 *(c)* does not need to be considered further. There remains the question of the relationship of Article XXI, paragraph 1 *(d)*, to the direct attacks on ports, oil installations, etc. ; the mining of Nicaraguan ports ; and the general trade embargo of 1 May 1985 (paragraphs 275 to 276 above).

281. In approaching this question, the Court has first to bear in mind the chronological sequence of events. If the activities of the United States are to be covered by Article XXI of the Treaty, they must have been, at the time they were taken, measures necessary to protect its essential security interests. Thus the finding of the President of the United States on 1 May 1985 that "the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States", even if it be taken as sufficient evidence that that was so, does not justify action by the United States previous to that date.

282. Secondly, the Court emphasizes the importance of the word "necessary" in Article XXI : the measures taken must not merely be such as tend to protect the essential security interests of the party taking them, but must be "necessary" for that purpose. Taking into account the whole situation of the United States in relation to Central America, so far as the Court is informed of it (and even assuming that the justification of self-defence, which the Court has rejected on the legal level, had some validity on the political level), the Court considers that the mining of Nicaraguan ports, and the direct attacks on ports and oil installations, cannot possibly be justified as "necessary" to protect the essential security interests of the United States. As to the trade embargo, the Court has to note the express justification for it given in the Presidential finding quoted in paragraph 125 above, and that the measure was one of an economic nature, thus one which fell within the sphere of relations contemplated by the Treaty. But by the terms of the Treaty itself, whether a measure is necessary to protect the essential security interests of a party is not, as the Court has emphasized (paragraph 222 above), purely a question for the subjective judgment of the party ; the text does not refer to what the party "considers necessary" for that purpose. Since no evidence at all is available to show how Nicaraguan policies had in fact become a threat to "essential security interests" in May 1985, when those policies had been consistent, and consistently criticized by the United States, for four years previously, the Court is unable to find that the embargo was "necessary" to protect those interests. Accordingly, Article XXI affords

no defence for the United States in respect of any of the actions here under consideration.

* * * * *

283. The third submission of Nicaragua in its Memorial on the merits, set out in paragraph 15 above, requests the Court to adjudge and declare that compensation is due to Nicaragua and

> "to receive evidence and to determine, in a subsequent phase of the present proceedings, the quantum of damages to be assessed as the compensation due to the Republic of Nicaragua".

The fourth submission requests the Court to award to Nicaragua the sum of 370,200,000 United States dollars, "which sum constitutes the minimum valuation of the direct damages" claimed by Nicaragua. In order to decide on these submissions, the Court must satisfy itself that it possesses jurisdiction to do so. In general, jurisdiction to determine the merits of a dispute entails jurisdiction to determine reparation. More specifically, the Court notes that in its declaration of acceptance of jurisdiction under the Optional Clause of 26 August 1946, the United States expressly accepted the Court's jurisdiction in respect of disputes concerning "the nature or extent of the reparation to be made for the breach of an international obligation". The corresponding declaration by which Nicaragua accepted the Court's jurisdiction contains no restriction of the powers of the Court under Article 36, paragraph 2 *(d)*, of its Statute ; Nicaragua has thus accepted the "same obligation". Under the 1956 FCN Treaty, the Court has jurisdiction to determine "any dispute between the Parties as to the interpretation or application of the present Treaty" (Art. XXIV, para. 2) ; and as the Permanent Court of International Justice stated in the case concerning the *Factory at Chorzów*,

> "Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application." (*Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21.)

284. The Court considers appropriate the request of Nicaragua for the nature and amount of the reparation due to it to be determined in a subsequent phase of the proceedings. While a certain amount of evidence has been provided, for example, in the testimony of the Nicaraguan Minister of Finance, of pecuniary loss sustained, this was based upon contentions as to the responsibility of the United States which were more far-reaching than the conclusions at which the Court has been able to arrive. The opportunity should be afforded Nicaragua to demonstrate and prove

exactly what injury was suffered as a result of each action of the United States which the Court has found contrary to international law. Nor should it be overlooked that, while the United States has chosen not to appear or participate in the present phase of the proceedings, Article 53 of the Statute does not debar it from appearing to present its arguments on the question of reparation if it so wishes. On the contrary, the principle of the equality of the Parties requires that it be given that opportunity. It goes without saying, however, that in the phase of the proceedings devoted to reparation, neither Party may call in question such findings in the present Judgment as have become *res judicata.*

285. There remains the request of Nicaragua (paragraph 15 above) for an award, at the present stage of the proceedings, of $370,200,000 as the "minimum (and in that sense provisional) valuation of direct damages". There is no provision in the Statute of the Court either specifically empowering the Court to make an interim award of this kind, or indeed debarring it from doing so. In view of the final and binding character of the Court's judgments, under Articles 59 and 60 of the Statute, it would however only be appropriate to make an award of this kind, assuming that the Court possesses the power to do so, in exceptional circumstances, and where the entitlement of the State making the claim was already established with certainty and precision. Furthermore, in a case in which the respondent State is not appearing, so that its views on the matter are not known to the Court, the Court should refrain from any unnecessary act which might prove an obstacle to a negotiated settlement. It bears repeating that

> "the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties ; as consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement . . ." (*Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22,* p. 13).

Accordingly, the Court does not consider that it can accede at this stage to the request made in the Fourth Submission of Nicaragua.

* *

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",

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 Colliard ;

AGAINST : *Judges* Ruda, Elias, Sette-Camara and Ni.

(2) By twelve votes to three,

Rejects the justification of collective self-defence maintained by the United States of America in connection with the military and paramilitary activities in and against Nicaragua the subject of this case ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; *Judge* ad hoc Colliard ;

AGAINST : *Judges* Oda, Schwebel and Sir Robert Jennings.

(3) By twelve votes to three,

Decides that the United States of America, by training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; *Judge* ad hoc Colliard ;

AGAINST : *Judges* Oda, Schwebel and Sir Robert Jennings.

(4) By twelve votes to three,

Decides that the United States of America, by certain attacks on Nicaraguan territory in 1983-1984, namely attacks on Puerto Sandino on 13 September and 14 October 1983 ; an attack on Corinto on 10 October 1983 ; an attack on Potosí 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 Colliard ;

AGAINST : *Judges* Oda, Schwebel and Sir Robert Jennings.

(5) By twelve votes to three,

Decides that the United States of America, by directing or authorizing overflights of Nicaraguan territory, and by the acts imputable to the United States referred to in subparagraph (4) hereof, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to violate the sovereignty of another State ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; *Judge* ad hoc Colliard ;

AGAINST : *Judges* Oda, Schwebel and Sir Robert Jennings.

(6) By twelve votes to three,

Decides that, by laying mines in the internal or territorial waters of the Republic of Nicaragua during the first months of 1984, the United States of America has acted, against the Republic of Nicaragua, in breach of its obligations under customary international law not to use force against another State, not to intervene in its affairs, not to violate its sovereignty and not to interrupt peaceful maritime commerce ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; *Judge* ad hoc Colliard ;

AGAINST : *Judges* Oda, Schwebel and Sir Robert Jennings.

(7) By fourteen votes to one,

Decides that, by the acts referred to in subparagraph (6) hereof, the United States of America has acted, against the Republic of Nicaragua, in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua signed at Managua on 21 January 1956 ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen ; *Judge* ad hoc Colliard ;

AGAINST : *Judge* Schwebel.

(8) By fourteen votes to one,

Decides that the United States of America, by failing to make known the existence and location of the mines laid by it, referred to in subparagraph

(6) hereof, has acted in breach of its obligations under customary international law in this respect ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Schwebel, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen ; *Judge* ad hoc 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, Schwebel, Sir Robert Jennings, Mbaye, 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, Mbaye, Bedjaoui, Ni and Evensen ; *Judge* ad hoc Colliard ;

AGAINST : *Judges* Oda, Schwebel and Sir Robert Jennings.

(11) By twelve votes to three,

Decides that the United States of America, by the attacks on Nicaraguan territory referred to in subparagraph (4) hereof, and by declaring a general embargo on trade with Nicaragua on 1 May 1985, has acted in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956 ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; *Judge* ad hoc Colliard ;

AGAINST : *Judges* Oda, Schwebel and Sir Robert Jennings.

(12) By twelve votes to three,

Decides that the United States of America is under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; *Judge* ad hoc Colliard ;

AGAINST : *Judges* Oda, Schwebel and Sir Robert Jennings.

(13) By twelve votes to three,

Decides that the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of obligations under customary international law enumerated above ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; *Judge* ad hoc Colliard ;

AGAINST : *Judges* Oda, Schwebel and Sir Robert Jennings.

(14) By fourteen votes to one,

Decides that the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956 ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen ; *Judge* ad hoc Colliard ;

AGAINST : *Judge* Schwebel.

(15) By fourteen votes to one,

Decides that the form and amount of such reparation, failing agreement between the Parties, will be settled by the Court, and reserves for this purpose the subsequent procedure in the case ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen ; *Judge* ad hoc Colliard ;

AGAINST : *Judge* Schwebel.

(16) Unanimously,

Recalls to both Parties their obligation to seek a solution to their disputes by peaceful means in accordance with international law.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-seventh day of June, one thousand nine hundred and eighty-six, in three copies, one of which will be placed in the archives of the Court and the others will be transmitted to the Government of the Republic of Nicaragua and to the Government of the United States of America, respectively.

(Signed) NAGENDRA SINGH,
President.

(Signed) Santiago TORRES BERNÁRDEZ,
Registrar.

President NAGENDRA SINGH, Judges LACHS, RUDA, ELIAS, AGO, SETTE-CAMARA and NI append separate opinions to the Judgment of the Court.

Judges ODA, SCHWEBEL and Sir Robert JENNINGS append dissenting opinions to the Judgment of the Court.

(Initialled) N.S.
(Initialled) S.T.B.

Annex 15

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING THE CONTINENTAL SHELF

(TUNISIA/LIBYAN ARAB JAMAHIRIYA)

APPLICATION BY MALTA FOR PERMISSION TO INTERVENE

JUDGMENT OF 14 APRIL 1981

1981

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DU PLATEAU CONTINENTAL

(TUNISIE/JAMAHIRIYA ARABE LIBYENNE)

REQUÊTE DE MALTE À FIN D'INTERVENTION

ARRÊT DU 14 AVRIL 1981

Official citation :

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JUDGMENT

CASE CONCERNING THE CONTINENTAL SHELF (TUNISIA/LIBYAN ARAB JAMAHIRIYA)

APPLICATION BY MALTA FOR PERMISSION TO INTERVENE

AFFAIRE DU PLATEAU CONTINENTAL (TUNISIE/JAMAHIRIYA ARABE LIBYENNE)

REQUÊTE DE MALTE À FIN D'INTERVENTION

14 AVRIL 1981

ARRÊT

INTERNATIONAL COURT OF JUSTICE

1981
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14 April 1981

CASE CONCERNING THE CONTINENTAL SHELF

(TUNISIA/LIBYAN ARAB JAMAHIRIYA)

APPLICATION BY MALTA FOR PERMISSION TO INTERVENE

Intervention under Article 62 of the Statute — Legal interest which may be affected by the decision in the case — Object of the intervention.

JUDGMENT

Present : President Sir Humphrey WALDOCK ; *Vice-President* ELIAS ; *Judges* GROS, LACHS, MOROZOV, NAGENDRA SINGH, RUDA, MOSLER, ODA, AGO, EL-ERIAN, SETTE-CAMARA, EL-KHANI, SCHWEBEL ; *Judges* ad hoc EVENSEN, JIMÉNEZ DE ARÉCHAGA ; *Registrar* TORRES BERNÁRDEZ.

In the case concerning the continental shelf,

between

the Republic of Tunisia,

represented by

H.E. Mr. Slim Benghazi, Ambassador of Tunisia to the Netherlands,

as Agent,

Professor Sadok Belaïd, Professor agrégé, in the Faculty of Law, Political Science and Economics, at the University of Tunis,

as co-Agent and Counsel,

Professor R. Y. Jennings, Q.C., Whewell Professor of International Law in the University of Cambridge,

as Counsel,

assisted by

Mr. J. P. Carver, Solicitor (Coward Chance),
Mr. Abdelwahab Chérif, Counsellor at the Tunisian Embassy to the Netherlands,

Mr. Samir Chaffai, Secretary at the Tunisian Embassy to the Netherlands,

and

the Socialist People's Libyan Arab Jamahiriya,

represented by

H.E. Mr. Kamel H. El Maghur, Ambassador,

as Agent,

Dr. Abdelrazeg El-Murtadi Suleiman, Professor of International Law at the University of Garyounis,

as Counsel,

Sir Francis A. Vallat, K.C.M.G., Q.C.,

Professor Antonio Malintoppi, Professor in the Faculty of Law at the University of Rome,

Mr. Keith Highet, Member of the District of Columbia and New York Bars,

as Counsel and Advocates,

and

Mr. Walter D. Sohier,
Mr. Rodman R. Bundy,
Mr. Richard Meese,
Mr. Michel Vodé,

as Counsel ;

Upon the application for permission to intervene submitted by the Republic of Malta,

represented by

Dr. Edgar Mizzi, Attorney-General of Malta,

as Agent and Counsel,

H.E. Mr. Emanuel Bezzina, Ambassador of Malta to the Netherlands,

as co-Agent,

assisted by

Sir Gerald Fitzmaurice, G.C.M.G., Q.C.,

as Consultant and Co-ordinator,

and by

Professor Pierre Lalive, Professor in the Faculty of Law at the University of Geneva, and at the Graduate Institute of International Studies ; Member of the Geneva Bar,

Mr. M. E. Bathurst, C.M.G., C.B.E., Q.C.,
Mr. E. Lauterpacht, Q.C.,

as Counsel,

and

Mr. M. C. Tynan, Solicitor (Bischoff and Co.),

THE COURT,

Composed as above,

After deliberation,

Delivers the following Judgment :

1. By a letter of 25 November 1978, received in the Registry of the Court on 1 December 1978, the Minister of Foreign Affairs of the Republic of Tunisia notified the Court of a Special Agreement in the Arabic language signed at Tunis on 10 June 1977 between the Republic of Tunisia and the Socialist People's Libyan Arab Jamahiriya, providing for the submission to the Court of a dispute concerning the delimitation of the continental shelf between those two States ; a certified copy of the Special Agreement was enclosed with the letter, together with a translation into French. Pursuant to Article 40, paragraph 2, of the Statute, and to Article 39, paragraph 1, of the Rules of Court, a certified copy of the notification and of the Special Agreement was forthwith transmitted to the Government of the Socialist People's Libyan Arab Jamahiriya. By a letter of 14 February 1979, received in the Registry of the Court on 19 February 1979, the Secretary of Foreign Affairs of the Socialist People's Libyan Arab Jamahiriya made a like notification to the Court, enclosing a further certified copy of the Special Agreement in the Arabic language, together with a translation into English.

2. Pursuant to Article 40, paragraph 3, of the Statute and to Article 42 of the Rules of Court, copies of the notifications and Special Agreement were transmitted to the Secretary-General of the United Nations, the Members of the United Nations and other States entitled to appear before the Court.

3. Since the Court did not include upon the bench a judge of Tunisian or of Libyan nationality, each of the Parties proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. On 14 February 1979 the Libyan Arab Jamahiriya designated Mr. Eduardo Jiménez de Aréchaga, and the Parties were informed on 25 April 1979, pursuant to Article 35, paragraph 3, of the Rules of Court that there was no objection to this appointment ; on 11 December 1979 Tunisia designated Mr. Jens Evensen, and on 7 February 1980 the Parties were informed that there was no objection to this appointment.

4. By a letter of 18 August 1980, the Government of the Republic of Malta, in reliance on Article 53, paragraph 1, of the Rules of Court asked to be furnished with copies of the pleadings in the case, which at that date comprised the Memorials filed on 30 May 1980, and documents annexed thereto. By letters dated as hereafter indicated, the Governments of the following States had previously submitted similar requests : the United States of America (12 June 1980) ; Canada (13 June 1980) ; Netherlands (18 June 1980) ; Argentina (23 June 1980) ; and subsequently, on 8 October 1980, the Government of Venezuela also made a similar request. By letters of 24 November 1980, after the views of the Parties had been sought, and objection had been raised by one of them, the Registrar informed the Government of Malta and those other Governments that the President of the Court had decided that the pleadings in the case and documents annexed would not, for the present, be made available to States not parties to the case.

5. The Counter-Memorials of the Parties to the case, as contemplated by the Special Agreement of 10 June 1977, and in accordance with an Order made by the President of the Court on 3 June 1980, were required to be filed within the following time-limits : for the Counter-Memorial of the Republic of Tunisia, 1 December 1980 ; for the Counter-Memorial of the Libyan Arab Jamahiriya, 2 February 1981. The Special Agreement, however, included a provision for a possible further exchange of pleadings, so that even when the Counter-Memorials of the Parties had been filed, the date of the closure of the written proceedings, within the meaning of Article 81, paragraph 1, of the Rules of Court, would remain still to be finally determined. The Counter-Memorials were each, in turn, filed within the appropriate time-limits, that of the Libyan Arab Jamahiriya being received in the Registry on 2 February 1981.

6. By a letter from the Prime Minister of the Republic of Malta dated 28 January 1981 and received in the Registry of the Court on 30 January 1981, the Government of Malta, invoking Article 62 of the Statute, submitted to the Court a request for permission to intervene in the case. In accordance with Article 83, paragraph 1, of the Rules of Court, certified copies of the Application by Malta for permission to intervene were forthwith communicated to Tunisia and the Libyan Arab Jamahiriya, the Parties to the case, and copies were also transmitted, pursuant to paragraph 2 of that Article, to the Secretary-General of the United Nations, the Members of the United Nations and other States entitled to appear before the Court.

7. On 26 February 1981, within the time-limit fixed for that purpose by the President of the Court as provided by Article 83, paragraph 1, of the Rules of Court, the Government of Tunisia and the Government of the Libyan Arab Jamahiriya submitted written observations on the Application of Malta for permission to intervene, in which they set out their respective reasons for contending that the Application did not satisfy the conditions laid down by the Statute and Rules of Court. The Parties and the Government of Malta were therefore notified by letters of 3 March 1981 that the Court would hold public hearings, in accordance with Article 84, paragraph 2, of the Rules of Court, to hear the observations of Malta, the State seeking to intervene, and those of the Parties to the case, on the question whether the Application of Malta for permission to intervene should be granted.

8. By a letter of 2 March 1981, received in the Registry of the Court on 4 March 1981, the Government of Malta notified the Court that in reliance on Article 31, paragraph 3, of the Statute of the Court it nominated a judge *ad hoc* "for the purpose of the intervention proceedings", and raised questions related to the participation of the two judges *ad hoc* designated by the Parties to the case, suggesting that Tunisia and the Libyan Arab Jamahiriya should be considered as "in the same interest" in the proceedings on the application for permission to intervene. The Court, sitting without the participation of the judges *ad hoc*, decided on 7 March 1981 that, on their face, the matters which were the subject of the letter of 2 March 1981 did not at that time fall within the ambit of Article 31 of the Statute of the Court ; that a State which seeks to intervene under Article 62 of the Statute has no other right than to submit a request to be permitted to intervene, and has yet to establish any status in relation to the case ; that pending consideration of and decision on a request for permission to intervene, the conditions under which Article 31 of the Statute may become applicable do not exist ; and therefore that the letter of 2 March 1981 being in the circumstances

premature, the matters to which it referred could not be taken under consideration by the Court at that stage of the proceedings. By a letter from the Registrar dated 7 March 1981 the Agent of Malta was informed of that decision.

9. On 19, 20, 21 and 23 March 1981 public hearings were held, in the course of which the Court heard oral argument, on the question whether the permission to intervene under Article 62 of the Statute requested by Malta should be granted, by the following representatives :

For the Republic of Malta :	Dr. Edgar Mizzi, Professor Pierre Lalive, Mr. M. E. Bathurst, C.M.G., C.B.E., Q.C., Mr. E. Lauterpacht, Q.C. ;
For the Socialist People's Libyan Arab Jamahiriya :	H.E. Mr. Kamel H. El Maghur, Sir Francis A. Vallat, K.C.M.G., Q.C., Professor Antonio Malintoppi, Mr. Keith Highet ;
For the Republic of Tunisia :	H.E. Mr. Slim Benghazi, Professor Sadok Belaïd, Professor R. Y. Jennings, Q.C.

10. No formal submissions were addressed to the Court by any of the three States participating in the proceedings ; the principal contentions of these States on the questions raised in the proceedings are however set out below (paragraphs 12-16).

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11. The Application of the Republic of Malta (hereinafter referred to as "Malta") submitting a request to the Court for permission to intervene is based on Article 62 of the Statute of the Court which provides :

> "1. Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.
> 2. It shall be for the Court to decide upon this request."

Such an application under Article 62 is required by Article 81, paragraph 2, of the Rules of Court to specify the case to which it relates and to set out :

> "*(a)* the interest of a legal nature which the State applying to intervene considers may be affected by the decision in that case ;
> *(b)* the precise object of the intervention ;
> *(c)* any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case".

Malta's Application to be permitted to intervene in the present case set out its contentions with respect to the matters specified in each of those three subparagraphs, and those contentions were further explained and de-

veloped in the oral argument addressed to the Court by its representatives at the hearings. The Republic of Tunisia (hereinafter referred to as "Tunisia") and the Socialist People's Libyan Arab Jamahiriya (hereinafter referred to as "Libya"), in written observations on the Application of Malta, gave their respective reasons for maintaining that Malta's request for permission to intervene did not satisfy the conditions set out in the Statute and Rules of Court ; and their views were further explained and developed in the oral argument of their representatives at the hearings. The positions taken in the written and oral proceedings on these matters by the three States concerned may be summarized as follows.

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12. Malta maintains that no condition is prescribed by the Statute as necessary to found a request for permission to intervene under Article 62 other than that the State seeking to intervene should "consider that it has an interest of a legal nature which may be affected by the decision" to be given in a case. It points to the absence of any mention in Article 62 of the existence of a basis of jurisdiction between a State seeking to intervene and the parties to a case as a condition of intervention. While noting and complying with the provision in Article 81, paragraph 2 *(c)*, of the Rules requiring the Application to set out any basis of jurisdiction claimed to exist as between the applicant State and the parties to the case, Malta stresses that this provision did not figure in any earlier version of the Rules. That provision of the Rules, Malta contends, cannot have created a new substantive condition of the grant of permission to intervene. The Court's rule-making power, it argues, cannot be employed for the purpose of introducing a requirement not expressed, and not to be found by any process of necessary implication, in Article 62 of the Statute, which it considers must prevail. Malta also calls attention to its declaration in paragraph 22 of its Application that it is not its object to obtain from the Court by way of the intervention any form of ruling or decision concerning Malta's own continental shelf boundaries with either or both of the parties to this case. Counsel for Malta emphasized that it did not seek to be admitted as a veritable "party" to the proceedings having a status on a footing of complete equality with the Parties to the case, but was seeking the procedural position of a "participant" by way of intervention. Since the intervention for which it has applied would not seek any substantive or operative decision against either Party, Malta further maintains that "no question of jurisdiction in the strict sense of the word could arise" as between Malta and the Parties to the *Tunisia/Libya* case.

13. The interest of a legal nature which Malta claims to possess in the *Tunisia/Libya* case and considers may be affected by the decision is the interest that, according to Malta, it has in the legal principles and rules for determining the delimitation of the boundaries of its continental shelf. Malta observes that "the continental shelf rights of States are derived from law, as are also the principles and rules on the basis of which such areas are

to be defined and delimited", and it contends that it has a "specific and unique interest" in the present proceedings which arises out of its "involvement in the facts" of the *Tunisia/Libya* case. It is involved in the facts of that case, it argues, by virtue of its geographical location vis-à-vis the two Parties to the case. The effect of this would be, it urges, that any pronouncement made by the Court in the context of the dispute between Tunisia and Libya may "prove relevant in one way or another ... to Malta's own legal situation" and thus "inescapably ... affect this situation". It would do so, according to Malta, by reason of the process of "the identification and assessment of local or regional factors", required for the delimitation of the boundary between Libya and Tunisia. In Malta's view there can be little doubt that the *Tunisia/Libya* case, "considered in legal and physical terms, meshes closely with the continental shelf interests of the Republic of Malta". Stressing that the Statute requires only that the interest be capable of being "affected", without any demonstration of its being impaired or compromised being necessary, Counsel for Malta pointed to a number of ways in which the interest of Malta would be so affected. Amongst examples Counsel gave were the impact on a possible equidistance line that might be drawn between Malta and the North African mainland of the adoption in the delimitation between Libya and Tunisia of any special baselines along their respective coasts ; or the identification, in such delimitation, of any particular geographical or other factors found to be relevant either as constituting "special circumstances" or as a matter of the application of equitable principles. Malta, moreover, contends that its interests will necessarily be affected by the Court's decision in the case notwithstanding the fact that, as stated in Article 59 of the Statute, " the decision of the Court has no binding force except between the parties and in respect of that particular case". It considers that its interests might be affected not only by the formal operative part of the Court's decision in the case, but by the "effective decision contained in the Court's reasoning", which is bound to contain substantive elements that in content must inevitably have, or at any rate are likely to have, an impact upon subsequent relations between Malta and Libya and Tunisia.

14. The precise object of Malta's intervention in the *Tunisia/Libya* case is stated in the Application to be to enable Malta to submit its views to the Court on the issues raised in the pending case before the Court has given its decision in that case. At the hearing, Counsel for Malta explained that what Malta seeks is "to make its submissions on those issues in the case which subsequent examination of the pleadings might indicate could affect Malta's interests". Malta however stresses that it is not its object "by way, or in the course, of intervention" in the *Tunisia/Libya* case, "to obtain any form of ruling or decision from the Court concerning its continental shelf boundaries with either or both of those countries". It draws attention to the fact that the very purpose of that case, as defined in the Special Agreement of 10 June 1977, is to secure a statement from the Court of what the appropriate law is, not to formulate claims on which the Parties ask the Court to reach judgment. It argues that there is accordingly no justification

for suggesting that "the object of Malta in seeking to intervene must be more exact, more precise, more operative in formal terms" than the object of the Parties. Nor would it be correct, the Agent of Malta emphasized, to conclude from Malta's insistence that it does not seek any ruling or decision of the Court against either Tunisia or Libya, that Malta does not accept to be bound by the decision of the Court. Pointing out that the extent to which an intervening State is bound by the decisions of the Court is independent of acceptance or non-acceptance by that State, he declared that by its Application to intervene Malta submits itself to all the consequences and effects of intervention, whatever these may be. He further maintained that the pertinence of Malta's request for intervention could in no way be affected by the possibility that Malta might appear before the Court as a principal party in parallel proceedings against one or both of the Parties to the present case, since any decision given in such proceedings would be bound to be rendered considerably later than that in the current *Tunisia/Libya* case.

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15. Libya, in its observations, has opposed the application of Malta on the ground that the jurisdiction of the Court is governed by Article 36 of the Statute, and contends that Malta does not possess any jurisdictional link with both Parties within the meaning of that Article. It argues that Article 62 of the Statute does not confer an independent title of jurisdiction upon a State seeking to intervene, that an intervention cannot be admitted unless the Court is satisfied that there exists a valid jurisdictional link between the parties and the intervening State, and that Article 81, paragraph 2 *(c)*, of the Rules of Court is simply an accurate interpretation of the meaning and scope of Article 62 of the Statute in respect of jurisdiction. Libya moreover contends that, in any event, for intervention to be possible under Article 62 the legal interest invoked must be so related legally to the subject-matter of the proceedings that, whatever the decision of the Court, the legal interest will be affected, and that for the purposes of Article 62, the "decision" of the Court referred to in the English text of that Article does not include the *consideranda* of the judgment. Libya argues that Malta does not in fact have any interest of a legal nature which might be affected by the decision, inasmuch as the Special Agreement does not contemplate a delimitation of the continental shelf by the Court, but by the Parties, nor does it contemplate any delimitation of any continental shelf areas other than those appertaining to Libya and Tunisia. Any interest of Malta in respect of the delimitation of its continental shelf would, in Libya's view, be safeguarded by the Court in delivering its judgment, and would be adequately protected by Article 59 of the Statute. Furthermore, having regard to Malta's indication of the object of its intended intervention, Libya also questions whether what Malta is seeking is an intervention at all within the meaning of Article 62 of the Statute, since it considers that the purpose of intervention in contentious proceedings must be more than to

"submit views". To comply with Article 81, paragraph 2 *(b)*, of the Rules of Court, a State seeking to intervene must, Libya maintains, go further than a mere assertion ; it must state the precise object, the purpose of its intended action, and not merely the means by which it intends to achieve that object. If Malta is merely preoccupied with the principles and rules of law which may hereafter be stated in the Court's judgment, this does not constitute a proper or sufficient justification for intervention under Article 62.

16. Tunisia, for its part, considers that for Malta to be able to intervene and be heard before judgment is rendered, it would be necessary for the Government of Malta to prove the existence of a basis of jurisdiction between it and the Parties to the case. Article 62 of the Statute must, according to Tunisia, be read subject to the provisions of Article 36, governing the jurisdiction of the Court ; and, in its view, from the overriding principle of international law that jurisdiction is based upon consent it follows that a basis of jurisdiction must always be a requirement of intervention, at least where the State seeking to intervene wishes in any degree to be a party. Referring to the English text of Article 62, Tunisia further maintains that for the purposes of that Article the interest asserted must be such as to be affected by the "decision" in the case, that is to say the operative clause, constituting *res judicata* between the parties, and not the reasoning in the judgment. It maintains that the Special Agreement would not permit the Court to adjudicate upon the extent of the continental shelf boundaries of any State other than the Parties thereto ; therefore, while conceding that Malta, in common with other States, has an interest of a legal nature that might be "touched", but not "affected", by the decision in the case, Tunisia argues that Malta's interest is not sufficient to justify intervention under Article 62. The effect, in Tunisia's view, of a decision by the Court on the principles and rules of international law concerning continental shelf boundaries cannot of itself be a good reason for intervention ; all factors taken into account in such a decision are relative, and not necessarily applicable to other delimitations even in the same geographical region, since the relevant circumstances must vary in accordance with the differing geographical relationships. Tunisia also observes that, on the basis of the object of the intervention as explained by Malta, the Application amounted to a request to intervene in a case in order to argue points of general law, simply because the resulting judgment might form an important precedent as a subsidiary means for the ascertainment of the law ; and this Tunisia considers to be inadmissible, the more so if Malta, as seemed to be its intention, does not propose to be bound in any way by the precedent. Tunisia, indeed, suggests that the avowed object of Malta has in fact already been achieved by the hearings on the question of intervention, in view of the explanations Malta has there been able to give of its preoccupations.

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17. The Court will now examine the legal problems involved in Malta's request for permission to intervene in the present continental shelf case between Tunisia and Libya. Certain objections have been raised to Malta's request by each of the Parties in relation to all three matters specified in Article 81, paragraph 2, of the Court's Rules. One objection is that Malta has not succeeded in showing the existence of "an interest of a legal nature which may be affected by the decision in the case" within the meaning of Article 62 of the Statute. Another is that the object of Malta's request, as declared and defined in its Application, falls altogether outside the scope of the form of intervention for which Article 62 provides. The objection has further been made that, even if not expressly mentioned in Article 62, a link of jurisdiction between the States seeking to intervene and the parties to the case has necessarily, under Article 36 of the Statute, to be considered an essential condition of the grant of permission to intervene, more especially when the case is submitted to the Court by special agreement ; and that Malta has not established any such jurisdictional link in the present instance. The Court observes that under paragraph 2 of Article 62 it is for the Court itself to decide upon any request for permission to intervene under that Article. The Court, at the same time, emphasizes that it does not consider paragraph 2 to confer upon it any general discretion to accept or reject a request for permission to intervene for reasons simply of policy. On the contrary, in the view of the Court the task entrusted to it by that paragraph is to determine the admissibility or otherwise of the request by reference to the relevant provisions of the Statute.

18. In the present case, if any one of the objections raised by the Parties should be found by the Court to be justified, it will clearly not be open to the Court to give any further consideration to the request. As the questions of the interest of a legal nature which Malta alleges may be affected by the Court's decision in the present case and of the object of Malta's intervention are closely connected, the Court will examine these two questions together.

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19. The interest of a legal nature invoked by Malta does not relate to any legal interest of its own directly in issue as between Tunisia and Libya in the present proceedings or as between itself and either one of those countries. It concerns rather the potential implications of reasons which the Court may give in its decision in the present case on matters in issue as between Tunisia and Libya with respect to the delimitation of their continental shelves for a subsequent delimitation of Malta's own continental shelf. In particular, as the Court has previously indicated, Malta says that its legal interests may be affected by the Court's appreciation of certain geographical and geomorphological features in the area and by its assessment of their legal relevance and value as factors in the delimitation of areas of the continental shelf which, it says, are adjacent to its own continental shelf, as well as by any pronouncements by the Court on, for

example, the application of equitable principles or special circumstances in regard to that area. The object of its intervention, Malta explains, would be to enable it to submit its views on issues raised in the present case of the kind just mentioned before the Court has given its decision in the case. At the same time, however, Malta is at pains in paragraph 22 of its Application to stress that :

> "it is not Malta's object, by way, or in the course, of intervention in the *Libya/Tunisia* case, to obtain any form of ruling or decision from the Court concerning its continental shelf boundaries with either or both of those countries".

Moreover, to leave no doubt whatever on this point, Malta again underlines in paragraph 24 of its Application that the intervention for which it requests permission "would not seek any substantive or operative decision against either party".

20. The limited object of the intervention which Malta seeks has already been referred to by the Court. Malta has explained that, in applying for permission to intervene in the *Tunisia/Libya* proceedings it "is not seeking to appear as a plaintiff or claimant against either of those States, or to assert any specific right against either of them as such". "Malta", its Counsel said, "is not seeking to take sides" in the *Tunisia/Libya* case, or "to obtain from the Court a decision on the continental shelf boundary" between itself and Tunisia and Libya. Such a determination, Malta recognized, would not be the proper object either of the present Application or of the intervention if it were allowed.

21. The limit thus placed by the Government of Malta on the scope of the intervention which it seeks, and the very character of that intervention, raise both the question whether its Application is really based on an interest of a legal nature which may be affected by the decision in the *Tunisia/Libya* case, and the question whether the form of intervention for which Article 62 of the Statute provides includes the intervention that is the object of Malta's Application. The Statute of the Court provides for two different forms of intervention : one under Article 62 which allows a State to request permission to intervene if it should consider itself to have "an interest of a legal nature which may be affected by the decision in the case" ; and the other under Article 63 which gives parties to a convention the construction of which is in question in a case "the right to intervene in the proceedings". The two Articles with their two forms of intervention, the records show, were taken into the present Statute directly from the corresponding Articles 62 and 63 of the Statute of the Permanent Court of International Justice and with only minor changes of language.

22. Article 62 had no forerunner in State practice in 1920, being introduced into the draft Statute by the Advisory Committee of Jurists in the course of their consideration of what is now Article 63. The Committee had before it, *inter alia*, a plan for the Court previously worked out by a Conference of Five Neutral Powers, paragraph 1 of Article 48 of which

read : "Whenever a dispute submitted to the Court affects the interests of a third State, the latter may intervene in the case." When the Advisory Committee began its consideration of Article 63 of the Statute, the suggestion was made that it should be completed by the addition of Article 48 of the Five Powers plan. The point having been made that "the interests affected must be legitimate interests", the President of the Advisory Committee, Baron Descamps, proposed :

> "Should a State consider that it has an interest of a legal nature, which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. It will be for the Court to decide upon this request."

This formula was adopted by the Committee, subject to revision, and it was decided to make the new provision a separate article inserted immediately before Article 63. In the French text – the text established by the Committee – it was sought to make the phrase "un intérêt d'ordre juridique le concernant est en cause" more precise by revising it so as to read "un intérêt d'ordre juridique est *pour lui* en cause". In the English text, the corresponding phrase "interest of a legal nature which may be affected by the decision in the case" was at the same time completed by adding the words "as a third party". What was intended to be the precise significance of that addition is not stated in the Committee's records. However, when the words "as a third party" added to the English text are read together with the revised wording of the French text "est pour lui en cause", it becomes clear that the interest of a legal nature to which Article 62 was intended to refer was an interest which is in issue in the proceedings and consequently one that "may be affected by the decision in the case".

23. When the Permanent Court began, in 1922, to consider its rules of procedure for applying Article 62 of the Statute, it became apparent that different views were held as to the object and form of the intervention allowed under that Article, and also as to the need for a basis of jurisdiction vis-à-vis the parties to the case. Some Members of the Permanent Court took the view that only an interest of a legal nature in the actual subject of the dispute itself would justify the intervention under Article 62 ; others considered that it would be enough for the State seeking to intervene to show that its interests might be affected by the position adopted by the Court in the particular case. Similarly, while some Members of the Court regarded the existence of a link of jurisdiction with the parties to the case as a further necessary condition for intervention under Article 62, others thought that it would be enough simply to establish the existence of an interest of a legal nature which might be affected by the Court's decision in the case. The outcome of the discussion was that it was agreed not to try to resolve in the Rules of Court the various questions which had been raised, but to leave them to be decided as and when they occurred in practice and in the light of the circumstances of each particular case.

24. In the event, the Permanent Court was confronted with intervention under Article 62 in only one case, the *S.S. "Wimbledon"* case, in which

Poland's application to intervene had been framed on the basis of that Article. In the application, however, Poland had referred to its participation in the Treaty of Versailles, the provisions of which regarding the Kiel Canal were the subject-matter of the case ; and at the suggestion of one of the Parties to the case it supplemented the basis of its application by also invoking Article 63, before the Court came to pronounce upon it. As to the Parties to the case, they did not raise any objection to Poland's intervention. The Permanent Court decided to uphold the application simply on the basis of Article 63 and found it unnecessary to consider whether the intervention might equally have been "justified by an interest of a legal nature, within the meaning of Article 62 of the Statute" (*P.C.I.J., Series A, No. 1,* pp. 11-14). Thus when the Permanent Court revised its Rules it had not had any real experience of the operation of Article 62 in practice ; and in consequence its further debates on the Rules do not throw a great deal of new light on the problems involved in the application of that Article. For present purposes it is enough to say that in these debates the differences of view as to the precise object or objects of intervention contemplated by Article 62 and as to the need for a jurisdictional link with the parties to the case still remained to be decided. At the same time, it seems to have been assumed that a State permitted to intervene under Article 62 would become a "party" to the case. That was only to be expected as the English text of Article 62 then spoke specifically of permission to intervene "as a third party".

25. When the present Statute was drafted, a change was made in the English text of paragraph 1 of Article 62 : the words "as a third party", which had no corresponding expression in the French text, were omitted. This was done in the Committee of Jurists responsible for preparing the new Statute on the basis of a proposal from its drafting committee which considered the phrase to be "misleading". The Rapporteur of the Committee at the same time underlined in his report that no change had been found necessary in the French text and that the elimination of the phrase "as a third party" from the English text was not intended to "change the sense thereof".

26. The present Court was first led to address itself to the problems of intervention in 1951 in the context of Article 63 of the Statute when Cuba, as a party to the Havana Convention of 1928 on Asylum, filed a declaration of intervention in the *Haya de la Torre* case (*I.C.J. Reports 1951,* pp. 74, 76-77). In that case the Court stressed that, under Article 63, intervention by a party to a convention the construction of which is in issue in the proceedings is a matter of right. At the same time, however, it also underlined that the right to intervene under Article 63 is confined to the point of interpretation which is in issue in the proceedings, and does not extend to general intervention in the case. Intervention under Article 62 of the Statute was brought briefly, if very indirectly, to the Court's notice three years later in the case concerning *Monetary Gold Removed from Rome in 1943* (*I.C.J. Reports 1954,* p. 32). Subsequently, these and other problems involved in the application of Articles 62 and 63 of the Statute were

studied within the Court and its Committee for the Revision of the Rules of Court.

27. In 1974 one of the fundamental questions raised in connection with Article 62 – the question whether or not a link of jurisdiction with the parties to the case is necessary – was directly raised when Fiji applied for permission to intervene in the *Nuclear Tests* cases. These cases having become moot, the court did not itself make any pronouncement on that aspect of Fiji's application for permission to intervene under Article 62. A number of Judges, on the other hand, drew attention to it in declarations appended to the Court's Orders in the matter (*I.C.J. Reports 1974,* pp. 530, 535) emphasizing its importance. Afterwards, on the completion in 1978 of the revision of the Rules, the Court introduced, in Article 81, paragraph 2, thereof, a new subparagraph *(c)* requiring an application for permission to intervene under Article 62 of the Statute to specify : "any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case". This it did in order to ensure that, when the question did arise in a concrete case, it would be in possession of all the elements which might be necessary for its decision. At the same time the Court left any question with which it might in future be confronted in regard to intervention to be decided on the basis of the Statute and in the light of the particular circumstances of each case. Accordingly, it is on the basis of the applicable provisions of the Statute and in the light of the particular circumstances of the present case that the Court will now examine whether the interest of a legal nature in the case invoked by Malta and the stated object of Malta's intervention are such as to justify the granting of its request for permission to intervene.

*

28. The Court has earlier in this Judgment (paragraphs 13, 14, 19 and 20) set out the contentions by which Malta seeks to justify its request for permission to intervene in the present case between Tunisia and Libya. As appears from that summary, the interest of a legal nature which Malta invokes consists essentially in its possible concern with any findings of the Court, identifying and assessing the relevance of local or regional, geographical or geomorphological factors in the delimitation of the Libya/Tunisia continental shelf, and with any pronouncements made by the Court regarding, for example, the significance of special circumstances or the application of equitable principles in that delimitation. Any such findings or pronouncements, in Malta's view, are certain or likely to affect or have repercussions upon Malta's own rights and legal interests in the continental shelf, whenever there may be similarities or analogies between their basic factors and those of the rights and legal interests on which the Court has pronounced. Malta points to a number of specific geographical and geomorphological features as possible subjects of findings or pronouncements of the Court which might have repercussions on Malta's legal interest in regard to the continental shelf ; and it maintains that, given the

particular geography of the area, Malta would have a continental shelf boundary with both Libya and Tunisia and that the boundaries between all three States would converge at a single, as yet undetermined, point.

29. Thus, what Malta fears is that in its decision in the present case the reasoning of the Court regarding particular geographical and geomorphological factors, special circumstances or the application of equitable principles may afterwards have a prejudicial effect on Malta's own legal interests in future settlement of its own continental shelf boundaries with Libya and Tunisia. At the hearing Malta underlined that it is only elements in the *Tunisia/Libya* case of such a kind that are the object of its request for permission to intervene, and also that it is not concerned with the choice of the particular line to delimit the boundary as between those two countries. It further underlined that it is not concerned with the laying down of general principles by the Court as between Libya and Tunisia.

30. In order to determine the precise implications of Malta's request for permission to intervene, the Court must have regard to the description which has been given by Malta of the nature of its legal interest and the object of its intervention. The Court notes that Malta does not base its request for permission to intervene simply on an interest in the Court's pronouncements in the case regarding the applicable general principles and rules of international law. In its Application and at the hearing Malta has laid heavy emphasis on the fact that it bases its request on quite specific elements in the *Tunisia/Libya* case. It described these elements in its Application only in general terms, and then gave the following as examples of what it has in mind :

> "(1) the question of the particular factors, equitable or other, which determine the character of boundaries in the seabed bordered by Libya, Tunisia and Malta ;
> (2) the question of whether equidistance as a principle or method of delimitation gives effect to such factors in accordance with international law ;
> (3) the effect of any geomorphic features of the relevant seabed areas that separate Malta from the African coasts ;
> (4) the question of applicable base-lines, including bay-closing lines ;
> (5) the question of whether there is a concept of coastline proportionality which a State may validly invoke as a method of delimiting its seabed boundaries with other States".

These specific elements on which Malta bases its request were further particularized at the hearing, when its Counsel spelt them out for the Court point by point. Coast by coast, bay by bay, island by island, sea area by sea area, Counsel for Malta indicated local and regional factors which it claimed as having possible relevance in determining the continental shelf

boundaries of the States concerned. He also referred to various drilling concessions that have been granted in the region, and to correspondence between Malta and Libya and Malta and Tunisia regarding their respective continental shelf claims. He further referred to the existence of a Special Agreement between Libya and Malta for the purpose of bringing their differences concerning their continental shelf claims before the Court, which now remains to be notified to the Court.

31. Malta thus makes it plain that the legal interest which it alleges and on the basis of which it seeks to justify its request for permission to intervene would concern matters which are, or may be, directly in issue between the Parties in the *Tunisia/Libya* case. These matters, as Malta presents them, are part of the very subject-matter of the present case. Yet, Malta has at the same time made it plain that it is not the object of its intervention to submit its own interest in those matters for decision as between itself and Libya or as between itself and Tunisia now in that case. In its Application and at the hearing, as has already been stated, Malta underlined that it is not its object "by way, or in the course, of intervention in the *Libya/Tunisia* case, to obtain any form of ruling or decision from the Court concerning its continental shelf boundaries with either or both of those countries". However, even while thus disavowing any intention of putting its own rights in issue in the present case, Malta emphasized that its "object and interest in intervening does relate to the general area in which those two States also claim continental shelf rights". In short, Malta's position in its argument before the Court assumes existing rights of Malta to areas of continental shelf opposable to the claims of the two States Parties to the dispute before the Court. In effect, therefore, Malta in its request is asking the Court to give a decision in the case between Tunisia and Libya which in some measure would prejudge the merits of Malta's own claims against Tunisia and against Libya in its separate disputes with each of those States.

32. Thus, the intervention for which Malta seeks permission from the Court would allow Malta to submit arguments to the Court upon concrete issues forming an essential part of the case between Tunisia and Libya. Malta would moreover do so, not objectively as a kind of *amicus curiae,* but as a closely interested participant in the proceedings intent upon seeing those issues resolved in the manner most favourable to Malta. Nor would it be the object of Malta's intervention at the same time to submit its own legal interest in the subject-matter of the case for decision as between itself and Libya or as between itself and Tunisia in the present proceedings. Malta, in short, seeks permission to enter into the proceedings in the case but to do so without assuming the obligations of a party to the case within the meaning of the Statute, and in particular of Article 59 under which the decision in the case would hereafter be binding upon Malta in its relations with Libya and Tunisia. If in the present Application Malta were seeking permission to submit its own legal interest in the subject-matter of the case for decision by the Court, and to become a party to the case, another

question would clearly call for the Court's immediate consideration. That is the question mentioned in the *Nuclear Tests* cases, whether a link of jurisdiction with the parties to the case is a necessary condition of a grant of permission to intervene under Article 62 of the Statute. Indeed, it was suggested by Libya and Tunisia that the limit placed by Malta on the object of its intervention is to be explained by its desire to avoid, or minimize, the question of a need for a jurisdictional link with the Parties.

33. Clearly, as Malta asserts, it has a certain interest in the Court's treatment of the physical factors and legal considerations relevant to the delimitation of the continental shelf boundaries of States within the central Mediterranean region that is somewhat more specific and direct than that of States outside that region. Even so, Malta's interest is of the same kind as the interests of other States within the region. But what Malta has to show in order to obtain permission to intervene under Article 62 of the Statute is an interest of a legal nature which may be affected by the Court's decision in the present case between Tunisia and Libya. This case has been brought before the Court by a Special Agreement between those two countries under which the Court is requested to decide what are the principles and rules of international law which may be applied and to indicate the practical way to apply them in the delimitation of the areas of continental shelf appertaining to Libya and Tunisia. That is the case before the Court and it is one in which Tunisia and Libya put in issue their claims with respect to the matters covered by the Special Agreement. Accordingly, having regard to the terms of Article 59 of the Statute, the Court's decision in the case will certainly be binding upon Tunisia and Libya with respect to those matters. Malta now requests permission to intervene on the assumption that it has an interest of a legal nature that is in issue in the proceedings in that case. It seeks permission to submit its views with respect to the applicable principles and rules of international law, not merely from the point of view of their operation as between Libya and Tunisia but also of their operation as between those States and Malta itself. Yet Malta attaches to its request an express reservation that its intervention is not to have the effect of putting in issue its own claims with regard to those same matters vis-à-vis Libya and Tunisia. This being so, the very character of the intervention for which Malta seeks permission shows, in the view of the Court, that the interest of a legal nature invoked by Malta cannot be considered to be one "which may be affected by the decision in the case" within the meaning of Article 62 of the Statute.

34. Likewise, it does not appear to the Court that the direct yet limited form of participation in the subject-matter of the proceedings for which Malta here seeks permission could properly be admitted as falling within the terms of the intervention for which Article 62 of the Statute provides. What Malta in effect seeks to secure by its application is the opportunity to argue in the present case in favour of a decision in which the Court would refrain from adopting and applying particular criteria that it might otherwise consider appropriate for the delimitation of the continental shelf of Libya and Tunisia. In short, it seeks an opportunity to submit arguments to

the Court with possibly prejudicial effects on the interests either of Libya or of Tunisia in their mutual relations with one another. To allow such a form of "intervention" would, in the particular circumstances of the present case, also leave the Parties quite uncertain as to whether and how far they should consider their own separate legal interests vis-à-vis Malta as in effect constituting part of the subject-matter of the present case. A State seeking to intervene under Article 62 of the Statute is, in the view of the Court, clearly not entitled to place the parties to the case in such a position, and this is the more so since it would not be submitting its own claims to decision by the Court nor be exposing itself to counter-claims.

35. Malta has voiced the preoccupations which it has regarding possible implications for its own interests of the Court's findings and pronouncements on particular elements in the present case between Tunisia and Libya. The Court understands those preoccupations ; even so, for the reasons which have been set out in this Judgment, the request for permission to intervene is not one to which, under Article 62 of the Statute, the Court may accede. The Court at the same time thinks it proper to state that it has necessarily and at all times to be sensible of the limits of the jurisdiction conferred upon it by its Statute and by the parties to the case before it. The findings at which it arrives and the reasoning by which it reaches those findings in the case between Tunisia and Libya will therefore inevitably be directed exclusively to the matters submitted to the Court in the Special Agreement concluded between those States and on which its jurisdiction in the present case is based. It follows that no conclusions or inferences may legitimately be drawn from those findings or that reasoning with respect to rights or claims of other States not parties to the case.

36. Having reached the conclusion, for the reasons set out in the present Judgment, that Malta's request for permission to intervene is in any event not one to which it can accede, the Court finds it unnecessary to decide in the present case the question whether the existence of a valid link of jurisdiction with the parties to the case is an essential condition for the granting of permission to intervene under Article 62 of the Statute.

* *

37. For these reasons,

THE COURT,

Unanimously,

Finds that the Application of the Republic of Malta, filed in the Registry of the Court on 30 January 1981, for permission to intervene in the proceedings under Article 62 of the Statute of the Court, cannot be granted.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this fourteenth day of April, one thousand nine hundred and eighty-one, in four copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Tunisia, the Government of the Socialist People's Libyan Arab Jamahiriya, and the Government of the Republic of Malta, respectively.

(Signed) Humphrey WALDOCK,
President.

(Signed) Santiago TORRES BERNÁRDEZ,
Registrar.

Judges MOROZOV, ODA and SCHWEBEL append separate opinions to the Judgment of the Court.

(Initialled) H.W.

(Initialled) S.T.B.

Annex 16

THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE 1960–1989*

PART ONE

By HUGH THIRLWAY‡

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‡ Principal Legal Secretary, International Court of Justice.

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Introduction

A regular feature of this *Year Book* from 1950 to 1959 was a series of articles by Sir Gerald Fitzmaurice analysing the judgments and advisory opinions of the International Court of Justice in terms of the statements of legal principle made therein, and the principles implicitly underlying the findings made. That series came to an end when Sir Gerald was himself elected a Member of the Court in 1960, though some of the same ground was covered in his tribute to 'Hersch Lauterpacht: The Scholar as Judge' which appeared in instalments in the *Year Books* for 1961 to 1963. Nor was Sir Gerald able to resume the series when he retired from the Court in 1973.

It is now thirty years since the last article of the original series appeared; and though time has not dimmed the lustre of Sir Gerald's achievement, there has been sufficient opportunity for scholars of greater distinction than myself to step forward to carry on the work. Whether the fact of their not having done so lessens or increases the degree of presumption shown in my undertaking the task must be left to the reader to judge; it is, at all events, a tribute to the scientific value of Sir Gerald's system of analysis that the Editors of the *Year Book* have considered it well worth resuming even though it must now come from a less distinguished pen.

The purpose in view remains as it was defined by Fitzmaurice in his first article: he noted that the Court had 'produced a considerable volume of authority on points of general interest to international lawyers', and continued:

> It is the purpose of the present study to call attention to the existence of this body of statements of principle, by extracting and assembling in classified form, and with such comment as may be necessary to explain their bearing and effect in

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the context in which they were made, all the conclusions and findings of the Court (and, within certain limits, of individual Judges) presenting features of general interest from the standpoint of international law and procedure. It follows that the object is both a specialized and a limited one: in particular, it is not the intention to give an account of, or to comment on, the cases *as such* with which the Court has been called upon to deal. So far as the present study goes, these cases are the framework within which the Court has made general statements of principle. A good deal will naturally emerge as to the actual decisions in the cases themselves, but this will be incidental. Frequently, the decision or opinion of a judicial tribunal has no interest except in relation to the particular facts of the case. What is of *general* interest is the underlying principle: the immediate decision or opinion itself may turn simply on how that principle is to be applied to the circumstances of the case, or to the terms of the treaty provision under consideration.

The present series of articles is thus intended to take up where Sir Gerald Fitzmaurice left off, and the period covered may be stated to be the years 1960 to 1989. It is, however, difficult to mark the starting point with complete precision: the cycle of articles planned by Sir Gerald to cover the period 1954–59 was never completed, and his subsequent articles on 'Hersch Lauterpacht: The Scholar as Judge' covered only some of the missing ground.

In terms of decisions of the Court examined in the present series, the first is the judgment on the merits in the case of the *Right of Passage over Indian Territory* in 1960, and the last is the judgment of the Chamber of the Court formed to deal with the *Elettronica Sicula (ELSI)* case in 1989. At the same time, reference will occasionally be made to points discussed in decisions dating from 1954–59 where it appeared that Sir Gerald had not found the opportunity to discuss those decisions from the particular angle presently under consideration. In principle, although the series will take some years to complete, no attempt will be made to deal with decisions after 1989; as it is, the author fears the fate of Tristram Shandy, who found that he could not write his account of his life fast enough to keep up with his living of it![1]

The articles of Sir Gerald were devoted to successive four-year periods and were published not long after the expiration of the relevant period. This had two advantages (at least): the issues were fresh, and a four-year crop of decisions presented a manageable amount of material. The main disadvantage was one which only made itself felt as the cycles succeeded each other, and were eventually collected into two volumes. As Sir Gerald himself explained in the Preface to these volumes:

> What was clearly needed, after the accumulation of a sufficient amount of material, was a fusion or blending of all those passages in the various articles that considered the same principle or rule, though in the context of different cases.[2]

[1] Lawrence Sterne, *The Life and Opinions of Tristram Shandy* (1759–67), vol. 4, ch. 13.

[2] *The Law and Procedure of the International Court of Justice* (hereinafter *Collected Edition*) (Cambridge, Grotius Publications Ltd., 1986), p. xxxi.

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For this reason, the possibility of dividing up the period since 1959 into a number of periods for the purpose of the present articles was rejected, after brief consideration; it seemed wrong to throw away, for this period, the advantages of unity of treatment which had not been available to Sir Gerald for the period 1947–59.

On the other hand, I have had to contend with the correlative disadvantages stemming from the sheer volume of material (some 6,500 pages of the Court's *Reports* series), and from the lapse of many years since the earlier decisions treated were rendered. As a consequence I have thought it advisable to give less exhaustive coverage than did Sir Gerald to the numerous separate and dissenting opinions of Members of the Court, though these will not be neglected where they raise matters of principle not touched on by the Court, or approach the same principle in an original way. The existence of a vast published literature, in the various fields covered, commenting on the Court's decisions during the period, is both an advantage and a disadvantage: the reaction of scholars to a Court decision is sometimes enlightening, but it has obviously not been possible for me to review all the published material on the work of the Court during the period covered.

A special problem is posed by Sir Gerald Fitzmaurice's own separate or dissenting opinions as a Member of the Court, which often take up and develop themes previously outlined in his series of articles. To quote them as fully as their own merits deserve would hopelessly overload the present series; and since they exist in readily accessible form, this would perhaps be a work of supererogation. I shall endeavour to indicate, in relation to each specific matter discussed in these articles, at least the existence of any individual examination of it by Sir Gerald, which will always repay study; and I quote, sparingly, from Sir Gerald either when such quotation seems particularly illuminating, or when it appears to me useful to criticize the view he advances.

The size of the undertaking has had one particular practical consequence, namely the impossibility of planning the series in advance in anything more than broad outline. It appears from internal references that when the first article of a cycle from Sir Gerald's hand appeared in print, the structure of the remainder of the cycle was already foreseen; and Sir Gerald could therefore announce with confidence that such-and-such a point would be dealt with in such-and-such a later section. In the case of the present series, however, if the publication of the first part were delayed until all the subsequent parts were in a comparable state of readiness, the period covered would by then have slipped still further into the past. This means also that the structure of the series may prove to be lacking in architectural perfection; later articles may have to find room for afterthoughts, points which might have been well placed in this first article but only make their presence felt in the context of the later article.

The general arrangement of the various subjects considered is, so far as possible, based on that employed by Sir Gerald Fitzmaurice. Other sys-

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tems of organization might commend themselves, but do not appear to present advantages outweighing the convenience of relating the treatment of a particular point in this series to Sir Gerald's handling of the same point, to which a footnote at the beginning of each section will refer.

Any discussion of matters dealt with in the decisions of the Court poses first the problem of the extent to which it is necessary to outline the factual background, and secondly that of the amount of direct quotation of the decisions, as opposed to paraphrase, summary or reference. The objective I have aimed at has been to produce a study which is self-contained, in the sense that sufficient facts are given, even in well-known cases, for the legal argument to be understood; and that argument is best expressed, at least initially, in the words used by the Court, even if the result is that these articles are, as the old lady said of *Hamlet*, 'all quotations'.

* * *

The following *caveat* has to be prefixed to any publication of mine, in view of my position as an official of the Registry of the International Court of Justice:

I should make it clear, first that the views which I have expressed are purely personal, and cannot of course be taken as reflecting the views, or having the approval, of the International Court of Justice, or of the United Nations; and secondly that my comments on the judgments and advisory opinions of the Court are based solely on published material, and not on any information of a confidential character to which I may have had access in the course of my duties. Accordingly, any comments of mine on the significance of any particular decision, or of any particular form of words in a judgment, advisory opinion, or separate or dissenting opinion, carry no more weight than those of any other student of the jurisprudence of the Court.

Chapter I:

Good Faith and Related Principles

1. *The Principle of Good Faith*

During the period under review, the concept of good faith, which had previously only been referred to by individual judges and not employed by the Court in its decisions,[3] developed into a notable element in the judicial armoury. The Court's statements on the subject are, however, at first sight somewhat contradictory. The period may be said to be framed, not merely chronologically but jurisprudentially, by the following two quotations:

[3] See Fitzmaurice, this *Year Book*, 27 (1950), p. 12; 30 (1953), p. 52; 35 (1959), pp. 206–7; *Collected Edition*, I, pp. 12, 183; II, pp. 609–10.

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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.[4] (1973)

The principle of good faith is, as the Court has observed, 'one of the basic principles governing the creation and performance of legal obligations' . . .; it is not in itself a source of obligation where none would otherwise exist.[5] (1988)

The explanation for the apparent contradiction is, it is suggested, that the Court has used the expression 'good faith' to convey two different ideas; for clarity, these will be treated separately.

(1) *Good faith* lato sensu: *creation of a* 'servandum'

(a) *The* Nuclear Tests *cases*

The most far-reaching effects yet attributed to the concept of good faith were those declared by the Court in the *Nuclear Tests* cases. These cases, as the Court found,[6] had been brought with the sole intention of putting an end to the nuclear tests in the atmosphere being conducted by France in the Pacific; and while the proceedings before the Court were in progress, the French Government made it known, by various unilateral announcements, that no more atmospheric tests would be held. The proceedings brought could therefore be regarded as having achieved their object,[7] provided France was legally bound to conform to the line of conduct announced, and was not free to change its mind and resume atmospheric testing. The relations between France and the two applicant parties were such that no element of synallagmatic contract could be identified; was France to be held bound by purely unilateral declarations?

The Court responded on this point in terms which show that it was consciously making a broad statement of principle:

> It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since

[4] *Nuclear Tests, ICJ Reports*, 1973, p. 268, para. 46.

[5] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), ICJ Reports*, 1988, p. 105, para. 94.

[6] There was strong dissent on this and other issues, but for purposes of discussion it may be assumed that the Court was correct in this view.

[7] Whether, even so, the Court was entitled to put an end to the proceedings *ex officio* is a point to be discussed in a later article.

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such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made . . .

Of course, not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound—the intention is to be ascertained by interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.[8]

After explaining that international law laid down no requirements of form for such declarations, the Court continued:

One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.[9]

This finding of the Court has been much criticized;[10] and one of its features which may inspire doubt is the creative role given to good faith. To some extent, however, the matter may be no more than one of terminology. What the Court is talking about here is something which would not normally be referred to as 'good faith'. The rule of *pacta sunt servanda* is based on a very fundamental idea or principle, and it may be that that fundamental idea can justify attaching legally binding effect to something which, lacking two-sidedness, is not a *pactum*; but 'good faith' is perhaps not the best name for it. It is instructive to consider Fitzmaurice's discussion of the basis of the *pacta sunt servanda* rule:

Consent may indeed be the foundation of the rules of customary international law. But the obligation to conform to these rules requires something more, namely the existence of a principle to the effect that the giving of consent, whether express or implied, creates obligation. This principle is the principle *pacta sunt servanda*. But strictly this is not a rule or principle of international law. It is, for international law, a postulate lying outside the actual field of international law. The system of international law cannot be clothed with force by a principle that is part of the system itself; for unless the system already had force that principle itself would have no validity, and there would be a *circulus inextricabilis* or *viciosus*. A principle exterior to the system must be sought. Such a principle is the rule *pacta sunt servanda*; and if the principle is to do what is required of it, it must, in relation to international law, be regarded not as a principle but as a *postulate*—an assumption

[8] *ICJ Reports*, 1974, p. 267, paras. 43–4.

[9] *ICJ Reports*, 1974, p. 268, para. 46.

[10] See Zoller, *La Bonne Foi en droit international public*, pp. 340 ff.; Macdonald and Hough, 'The Nuclear Tests Case Revisited', *German Yearbook of International Law*, 20 (1977), p. 337; Rubin, 'The International Legal Effects of Unilateral Declarations', *American Journal of International Law*, 71 (1977), p. 1.

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that has to be made before the system can work or have any meaning. In this sense, the principle *pacta servanda* becomes the postulate on which the whole system is founded, and becomes the theoretical foundation of international law and its binding force.[11]

It is the principle 'to the effect that the giving of consent'—consent to be bound—'creates obligation' which the Court appears to have had in mind in 1973, and to which it gave the inappropriate designation of 'good faith'. Avoiding the misleading implications of this term, what is the contribution so made by the Court to the development, or to the clarification, of international law?

Despite the assertion by the Court that 'It is well recognized that declarations made by way of unilateral acts . . . may have the effect of creating legal obligations',[12] this cannot be said to have been clearly established as a legal rule prior to the Court's pronouncement.[13] At all events, the conditions enunciated for a unilateral declaration to have a binding character have not previously been stated systematically. Let us take them one by one, as stated in the *Nuclear Tests* judgments.

(i) *The intention of the declarant State*

When it is the intention of the State making the declarations that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking . . .

Speaking very generally, when for the purposes of any system of law it is necessary to determine whether a statement (apparently of the nature of a promise, undertaking or commitment—but to use any of these terms would beg the question) is to be regarded as placing its maker under an obligation for the future to conform its conduct to that statement, the enquiry may be regarded as one into the nature of the intentions of the maker of the statement; but at a more direct and concrete level, it is necessary to apply a number of criteria to see whether the statement fits one or other of them. Thus: was the statement made in exchange, retrospectively or prospectively, for some statement (promise, undertaking) made in favour of, or benefit conferred on, the maker of the statement (contract situation)? Was the statement made in a form defined by the legal system as sufficient in itself to prove intention, or deemed intention, to create obligation (e.g., promise under seal: see below)?

The enquiry may, however, range wider than the actual intention of the maker of the statement: it may be asked whether the circumstances are such that the addressee of the statement could properly have supposed that the statement was intended to create a commitment (acquiescence). The passage quoted from the *Nuclear Tests* judgment shows that it justifies the

[11] This *Year Book*, 35 (1959), pp. 195–6; *Collected Edition*, II, p. 597.
[12] *ICJ Reports*, 1974, p. 267, para. 43.
[13] See Rubin, loc. cit. above (n. 10), at p. 24.

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enforceability of a unilateral declaration, in terms of the underlying principle of intention: this differentiates the legal situation from such hypotheses as estoppel, where the emphasis is on the reaction and expectations of the addressee of the declaration rather than the intentions of its maker.[14]

(ii) *The context of the statement*

An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding.

The reference to international negotiations is presumably to emphasize that the Court is here consciously laying down a broader ruling than that of the Permanent Court with regard to the Ihlen declaration in the *Eastern Greenland* case, which was specifically found to be a 'response to a request by the diplomatic representative of a foreign Power'.[15]

It is unclear whether it is, in the Court's thinking, an essential condition that the undertaking be 'given publicly'. The statements made on behalf of the French Government in the *Nuclear Tests* cases were of course made publicly rather than being addressed to the applicant governments directly; but one would have thought that it would be sufficient, as a general rule, for the declaration to have been made in such a way that it in fact became known to the State seeking to rely on it. To require that it should have been *addressed* to a particular State or States would, in the circumstances of the *Nuclear Tests* cases, have been asking more than France could give, and thus made it impossible to give effect to the declaration; but in general it is difficult to see why the legally binding effect of a declaration should depend on, *inter alia*, the fact of its having been made publicly.

A later paragraph of the judgment refers to the unilateral statements of the French authorities as having been made 'publicly and *erga omnes*',[16] which appears to add an additional element.[17] One cannot but recall the Court's *dictum* in the *Barcelona Traction* case, four years earlier:

> . . . 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

[14] Zoller, op. cit. above (n. 10), pp. 341–3, draws attention to the Court's references to 'trust and confidence' in this context, and suggests that the 'good faith' involved may be that of the addressee, which must not be abused. A similar view is expressed by Carbone, 'Promise in International Law: a Confirmation of its Binding Force', *Italian Yearbook of International Law*, 1 (1975), p. 169. In view of the emphasis on the intentions of the maker of the declaration, however, it seems that these references are intended only to buttress the moral or ethical attractiveness of the principle propounded.

[15] *Legal Status of Eastern Greenland, PCIJ*, Series A/B, No. 53, p. 53.

[16] *ICJ Reports*, 1974, p. 269, para. 50.

[17] A curious fact is that 'publicly' in the earlier paragraph is translated by 'publiquement' in the French text of the judgment, but here the expression used is 'en dehors de la Cour et *erga omnes*'. The idea seems to be not so much the publicity given to the statements as that they were made outside the framework of the proceedings before the Court: cf. *Polish Upper Silesia, PCIJ*, Series A, No. 7, p. 12; *Free Zones, PCIJ*, Series A/B, No. 46, p. 170.

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can be held to have a legal interest in their protection; they are obligations *erga omnes*.[18]

Does a unilateral declaration made *erga omnes* necessarily give rise to an international legal obligation *erga omnes*? If so, it would appear to follow that if France had recommenced atmospheric nuclear tests, proceedings could have been brought against it by any other State which could assert a title of jurisdiction, whether or not it was affected by the fall-out from the tests.[19] Furthermore, if this is an essential aspect of the law of unilateral declarations, it must apply whatever the degree of international importance of the subject-matter of the declaration. An obligation not to carry out atmospheric nuclear tests might rank in the scale of gravity not far short of the obligations *erga omnes* which the Court in 1970 presented as examples:

> 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.[20]

It is not difficult, however, to think of examples of subjects to which a declaration—made publicly, and with intent to be bound—might relate, which would be of limited interest and minor significance, so that commitment *erga omnes* would be disproportionate.

(iii) and (iv) *No* quid pro quo *or acceptance needed*

> In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.[21]

(iii) The Court here excludes anything corresponding to the requirement in English law of 'consideration' for an otherwise unilateral commitment to be legally enforceable.[22] It does more, however: the unqualified statement that 'nothing in the nature of a *quid pro quo* . . . is required' appears also to exclude anything corresponding to what French law refers to as 'la cause d'une obligation'. This concept to some extent parallels the English requirement of consideration: in a synallagmatic contract, the obligation of each party may be, and normally will be, the *cause* of the other; in the case of donations, wills, etc., the *cause* is the intention of conferring a

[18] *ICJ Reports*, 1970, p. 32, para. 33. To be discussed below, pp. 93–4.

[19] This reading of the *Nuclear Tests* judgments seems to be adopted by Weil, 'Towards Relative Normativity in International Law?', *American Journal of International Law*, 77 (1983), p. 432.

[20] *ICJ Reports*, 1970, p. 32, para. 34.

[21] *ICJ Reports*, 1974, p. 267, para. 43.

[22] This may be regarded as already established as far as treaties are concerned; 'it appears that the doctrine of consideration finds no room in international law': Mann, 'Reflections on a Commercial Law of Nations', this *Year Book*, 33 (1957), p. 30; cf. Lauterpacht, *Private Law Sources and Analogies of International Law*, pp. 177, 178.

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benefit. A unilateral act of a contractual nature which is without a *cause* is invalid. Except in the special case of negotiable instruments, and similar commercial paper, an abstract promise, i.e., a promise unsupported by a *cause*, does not create an obligation.

It is not necessary to seek in comparative law the essence of a 'general principle' to appreciate that a confrontation of the International Court's conception of a unilateral act as productive of legal obligation with domestic law rules of legal commitment shows that the Court's conception is, to say the least, by no means a necessary deduction from the basic principle which underlies *pacta sunt servanda*. If English law has developed the doctrine of consideration, and French law the concept of the *cause*, it is because in neither system was it found appropriate that the mere assertion *in vacuo* of an intent to be bound should in all circumstances give rise to a binding obligation.[23]

In the terminology of the *Nuclear Tests* decision, 'good faith' alone does not, in municipal systems, necessarily require that an 'obligation assumed by unilateral declaration' should be legally enforceable.

(iv) An 'acceptance' of a unilateral declaration, if it were required for the enforceability of the obligation assumed, would impart a synallagmatic character into the legal relationship, and adulterate the purity of the concept of unilateral commitment.

(v) *The question of form*

With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements.[24]

In particular, the Court observes, 'Whether a statement is made orally or in writing makes no essential difference . . . '.[25] In view of the general tolerance of international law in the matter of forms,[26] this is in itself neither surprising nor controversial; but it prompts further reflection. The English rule whereby a promise made under seal is valid and binding without proof of consideration may appear no more than an historical anomaly, but its significance in modern law is surely that the need for the specific form (the seal) draws the attention of the maker of the promise to the fact that he is entering into a binding commitment. When the Court lays down that, at the international level,

> When it is the intention of the State making the [unilateral] declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking . . .[27]

[23] Carbonnier (*Droit civil*, vol. 2 (1964)) quotes the Italian writer Gorla (*Il contratto* (1955), vol. 1, section 4 ff., section 22) as advancing the view that the essential purpose of the *cause* is to limit the principle that consent alone can give rise to obligation.

[24] *ICJ Reports*, 1974, p. 267, para. 45.

[25] Ibid.

[26] Cf. the well-known *dictum* in the *Mavrommatis* case, *PCIJ*, Series A, No. 2, p. 34.

[27] *ICJ Reports*, 1974, p. 267, para. 43.

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a gloss that should, it is suggested, be added is that it must have been the intention of the State concerned not merely to 'become bound according to its terms', but to become bound *unilaterally* according to its terms. A unilateral declaration which was intended to produce a response—in the *Nuclear Tests* cases, perhaps the discontinuance of the proceedings—may well entail an intention to become bound on the assumption, or indeed on the condition, that the response is forthcoming. This hypothesis is excluded from the Court's definition of the modalities of binding unilateral commitment.

The seal in English internal law further affords the necessary evidence of the nature of the intention of the author of the instrument; the question of proof is clearly more delicate, and more difficult, in the international sphere.

(vi) *Ascertainment of intention*

> . . . the intention [of being bound] is to be ascertained by interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.[28]

The meaning of the last sentence is presumably that unilateral statements by States should be interpreted restrictively in the sense that there should be a presumption against an intention to create a binding obligation, which would restrict the State's freedom of action. Whether there was such an intention is 'to be ascertained by interpretation of the act'; but the Court gives no guide as to how this might be done. In particular it is not clear whether the intention must appear on the face of the act, or whether the circumstances of its making are to be taken into account. Normally in interpreting a legal act, one guide as to the intention of the party or parties to it will be the presumed reason why the act was performed—in terms of treaty-interpretation, the treaty's object and purpose. In the case of a unilateral declaration, as envisaged in the *Nuclear Tests* judgment, the exclusion of any need for a *quid pro quo*, or indeed any reaction, makes this approach difficult, to say the least. However, when examining the actual statements made by the French Government, the Court did in fact find that 'they must be held to constitute an engagement of the State having regard to their intention *and to the circumstances in which they were made*'.[29] Further the Court considered that it was 'entitled to presume . . . that these statements were not made *in vacuo*, but in relation to the tests which constitute the very object of the present proceedings'.[30]

It was perhaps not to be expected that the Court would spell out in any detail the requirements by reference to which a unilateral act might be interpreted as constituting a binding obligation. Some guidance might

[28] Ibid., para. 44.
[29] *ICJ Reports*, 1974, p. 269, para. 49 (emphasis added).
[30] Ibid., para. 50.

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however be expected from the way in which the Court approached the specific instance before it: from what was it able to deduce that the declaration of cessation of atmospheric nuclear tests was intended to bind France internationally not to carry out any further such tests? This is perhaps the most obscure and least satisfactory aspect of the judgment.[31]

One of the relevant circumstances would appear to be the identity of the person making or issuing the statement on behalf of the State concerned. Thus the Court said:

> Of the statements by the French Government now before the Court, the most essential are clearly those made by the President of the Republic. There can be no doubt, in view of his functions, that his public communications or statements, oral or written, as Head of State, are in international relations acts of the French State. His statements, and those of members of the French Government acting under his authority, up to the last statement made by the Minister of Defence (of 11 October 1974), constitute a whole. Thus in whatever form these statements were expressed, they must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made.[32]

The emphasis here seems to be less on the question of who was entitled to commit the French Government at the international level than on the essential credibility of statements made at this level.

Two paragraphs further on, the Court gives the essence of its thinking on the point:

> In announcing that the 1974 series of atmospheric tests would be the last, the French Government conveyed to the world at large, including the Applicant, its intention effectively to terminate these tests. It was bound to assume that other States might take note of these statements and rely on their being effective. The validity of these statements and their legal consequences must be considered within the general framework of the security of international intercourse, and the confidence and trust which are so essential in the relations among States. It is from the actual substance of these statements, and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced. The objects of these statements are clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effect. The Court considers that the President of the Republic, in deciding upon the effective cessation of atmospheric tests, gave an undertaking to the international community to which his words were addressed. It is true that the French Government has consistently maintained . . . that it 'has the conviction that its nuclear experiments have not violated any rule of international law', nor did France recognize that it was bound by any rule of international law to terminate its tests, but this does not affect the legal consequences of the statements examined

[31] Judge de Castro dissented on this point; he interpreted the statements made as showing only 'that the French Government has made up its mind to cease atmospheric nuclear testing from now on and has informed the public of its intention to do so. But I do not feel that it is possible to go farther. I see no indication warranting a presumption that France wished to bring into being an international obligation possessing the same binding force as a treaty . . . ' (*ICJ Reports*, 1974, p. 375).

[32] *ICJ Reports*, 1974, p. 269, para. 49.

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above. The Court finds that the unilateral undertaking resulting from these statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration. The Court finds further that the French Government has undertaken an obligation the precise nature and limits of which must be understood in accordance with the actual terms in which they have been publicly expressed.[33]

The approach underlying this finding betrays, it is suggested, a shift between the two concepts of good faith discussed above. The Court took it as unquestionable that when the French Head of State announced the cessation of atmospheric tests, he was speaking in good faith, in the sense that he was correctly and honestly stating what was at the time the firm policy of the French Government. But was he at the same time guaranteeing that policy was immutable? The Court's reference to an 'arbitrary power of reconsideration' suggests that the reservation of such a power would be unusual and would have to be spelled out; but it is surely the irreversible unilateral commitment which is exceptional. In the sense first mentioned, the President's statement was fully entitled to 'confidence and trust'; and he was both entitled and bound to believe that it would be so received. But the more fundamental aspect of good faith, the principle whereby a unilateral commitment may rank as a '*servandum*' to be respected, requires the good faith intention to enter into such a commitment.

One element in the situation which was capable of importing this latter kind of good faith was one which the Court had ruled out of consideration, as a matter of principle, though its presence was detectable later in the reasoning. However '*erga omnes*' the statements were, they were obviously aimed at Australia and New Zealand in particular; and they were obviously related to the proceedings before the Court. If the parties had been in direct negotiation, the applicants would have been unlikely to agree to discontinue the proceedings in exchange for a cessation of atmospheric tests unless the respondent committed itself by way of legal obligation to make no more such tests.[34] Therefore, if the unilateral declaration was to achieve anything, it would have to be, and be intended to be, equally creative of obligations.

In conclusion, the *Nuclear Tests* judgments may be said to have contributed to the corpus of international law the development of the idea of a unilateral *servandum*, a legally enforceable obligation assumed purely unilaterally. The use of the concept of 'good faith' as a peg on which to hang this development is perhaps unfortunate, since what is operative here is a more fundamental principle, allied to the philosophical basis of *pacta sunt*

[33] *ICJ Reports*, 1974, pp. 269–70, para. 51.

[34] Cf. the very realistic discussion of the Belgian/Spanish negotiations for a discontinuance in the *Barcelona Traction* case, *ICJ Reports*, 1964, pp. 22–4. It should not be overlooked that if Australia and New Zealand had discontinued proceedings, they could not have brought a fresh case, since the jurisdictional titles had been withdrawn in the meantime — a point that throws some doubt on the Court's finding that the unilaterally created obligation to cease tests gave the applicants full satisfaction.

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servanda. Furthermore, in order to apply the principle of the unilateral obligation to the particularly recalcitrant facts of the case, the Court had to state the principle in a dangerously wide formulation—excluding any need for any acceptance of the unilateral undertaking, or indeed any sort of two-way relationship, or any *cause* in the sense of Continental law. In any future development of the law of the unilateral act as source of obligation, it may however be expected that some of the characteristics stated in *Nuclear Tests* will be tempered or modified.

(b) *The* WHO *advisory opinion*

In its advisory opinion on the *Interpretation of the Agreement of 15 March 1951 between the WHO and Egypt*, the Court had occasion to consider Article 56 of the Vienna Convention on the Law of Treaties and the corresponding provision of the ILC draft articles on treaties between States and international organizations, or between international organizations; it commented:

> These provisions . . . specifically provide that, when a right of denunciation is implied in a treaty by reason of its nature, the exercise of that right is conditional upon notice, and that of not less than twelve months. Clearly, these provisions also are based on an obligation to act in good faith and have reasonable regard to the interests of the other party to the treaty.[35]

This *dictum* however prompts some doubts. The nature of the treaty postulated is such that a right of denunciation is to be implied: that is to say that if the treaty is *interpreted* in good faith, it will be recognized that a right of denunciation must have been intended. A right of instant denunciation without previous warning, and effective immediately, would not, save perhaps in exceptional cases, have been intended; the parties would have assumed a reasonable period of notice, and the Vienna Convention lays down, as a practical solution, 12 months. But the basis for this is not 'an obligation *to act in good faith*'; it is *an interpretation in good faith* of the terms of the treaty 'in the light of its object and purpose'.[36]

Thus the *WHO* advisory opinion is not an authority for the proposition that good faith in itself can be a source of obligation.

(c) *The* Nicaragua *v.* United States of America *case*

In the case concerning *Military and Paramilitary Activities in and against Nicaragua,* the Court underlined the close relationship between a unilateral act, giving rise to binding obligations, and a *pactum*, both of which are therefore *servanda*. The United States had suggested that its policies and activities toward the Government of Nicaragua might be justified by alleged breaches by that Government of 'solemn commitments

[35] *ICJ Reports*, 1980, p. 95, para. 47.
[36] Cf. Waldock in *Yearbook of the ILC*, 1963, vol. 2, p. 67.

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to the Nicaraguan people, the United States, and the Organization of American States'.[37] These commitments were supposed to have been undertaken through unilateral declarations in 1979 by the Nicaraguan Junta of National Reconstruction. After observing that the matters claimed to be covered by the commitment were questions of domestic policy, the Court observed that

> 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.[38]

No specific reference was made, in the Court's discussion of the matter, to 'good faith' as the justifying principle whereby a unilateral statement could give rise to obligation; but the passage quoted shows that the Court was, as in the *Nuclear Tests* cases, concerned to enquire whether there was an intention to undertake a commitment which would render any subsequent reneging an act contrary to good faith. Similarly, in the question of a commitment to hold free elections, the Court concluded:

> But the Court cannot find an instrument with legal force, *whether unilateral or synallagmatic*, whereby Nicaragua has committed itself in respect of the principle or methods of holding elections.[39]

It should not be overlooked that the United States was not in fact claiming[40] that there existed an obligation *erga omnes*; the specific beneficiaries of the obligation were, as noted above, stated to be the Nicaraguan people, the OAS and the United States. This differentiates the legal situation sharply from that contemplated in the *Nuclear Tests* cases where, it will be recalled, the Court avoided any suggestion that the French statements were addressed to the applicant States by referring to a simple requirement that the undertaking should have been 'given publicly'.[41]

(d) *The* Frontier Dispute *case*

In the *Frontier Dispute* between Mali and Burkina Faso the question of the legal effects of a unilateral statement again arose, and in this case the statement was found to have been made *erga omnes*, or at least to have been

[37] *ICJ Reports*, 1986, p. 130, para. 257.

[38] Ibid., p. 131, para. 259.

[39] Ibid., p. 132, para. 261 (emphasis added).

[40] The Court also stated, curiously enough *after* examining the US contentions on the legal merits, that 'these justifications, advanced solely in a political context . . ., were not advanced as legal arguments' (ibid., p. 134, para. 266).

[41] In respect of alleged human rights violations, the question of obligations *erga omnes* did arise in the case; but these obligations were not alleged to rest on good faith observance of unilateral acts, and are therefore dealt with elsewhere in this article (pp. 99–102, below).

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'not directed to any particular recipient'.[42] The Chamber took the opportunity to clarify the meaning of the *Nuclear Tests dicta*[43] on a number of points.

The unilateral statement relied on by Burkina Faso was a statement by the President of Mali whereby, in Burkina Faso's interpretation, Mali 'proclaimed itself already bound' by a report to be made by a Mediation Commission concerning the position of the frontier. The statement in question had been made at a press interview, and was to the effect that even if the commission decided that the frontier line passed through the Malian capital, the Government of Mali would comply with the decision.[44] The Chamber based its rejection of the Burkina Faso contention essentially on the point that this was hardly a normal way of undertaking a legal commitment to accept a decision as binding, and it could therefore not be interpreted as having been intended as creating such a commitment.

The Chamber first indicated why each case had to be considered on its own facts:

> the Court . . . made clear in those cases that it is only 'when it is the intention of the State making the declaration that it should become bound according to its terms' that 'that intention confers on the declaration the character of a legal undertaking' . . . Thus it all depends on the intention of the State in question, and the Court emphasized that it is for the Court to 'form its own view of the meaning and scope intended by the author of a unilateral declaration which may create a legal obligation'.[45]

It then indicated why the French statements in the *Nuclear Tests* cases could, in the special circumstances of those cases, be regarded as a normal, indeed the only possible, way of creating a legal obligation:

> In order to assess the intentions of the author of a unilateral act, account must be taken of all the factual circumstances in which the act occurred. For example, in the *Nuclear Tests* cases, the Court took the view that since the applicant States were not the only ones concerned at the possible continuance of atmospheric testing by the French Government, that Government's unilateral declarations had 'conveyed to the world at large, including the Applicant, its intention effectively to terminate these tests' *(ICJ Reports 1974*, p. 269, para. 51; p. 474, para. 53). In the particular circumstances of those cases, the French Government could not express an intention to be bound otherwise than by unilateral declarations. It is difficult to see how it could have accepted the terms of a negotiated solution with each of the applicants without thereby jeopardizing its contention that its conduct was lawful.[46]

[42] *ICJ Reports*, 1986, p. 574, para. 39. The authentic French text is perhaps clearer: 'une déclaration unilatérale privée de tout destinataire précis'.

[43] The Chamber included two Members of the Court who had taken part in, and voted in favour of, the *Nuclear Tests* decisions.

[44] *ICJ Reports*, 1986, p. 571, para. 36.

[45] Ibid., 1986, p. 573, para. 39.

[46] Ibid., p. 574, para. 40.

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After thus explaining the special nature of the *Nuclear Tests* cases, the Chamber continued:

> The circumstances of the present case are radically different. Here, there was nothing to hinder the Parties from manifesting an intention to accept the binding character of the conclusions of the Organization of African Unity Mediation Commission by the normal method: a formal agreement on the basis of reciprocity. Since no agreement of this kind was concluded between the Parties, the Chamber finds that there are no grounds to interpret the declaration made by Mali's head of State on 11 April 1975 as a unilateral act with legal implications in regard to the present case.[47]

(e) *The* Border and Transborder Armed Actions *case*

The most recent attempt to build a legal obligation out of good faith and nothing more was made in the case of *Border and Transborder Armed Actions*, brought by Nicaragua against Honduras. Honduras had argued that under the provisions of the Pact of Bogotá, the jurisdictional title asserted by Nicaragua, and upheld by the Court, Nicaragua was debarred from having recourse to the Court so long as the 'pacific procedure' constituted, in the view of Honduras, by the Contadora Process, had not been concluded. The Court, without ruling on whether the Contadora Process was or was not a 'pacific procedure' as contemplated by the Pact of Bogotá, held that it had in any event been concluded by the time the case was brought to the Court.

The further argument of Honduras, and the Court's finding on it, was as follows:

> The Court has also to deal with the contention of Honduras that Nicaragua is precluded not only by Article IV of the Pact of Bogota but also 'by elementary considerations of good faith' from commencing any other procedure for pacific settlement until such time as the Contadora process has been concluded. The principle of good faith is, as the Court has observed, 'one of the basic principles governing the creation and performance of legal obligations' *(Nuclear Tests, ICJ Reports 1974*, p. 268, para. 46; p. 473, para. 49); it is not in itself a source of obligation where none would otherwise exist. In this case however the contention of Honduras is that, on the basis of successive acts by Nicaragua culminating in the Esquipulas Declaration of 25 May 1986 . . ., Nicaragua has entered into a 'commitment to the Contadora process'; it argues that by virtue of that Declaration, 'Nicaragua entered into a commitment with which its present unilateral Application to the Court is plainly incompatible'. The Court considers that whether or not the conduct of Nicaragua or the Esquipulas Declaration created any such commitment, the events of June/July 1986 constituted a 'conclusion' of the initial procedure both for purposes of Article IV of the Pact and in relation to any other obligation to exhaust that procedure which might have existed independently of the Pact.[48]

[47] Ibid., p. 574, para. 40.
[48] *ICJ Reports*, 1988, pp. 105–6, para. 94.

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The Esquipulas Declaration here referred to was one made by the Presidents of the five Central American countries indicating willingness to sign the Act of Contadora, and to comply with it. *Vis-à-vis* any other Government, this might be considered to be a unilateral act; but as between the five signatory Governments, it would seem, despite its form, to be essentially synallagmatic. Whether or not the Declaration is to be so regarded, the argument of Honduras was not so much that good faith had created an obligation on Nicaragua's part, as that the admitted commitment to the Contadora Process entered into by Nicaragua entailed an undertaking not to resort to judicial settlement procedures, such recourse being inconsistent with performance in good faith of the admitted obligation. Hence the question raised in this case—but not examined by the Court, for the reasons stated—was one of good faith execution of an obligation, good faith *stricto sensu*, to which we may now turn.

(2) *Good faith* stricto sensu

In its more traditional and established form, the principle of good faith is, as the Court pointed out in 1988, not creative of obligations, but rather governs the way in which existing obligations are carried out or existing rights exercised.

Fitzmaurice's own definition is as follows:

> The essence of the doctrine is that although a State may have a strict right to act in a particular way, it must not exercise this right in such a manner as to constitute an abuse of it; it must exercise its rights in good faith and with a sense of responsibility; it must have bona fide reasons for what it does, and not act arbitrarily or capriciously.[49]

Good faith has of course a role to play in the interpretation of treaties and other instruments, as indicated in Article 31 of the Vienna Convention on the Law of Treaties; but consideration of this aspect of the matter will be reserved for a later article, in the context of treaty interpretation and treaty law.

A field in which recourse to the term good faith has been frequent in the period under review has been in the context of the conduct of negotiations directed to settling a dispute or establishing the extent of the rights of the parties. The source of the obligation to negotiate, found in a number of recent decisions of the Court, will be examined elsewhere in these articles; for the present, attention will be addressed to what the Court has had to say concerning the way in which such negotiations are conducted.

(a) *Negotiations and good faith*

In the first of the series of modern cases in which the Court has had to grapple with problems of maritime delimitation, the *North Sea Continental*

[49] This *Year Book*, 27 (1950), pp. 12–13; *Collected Edition*, I, pp. 12–13.

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Shelf cases of 1969, it discerned 'certain basic legal notions which . . . have from the beginning reflected the *opinio juris* in the matter of delimitation' of the continental shelf. These were:

> that delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles.[50]

The court continued with an explanatory sentence which began with the following words:

> On a foundation of very general precepts of justice and good faith, actual rules of law are here involved which govern the delimitation of adjacent continental shelves . . .[51]

The sentence, which is of phenomenal length, contained *(inter alia)* the following prescription:

> (*a*) 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 as 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;
> *(b)* . . .[52]

Taking this passage as a whole, it appears that the prescription last quoted is in fact a definition—though probably not a limitative one—of what the Court considered to be the content of an obligation to negotiate in good faith.[53] Such an obligation had in fact been defined in not dissimilar terms in 1957 in the *Lake Lanoux* arbitration.[54]

The idea of negotiations in good faith played an important part in the judgments of the Court in the two *Fisheries Jurisdiction* cases in 1973–4. The claim before the Court was simply that Iceland was not entitled under international law unilaterally to extend its fishery limits; but the Court found it necessary to go into the question of the preferential fishing rights of Iceland as a coastal State particularly dependent on its fisheries.[55] In this context, the Court found that 'The most appropriate method for the solution of the dispute is clearly that of negotiation';[56] and in the course of the negotiations which would take place between the parties on the basis of the judgment,

[50] *ICJ Reports*, 1969, p. 46, para. 85.
[51] Ibid., pp. 46–7.
[52] Ibid., p. 47, para. 85.
[53] In this sense, Zoller, op. cit. above (n. 10), pp. 62–3.
[54] 24 ILR 101.
[55] This approach was criticized by some Members of the Court, and its justification will be examined in a later article.
[56] *ICJ Reports*, 1974, p. 31, para. 73.

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The task before them will be to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other . . .,[57]

the objective being 'an equitable solution derived from the applicable law'.[58]

In the *United Kingdom* v. *Iceland* case an interim arrangement had been entered into pending the Court's decision, which had still some time to run, but this was not so in the case brought by the Federal Republic of Germany. The Court therefore found it appropriate to include in its judgment in the latter case a special paragraph referring to the situation between delivery of the judgment and conclusion of the negotiations. After noting that the provisional measures indicated under Article 41 of the Statute would cease to have effect from the date of the judgment, the Court continued:

> Notwithstanding the fact that the Parties have not entered into any provisional arrangement, they are not at liberty to conduct their fishing activities in the disputed waters without limitation. Negotiations in good faith, which are ordered by the Court in the present Judgment, involve in the circumstances of the case an obligation upon the Parties to pay reasonable regard to each other's rights and to conservation requirements pending the conclusion of the negotiations.[59]

This is a further development of the concept of good faith in relation to negotiations; previously good faith merely governed the manner in which negotiations are conducted, but the Court here considers that good faith in negotiating a settlement of a dispute may also require the temporary non-exercise of the rights asserted by the one or the other party to the dispute, or at least restraint in their exercise.

It is, however, noteworthy first that the pronouncement quoted above was made in relation to the observation that the provisional measures indicated by the Court were about to lapse on delivery of the judgment, and secondly that there is a specific reference to 'conservation' of the fish stocks. The purpose of provisional measures under Article 41 of the Statute is 'to preserve the respective rights of either party'. It appears therefore that this enlarged obligation deriving from good faith was justified by the fact that overfishing in the area while the negotiations were going on could cause irreparable harm to the fish stocks, the very subject-matter of the negotiations.[60] It can therefore be said that good faith in this particular instance required that neither side should press its rights while the negotiations were

[57] Ibid., p. 33, para. 78.

[58] Ibid.

[59] Ibid., p. 202, para. 70.

[60] Cf. also the provisions of the United Nations Convention on the Law of the Sea for the delimitation of the exclusive economic zone (Art. 74) and the continental shelf (Art. 83): delimitation is to be effected 'by agreement on the basis of international law', and

> '3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical

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going on; but it does not follow that the same is true in all circumstances where there is an obligation to negotiate in good faith. In the absence of the element of potentially irreversible damage, good faith may restrain only acts of deliberate provocation or attempts to establish a *fait accompli* capable of prejudicing the outcome of the negotiations.

In the case of the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* the Court had been asked not only to define the 'principles and rules of international law' to be applied for the delimitation of the continental shelf, but also to 'specify precisely the practical way in which the aforesaid principles and rules apply in this particular situation'.[61] In its 1982 judgment the Court referred to the delimitation as 'to be effected by agreement in implementation of the present Judgment',[62] and gave detailed indications as to how this was to be done; it did not refer either to negotiations or to 'good faith'.[63]

The concept of negotiations in good faith for the purpose of delimitation of continental shelf boundaries, as an obligation imposed by the law on the subject, was however reiterated by the Chamber formed to deal with the *Gulf of Maine* case in 1984. While differing from the *North Sea Continental Shelf* judgment in a number of respects, the *Gulf of Maine* judgment nonetheless laid down what it regarded as the 'fundamental norm' in the matter as follows:

> What general international law prescribes in every maritime delimitation between neighbouring States could therefore be defined as follows:
>
> (1) No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence.
>
> (2) . . .[64]

The advisory opinion on the case of the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* has already been referred to. The Court there found that, for the purposes of a transfer of the WHO Regional Office from Egypt, the Organization and Egypt were under a duty 'to consult together in good faith as to the question under what conditions

nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.'

The conservation aspect is not treated, but is covered by the general prescription in Article 193 that the sovereign right of States to exploit their natural resources is to do so 'in accordance with their duty to protect and preserve the marine environment'.

Whether there is any distinction between good faith and 'a spirit of understanding and co-operation' is not clear.

[61] *ICJ Reports*, 1982, p. 21.

[62] Ibid., p. 92, para. 133.

[63] But note the observations of Judge Gros in his dissenting opinion on the effects of the principle of good faith on the implementation of the judgment: ibid., p. 145, para. 4.

[64] *ICJ Reports*, 1984, p. 299, para. 112.

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and in accordance with what modalities' such transfer might be effected.[65] Curiously, no reference was made to good faith as regards the duty, also found by the Court, to consult and negotiate 'regarding the various arrangements needed to effect the transfer from the existing to the new site in an orderly manner and with a minimum of prejudice to the work of the Organization and the interests of Egypt'.[66] The Court did however go on to say that:

> the paramount consideration both for the Organization and the host State in every case must be their clear obligation to co-operate in good faith to promote the objectives and purposes of the Organization as expressed in its Constitution; . . .[67]

Yet the commentator must wonder: does it in fact add anything to an obligation to negotiate, or to consult, to include the words 'in good faith' in its definition? Where an obligation, legal or conventional, is defined by specific words, good faith requires respect not only for the words but also for the spirit;[68] but to negotiate otherwise than in good faith is surely not to negotiate at all.

(b) *Abuse of rights*

Despite some *dicta* by individual judges, to which Fitzmaurice in his articles drew attention, no theory of abuse of rights in the international sphere has taken real shape in international practice and jurisprudence.[69] The matter may to a limited extent be one of terminology: it may be sufficient to employ the concept of good faith, in the two senses outlined above.[70]

It has of course to be accepted that if a right or discretion exists, it may be abused. An interesting observation in this connection was made by President Klaestad in his dissenting opinion in the case concerning the *Constitution of the Maritime Safety Committee of IMCO*. The majority of the Court had held that the eight 'largest ship-owning nations' had to be elected

[65] *ICJ Reports*, 1980, p. 95, para. 49, and p. 97, para. 51 (2)(*a*).

[66] Ibid., p. 95, para. 49, and p. 97, para. 51 (2)(*b*).

[67] Ibid., p. 96, para. 49.

[68] Reuter has suggested that the concept of negotiations involves, as one of its minimum obligations 'l'obligation de se comporter en négociateurs', and continues: 'Le principe dominant est ici celui de la bonne foi; les négociateurs s'interdisent certains agissements parce que ces agissements sont incompatibles avec une intention loyale de négocier': 'De l'obligation de négocier', *Communicazioni e studi*, 14 (1975), pp. 717–18.

[69] In this sense, Ago, Second Report on State Responsibility, *Yearbook of the ILC*, 1970, vol. 2, p. 193, para. 48. The study in this *Year Book*, 46 (1972–3), by Taylor, 'The Content of the Rule against Abuse of Rights in International Law', draws extensively on arbitral precedents and other international tribunals, but finds little in the jurisprudence of the ICJ.

[70] Fitzmaurice considered that 'there is little legal content in the obligation to exercise a right in good faith unless failure to do so would, in general, constitute an abuse of rights': this *Year Book*, 30 (1953), p. 52; *Collected Edition*, I, p. 183. 'Contra legem facit, qui id facit quod lex prohibet, in fraudem vero, qui salvis verbis legis sententiam eius circumvenit': Digest, I, 3, 29, quoted by Judge de Castro in the *Namibia* case, *ICJ Reports*, 1971, p. 183.

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to the Committee by virtue of Article 28 of the IMCO Convention despite the idea of choice or discretion implied in the word 'elect'. For the Court,

> The argument based on discretion would permit the Assembly, in use only of its discretion, to decide through its vote which nations have or do not have an important interest in maritime safety and to deny membership on the Committee to any State regardless of the size of its tonnage or any other qualification. The effect of such an interpretation would be to render superfluous the greater part of Article 28 *(a)* and to erect the discretion of the Assembly as the supreme rule for the constitution of the Maritime Safety Committee.[71]

President Klaestad took the opposite view, and replied to the majority argument as follows:

> It cannot rightly be argued against my interpretation of Article 28(*a*) that such a discretionary power vested in the Assembly might, in a hypothetical case, lead to abuse or arbitrariness. That is no valid argument against the existence of a discretionary power as such. The possibility that a discretionary power of appraisal vested in a political body may, in extreme and hypothetical cases, be abused by that body, does not of course prove that no such discretionary power exists. A power or a right may in certain cases be abused. Nevertheless, that power or right exists.[72]

Mention should be made in this connection of the extremely interesting suggestion made in the dissenting opinion of Judge Gros in the *Namibia* case as to the legal means of enforcing against South Africa the obligations of the Mandate. Taking up a suggestion in the dissenting opinion of Judge De Visscher in the 1950 *Status of South West Africa* case, he considered that although the Court in its advisory opinion in that case had not found that South Africa was obliged to conclude a trusteeship agreement for the territory, its conclusions did contain an implication that there was an obligation of South Africa and the United Nations to negotiate with a view to the conclusion of such an agreement. His analysis of the position was as follows:

> In 1950 the Court was unable, in its Opinion, to envisage the hypothesis that difficulties might arise over the implementation of the obligation to observe a certain line of conduct which it found incumbent on South Africa in declaring that an agreement for the modification of the Mandate should be concluded; hence its silence on that point. But the general rules concerning the obligation to negotiate suffice. If negotiations had been begun in good faith and if, at a given juncture, it had been found impossible to reach agreement on certain precise, objectively debatable points, then it might be argued that the Opinion of 1950, finding as it had that there was no obligation to place the Territory under trusteeship, prevented taking the matter further, inasmuch as the Mandatory's refusal to accept a draft trusteeship agreement could in that case reasonably be deemed justified: 'No party can impose its terms on the other party' *(ICJ Reports 1950*, p. 139). But the facts are otherwise: negotiations for the conclusion of a trusteeship agreement never began, and for that South Africa was responsible. The rule of law infringed herein is the obligation to negotiate in good faith.[73]

[71] *ICJ Reports*, 1960, p. 10.
[72] Ibid., p. 175.
[73] *ICJ Reports*, 1971, p. 344, para. 43.

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For Judge Gros, the appropriate legal consequences (which he did not specify) could thus have been based on a 'judicial finding that there had been a breach of the obligation to transform the Mandate by negotiation as the 1950 Opinion prescribed'.[74]

The Court was in fact asked in 1985 to make a finding that a State had not acted in good faith, in a rather different context. By its 1982 judgment in the case of the *Continental Shelf (Tunisia/Libya)* the Court had defined the delimitation line between the continental shelves of the two parties with a certain degree of precision, but had, in accordance with the Special Agreement, reserved the final definition of the line for experts appointed by the parties. Following a certain amount of negotiation, Tunisia brought before the Court a request for revision and interpretation of the 1982 judgment, under Articles 60 and 61 of the Statute of the Court.

However, the Special Agreement had contained the following provisions for the implementation of the Court's judgment:

Article 2

Following the delivery of the Judgment of the Court, the two Parties shall meet to apply these principles and rules in order to determine the line of delimitation of the area of the continental shelf appertaining to each of the two countries, with a view to the conclusion of a treaty in this respect.

Article 3

In case the agreement mentioned in Article 2 is not reached within a period of three months, renewable by mutual agreement from the date of delivery of the Court's Judgment, the two Parties shall together go back to the Court and request any explanations or clarifications which would facilitate the task of the two delegations to arrive at the line separating the two areas of the continental shelf, and the two Parties shall comply with the Judgment of the Court and with its explanations and clarifications.[75]

Libya objected to the admissibility of Tunisia's request for interpretation of the 1982 judgment, on the grounds that:

the jurisdiction of the Court to entertain a request for interpretation under Article 60 is subject to a condition requiring the exhaustion of the alternative interpretation procedure, by joint application to the Court, instituted by Article 3 of the Special Agreement;[76]

and Tunisia, according to Libya, had 'neither endeavoured in good faith to implement the Court's judgment, nor indicated the precise points of difference'[77] of views between the parties; it had 'not made a bona fide attempt to

[74] Ibid., p. 345, para. 45.
[75] *ICJ Reports*, 1985, p. 214, para. 41.
[76] Ibid., p. 215, para. 42.
[77] Ibid., para. 41.

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agree on points of explanation or clarification for the purpose of a joint request to the Court under Article 3'.[78]

The Court, however, did not deal with the alleged failure of Tunisia to act in good faith; it found that on a correct interpretation of the special agreement, this instrument did not require prior recourse to the procedure laid down by Article 3 as a precondition to a request for interpretation under Article 60 of the Statute. Judge Ruda dissented on this point: he considered that, because of the position taken up by Tunisia, 'there has never been a serious effort to try to settle between the Parties what were the points that needed explanation or clarification'.[79] However, since he considered that Libya had waived its objection based on this ground, he did not pursue the question of what consequences would flow from this failure.

An observation of the Court in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* suggests that the Court will be slow to assume an abuse of rights in other than flagrant cases. Nicaragua asserted that the United States reliance on collective self-defence was no more than a pretext:

> 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.[80]

The Court's finding was, 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.[81]

In (for example) French administrative law, if an administrative power or discretion has been exercised for some object other than that for which the power or discretion was conferred, there will be a *détournement de pouvoir*.[82] The choice whether or not to exercise a right, even that of

[78] Ibid., para. 42.
[79] Ibid., p. 235.
[80] *ICJ Reports*, 1986, pp. 70–1, para. 127.
[81] Ibid.
[82] Cf. Brabant, *Le Droit administratif français* (1984), p. 525; Brown and Garner, *French Administrative Law*, p. 131. A similar charge (*eccesso di potere per sviamento del fine*) was at one time pressed by the Elettronica Sicula company *vis-à-vis* the Italian authorities (*ICJ Reports*, 1989, p. 73, para. 123), but was not part of the United States case before the Court.

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self-defence, is not strictly to be assimilated to the exercise of a discretion; yet an interesting parallel is to be found in a decision of the French Conseil d'État, in a case in which an administrative act was done for more than one reason, and one of the reasons was improper. It decided that provided the act would have been done, even if that reason had not existed, on the basis of the remaining reasons, then the act was good;[83] i.e. the improper reason was treated as an 'additional motive' in the terminology of the *Nicaragua* v. *United States of America* decision.

2. *Estoppel, Preclusion and Acquiescence*

(1) *The nature of the concepts*

Another legal institution or concept which has suddenly sprung into prominence during the period under review is the notion of estoppel, with its companion or linked ideas of acquiescence and preclusion, derived, according to the Chamber in the *Gulf of Maine* case, from 'fundamental principles of good faith and equity'. While in his articles covering the period 1947 to 1959 Sir Gerald Fitzmaurice found it necessary to mention only one or two passing allusions to estoppel in individual opinions of judges,[84] one of the first cases in which he himself sat as a Member of the Court, the *Temple of Preah Vihear* case, afforded him the opportunity of examining the application of estoppel in international law in a separate opinion;[85] and the concept has played a part in the arguments in a number of other cases since 1959.

The essential aspect of a claim based on estoppel as distinguished from a claim based on acquiescence was brought out by Fitzmaurice in that separate opinion. A claim of estoppel may—and indeed frequently does—relate to the existence, non-existence or deemed existence of a particular state of mind of the respondent State, and in particular its acceptance of, or consent to, a particular matter; but while a claim of acquiescence asserts that the State concerned *did* accept or agree on that point, a claim of estoppel accepts, by implication, that the respondent State did *not* accept or agree, but contends that, having misled the applicant State by behaving as though it did agree, it cannot be permitted to deny the conclusion which its conduct suggested. As Fitzmaurice observes:

> Thus it may be said that A, having accepted a certain obligation, or having become bound by a certain instrument, cannot now be heard to deny the fact, to 'blow hot and cold'. True enough, A cannot be heard to deny it; but what this really means is simply that A is bound, and, being bound, cannot escape from the obligation merely by denying its existence. In other words, if the denial can be shown to be false, there is no room or need for any plea of preclusion or estoppel.

[83] Conseil d'État, 12 janvier 1968, *Dame Perrot*.
[84] This *Year Book*, 27 (1950), p. 12; 37 (1961), p. 47; *Collected Edition*, I, p. 12; II, p. 680.
[85] *ICJ Reports*, 1962, pp. 62–5.

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Such a plea is essentially a means of excluding a denial that might be *correct*—irrespective of its correctness. It prevents the assertion of what might in fact be *true*.[86]

There will obviously in many cases be a fairly fine line between the two analyses as applied to a particular situation; the same facts concerning the respondent State's conduct may be regarded as showing the attitude it did adopt, or as estopping it from denying that it had adopted that attitude, even if it had not. Hence the two contentions—acquiescence and estoppel—may be employed in parallel, and as a result the distinction between them may become blurred. Thus in the *Gulf of Maine* case, as the Chamber noted, Canada referred to estoppel as 'the alter ego of acquiescence'.[87] The Chamber itself kept the distinction firmly in mind, and stated it as follows:

> The Chamber observes that in any case the concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principles of good faith and equity. They are, however, based on different legal reasoning, since acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion. According to one view, preclusion is in fact the procedural aspect and estoppel the substantive aspect of the same principle.[88]

Preclusion also carries the notion of being prevented from asserting what is in fact true: thus the Chamber's distinction corresponds to that drawn by Fitzmaurice, and correctly presents, it is submitted, current international law on the subject.

(2) *The cases*

Before pursuing the present analysis of the jurisprudence of the Court in this field, it may be useful to outline the facts and contentions of the parties in the cases in which questions of acquiescence, preclusion or estoppel have arisen. The first of these, the case concerning the *Arbitral Award made by the King of Spain on 23 December 1906*,[89] illustrates the narrow distinctions between acquiescence, preclusion, estoppel, and recourse to the subsequent conduct of the parties as a means of interpretation of a treaty. Nicaragua advanced a number of reasons why the designation of the King of Spain as arbitrator in the frontier dispute with Honduras, pursuant to the Gómez-Bonilla Treaty of 7 October 1894, was invalid, one of which was that the Treaty had lapsed before the King of Spain had signified his acceptance of the office of arbitrator. The Gómez-Bonilla Treaty was, according to its terms, to 'be in force for a period of ten years', but there were two possible interpretations of the Treaty as to the date from which the ten years was to run.

[86] Ibid., p. 63.
[87] *ICJ Reports*, 1984, p. 304, para. 129.
[88] Ibid., p. 305, para. 130.
[89] *ICJ Reports*, 1960, p. 189. The decision in this case was taken after the death of Judge Lauterpacht, but before the election of Judge Fitzmaurice.

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The Court took the view, reading a number of the articles of the Treaty together, that, contrary to the contentions of Nicaragua, the intention of the parties had been that the ten-year period should begin to run from the date of the exchange of ratifications. It continued:

> That this was the intention of the Parties is put beyond doubt by the action taken by the two Parties by agreement in respect of the designation of the King of Spain as arbitrator.[90]

The Court, however, summed up its conclusion on the various Nicaraguan arguments for the nullity of the arbitration procedure as follows:

> Finally, the Court considers that, having regard to the fact that the designation of the King of Spain as arbitrator was freely agreed to by Nicaragua, that no objection was taken by Nicaragua to the jurisdiction of the King of Spain as arbitrator either on the ground of irregularity in his designation as arbitrator or on the ground that the Gómez-Bonilla Treaty had lapsed even before the King of Spain had signified his acceptance of the office of arbitrator, and that Nicaragua fully participated in the proceedings before the King, it is no longer open to Nicaragua to rely on either of these contentions as furnishing a ground for the nullity of the Award.[90]

Thus Nicaragua's agreement to the designation of the King of Spain as arbitrator was both conduct confirming the interpretation of the Gómez-Bonilla Treaty which validated the appointment, and conduct disentitling Nicaragua from relying on *(inter alia)* the contention that the appointment was invalid as out of time, on grounds of acquiescence or preclusion.[91]

The Court did not, in the *King of Spain* case, mention the possibility of estoppel, though this was raised—and rejected—by the Judge *ad hoc* (Urrutia Holguin) appointed by Nicaragua, in his dissenting opinion.[92] He emphasized the need to show reliance by the one party on the apparent acquiescence of the other; and it is true that Honduras did not prove any effective reliance on the conduct of Nicaragua in this respect, let alone any change of position to its detriment. What the Court relied on, as is shown by the passage quoted above, was a broader concept of preclusion.

In addition to its argument directed to showing the *ab initio* nullity of the arbitral procedure, Nicaragua argued also that the award made by the King of Spain was invalid or incapable of execution. The Court's finding on this aspect of the case was as follows:

> In the judgment of the Court, Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award. Nicaragua's failure to raise any question with regard to the validity of the Award for several

[90] Ibid., p. 208.

[91] The same cumulation of arguments is to be found in the arbitral decision in the *Costa Rica/Nicaragua Boundary* case (Moore's *International Arbitrations*, vol. 2, p. 1945), cited in Bowett, 'Estoppel before International Tribunals and its Relation to Acquiescence', this *Year Book*, 33 (1957), p. 176 at p. 198.

[92] *ICJ Reports*, 1960, pp. 222, 236.

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years after the full terms of the Award had become known to it further confirms the conclusion at which the Court has arrived. The attitude of the Nicaraguan authorities during that period was in conformity with Article VII of the Gómez-Bonilla Treaty which provided that the arbitral decision whatever it might be—and this, in the view of the Court, includes the decision of the King of Spain as arbitrator—'shall be held as a perfect, binding and perpetual Treaty between the High Contracting Parties, and shall not be subject to appeal'.[93]

Despite the reference to the terms of the Treaty, it does not appear that the Court was here thinking in terms of interpretation of the Treaty by reference to the subsequent conduct of the parties. It would be stretching this doctrine beyond its limits to suggest that, because the parties had agreed that the award should rank as a treaty, a failure to challenge the award would amount to an implied interpretation of the award as a valid treaty. The Court's conclusion however makes perfect sense if interpreted as a finding of preclusion.

The underlying facts, so far as material, in the case of the *Temple of Preah Vihear* were as follows: by a treaty of 1904, Thailand—then known as Siam—and France, as Protecting Power of Cambodia, had agreed that the frontier between the two countries should follow the watershed between two specified river-basins, and that the delimitation should be carried out by Mixed Commissions composed of officers appointed by the two countries. A Mixed Commission was set up, and maps were eventually produced, and printed and published by a French firm; the relevant map showed the frontier as leaving the temple of Preah Vihear to Cambodia. It was later established that the line of the watershed ran the other side of the temple, so that if the mapped frontier line had followed the watershed, as contemplated by the 1904 treaty, the temple would have been left to Thailand. The map had apparently been produced by French officers on the instructions of the Mixed Commission, but the Commission had never approved it—indeed, the Commission had ceased to meet before the map was produced.

France handed over copies of the maps to Siam, and they were also given wide publicity. The Court found specifically that the circumstances of the delivery of the maps:

> were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset et potuisset*.[94]

Before turning to the second aspect of the case, we may note that there was initially no estoppel in any strict sense. The Court made no finding that

[93] Ibid., pp. 213–14.
[94] *ICJ Reports*, 1962, p. 23.

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Cambodia (or France) had, in the early years, acted on the faith of Siam's apparent acceptance of the map, so as detrimentally to change its position. On the other hand, Siam was precluded from asserting that there had been no consent, by reason of its silence in face of the indication on the map of the frontier line. A finding of acquiescence of this kind is a finding of *deemed* consent: if there is evidence to show that a State has in fact given consent on a particular matter, there is no need to resort to the concept of acquiescence.

The Court did not, however, rest its decision solely on the conduct of Siam when, and immediately after, it received the map. It also took into account the many years of inaction, in the sense of lack of protest, which followed. It held that:

> Even if there were any doubt as to Siam's acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in the light of the subsequent course of events, that Thailand is now precluded by her conduct from asserting that she did not accept it. She has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier. France, and through her Cambodia, relied on Thailand's acceptance of the map . . . It is not now open to Thailand, while continuing to claim and enjoy the benefits of the settlement, to deny that she was even a consenting party to it.[95]

Fitzmaurice, in his separate opinion, was clear that the principle of preclusion 'is quite distinct theoretically from the notion of acquiescence', but continued:

> But acquiescence can operate as a preclusion or estoppel in certain cases, for instance where silence, on an occasion where there was a duty or need to speak or act, implies agreement, or a waiver of rights.[96]

Judge Wellington Koo, who dissented, assimilated preclusion to estoppel, since in his view the legal basis of the principle of preclusion:

> is that one party has relied on the statement or conduct of the other either to its own detriment or to the other's advantage.[97]

Judge Sir Percy Spender also emphasized the fact that 'the principle of preclusion is . . . quite distinct from the concept of recognition (or acquiescence) . . .',[98] the distinction being an important element in his dissent, for reasons to be examined in a moment. Like Judge Wellington Koo, he defined preclusion in terms which assimilate it wholly to estoppel:

> In my opinion the principle operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made to it by another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and

[95] Ibid., p. 32.
[96] Ibid., p. 62.
[97] Ibid., p. 97.
[98] Ibid., p. 131.

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as a result that other State has been prejudiced or the State making it has secured some benefit for itself.[99]

In the *North Sea Continental Shelf* cases, Denmark and the Netherlands asserted that the equidistance rule for delimitation of the continental shelf, employed in the 1958 Geneva Convention on the subject, had become binding on the Federal Republic of Germany (which was not party to that Convention), *inter alia* on the basis of conduct of the Federal Republic. After examining the details of the conduct relied on by the applicants, and stating that the Federal Republic had not become bound by the Convention as such, the Court concluded:

> Having regard to these considerations of principle, it appears to the Court that only the existence of a situation of estoppel could suffice to lend substance to his contention,—that is to say if the Federal Republic were now precluded from denying the applicability of the conventional régime, by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that regime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice. Of this there is no evidence whatever in the present case.[100]

An argument in the *Gulf of Maine* case which was based on estoppel related to the conduct of the parties in granting sea-bed exploration permits over disputed areas of the Georges Bank. Canada claimed that it was known to the United States that Canada had issued such permits, and that the United States had not protested or shown any reaction; and while the United States also issued permits in the disputed area it did nothing to inform Canada of this. Canada thus relied on the conduct of the United States as conveying the clear—even if incorrect—message that it accepted the Canadian claims. The essence of the Chamber's decision on these arguments was as follows:

> . . . while it may be conceded that the United States showed a certain imprudence in maintaining silence after Canada had issued the first permits for exploration on Georges Bank, any attempt to attribute to such silence, a brief silence at that, legal consequences taking the concrete form of an estoppel, seems to be going too far.
>
> . . . From 1965 onwards, as we have seen, the United States also issued exploration permits for the northwestern portion of Georges Bank, that is to say the area claimed by Canada. Here again it would have been prudent for the United States to inform Canada officially of those activities, but its failure to do so does not warrant the conclusion that it thereby gave Canada the impression that it accepted the Canadian standpoint, and that legal effects resulted. Once again the United States attitude towards Canada was unclear and perhaps ambiguous, but not to the point of entitling Canada to invoke the doctrine of estoppel.[101]

Canada also based its claim that the United States had acquiesced in the

[99] Ibid., pp. 143–4.
[100] *ICJ Reports*, 1969, p. 26, para. 30.
[101] *ICJ Reports*, 1984, p. 308, paras. 140–1.

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idea of adopting a median line as the boundary between their respective maritime jurisdictions on the conduct of United States officials, and in particular a letter which came to be known as the 'Hoffman letter' from the name of its signatory, as amounting to an estoppel. In that letter, enquiring about the position of certain Canadian concessions in relation to the median line, Mr Hoffman, an official of the Bureau of Land Management of the Department of the Interior, explained that he had no authority to commit the United States as to the position of a median line.[102] The Chamber rejected the Canadian contentions, essentially for the following reason:

> The Chamber considers that the terms of the 'Hoffman letter' cannot be invoked against the United States Government. It is true that Mr Hoffman's reservation, that he was not authorized to commit the United States, only concerned the location of a median line; the use of a median line as a method of delimitation did not seem to be in issue, but there is nothing to show that the method had been adopted at government level. Mr Hoffman, like his Canadian counterpart, was acting within the limits of his technical responsibilities and did not seem aware that the question of principle which the subject of the correspondence might imply had not been settled, and that the technical arrangements he was to make with his Canadian correspondents should not prejudge his country's position in subsequent negotiations between governments. This situation however, being a matter of United States internal administration, does not authorize Canada to rely on the contents of a letter from an official of the Bureau of Land Management of the Department of the Interior, which concerns a technical matter, as though it were an official declaration of the United States Government on that country's international maritime boundaries.[103]

When Nicaragua, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, sought to rely on its pre-war acceptance of the jurisdiction of the Permanent Court in order to bring proceedings against the United States of America, the United States argued that that acceptance was ineffective, or that, if it was effective so that Nicaragua could invoke it, 'Nicaragua's conduct in relation to the United States over the course of many years estops Nicaragua from doing so'.[104]

> 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.[105]

The Court, however, considered that Nicaragua's conduct over the period

[102] Ibid., p. 306, para. 133.
[103] Ibid., pp. 307–8, para. 139.
[104] Ibid., p. 413, para. 48.
[105] Ibid.

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in question was, on the contrary, 'such as to evince its consent to be bound' by its pre-war declaration 'in such a way as to constitute a valid mode of acceptance of jurisdiction'.[106] The Court could not regard the particular incidents relied on by the United States, which were apparently inconsistent with Nicaragua's general conduct, 'as sufficient to overturn that conclusion, let alone to support an estoppel'.[107]

(3) *Analysis of estoppel*

For purposes of analysis of the concept of estoppel as reflected in the cases, we may take a phrase, already quoted, from the judgment of 1969 in the *North Sea Continental Shelf* cases to serve as a working definition of estoppel:

> . . . only the existence of a situation of estoppel could suffice to lend substance to this contention,—that is to say if [the respondent State][108] were now precluded from denying the [fact asserted by the applicant State], by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that [fact], but also had caused [the applicant State], in reliance on such conduct, detrimentally to change position or suffer some prejudice.[109]

The elements of an estoppel here identified may thus be enumerated:

—conduct of the respondent State
—clearly and convincingly evincing assertion or acceptance
—of what must, according to the applicant State, be treated as a fact,
—relied on by the applicant State, which was thereby induced
—to change its position or suffer some prejudice.

(a) *Conduct of the respondent State*

As in the case of any conduct by which a State is to be held to have undertaken an obligation, the conduct must be that of the State, acting through its appropriate organs or officials.[110] Consistently with the underlying concept, whereby what matters is the effect produced on the respondent State, the constitutional niceties of the position of a given official are less important than the impression produced *ab extra* as to his competence to speak for the State. Yet there must be some degree of authority to speak vested in the person concerned.[111]

[106] Ibid., p. 414, para. 51.

[107] Ibid.

[108] For convenience of discussion, it will be assumed that in all cases an applicant is claiming that a respondent is bound by an estoppel; in the *North Sea Continental Shelf* cases, brought by special agreement, the parties were in fact not in the position of applicant or respondent.

[109] *ICJ Reports*, 1969, p. 26, para. 30.

[110] In the *Temple of Preah Vihear* case, there was the problem whether the estoppel or preclusion relied on to prevent Thailand from disputing the frontier line as mapped could prevail over the provisions of the frontier treaty; could a variation of a treaty be agreed to by anyone other than the persons who could sign the treaty? See below, pp. 47–9.

[111] Cf. the Court's observations, quoted above, p. 15, in respect of the statement made on behalf of the French Government in the *Nuclear Tests* cases, which had to be 'held to constitute an engagement of the State' (*ICJ Reports*, 1974, p. 269, para. 49).

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In the *Temple of Preah Vihear* case, some emphasis was laid by the Court on the rank and functions of those who were known or presumed to have seen and accepted the map of the frontier line.[112] In the *Gulf of Maine* case, as the passage quoted above shows, the Court was unable to regard the Hoffman letter as creating an estoppel in view of Mr Hoffman's position and duties. The Court's rejection of the United States contentions as to estoppel in the Nicaragua case do not appear to be based on any doubts in this respect: the alleged assurances were given by the Nicaraguan Foreign Minister and the Nicaraguan Ambassador in Washington.[113]

It should also be noted that where a reaction—or more commonly an absence of reaction—is relied on as showing an estoppel, the governmental level at which the conduct occurred which should have provoked the reaction may also be relevant. The United States in the *Gulf of Maine* case rejected an alleged estoppel based on its failure to react to the grant by Canada of sea-bed exploration permits in the disputed area (see next section), which had been made public, claiming that:

> the issue of offshore permits under Canadian legislation was not common knowledge, and merely constituted an internal administrative activity incapable of forming the basis of acquiescence or estoppel at the international level. Before any effect could result at this level it would, at least, have been necessary for the Canadian Department of External Affairs to send a diplomatic communication to the United States Department of State.[114]

In the jurisdictional phase of the *Barcelona Traction* case, it was argued for Spain that Belgium had by its conduct misled Spain about the import of the discontinuance of the proceedings before the Court, giving the impression that the discontinuance was final and the suit would not be re-started. The Court rejected this argument for a number of reasons, of which the first was that:

> it is not clear whether the alleged misleading conduct was on the part of the Applicant Government itself or of private Belgian parties, or in the latter event, how far it is contended that the complicity or responsibility of the Applicant Government is involved.[115]

(b) *Clear and convincing indication of acceptance*

It would seem that one of the clearest forms of indication of acceptance or recognition of a particular state of affairs is when the respondent State has, possibly in another context, urged the existence of that state of affairs, in order to found its own interests. Thus in the *Temple of Preah Vihear* case Thailand had used the contentious map, or other maps showing the Temple as lying in Cambodia, 'even for public and official purposes', without

[112] *ICJ Reports*, 1962, p. 25.
[113] *ICJ Reports*, 1984, pp. 413–14, paras. 49–50.
[114] Ibid., p. 305, para. 131.
[115] *ICJ Reports*, 1964, p. 24.

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raising any query; and this the Court regarded as significant.[116] Other examples of such a situation to have come before the Court relate to representations of law, as to which different considerations apply (see next section).

The time element may be relevant in this respect. In the *Temple* case the Court referred to the fifty-year period between the delivery of the map in 1908 and its being challenged in 1958; and in the *Gulf of Maine* case the Chamber emphasized that the United States silence relied on was a 'brief silence' only.

A claim of estoppel is, theoretically, based on the fact that the respondent State has done something; but it is, if anything, more common for a claim to be that a State has not done something which, on certain postulates, it might have been expected to do, and that this was a representation that the facts are otherwise. This was the position, as noted above, both in the *Temple* and the *Gulf of Maine* cases. The Chamber formed to deal with the case of *Elettronica Sicula SpA (ELSI)* observed that:

> 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.[117]

With due respect to the Chamber, the reference to a situation 'when something ought to have been said' corresponds more to an application of the principle *qui tacet consentire videtur* . . . than to an estoppel. It is submitted that for purposes of estoppel the question is not whether there is a duty to speak, but simply, did the silence or non-action amount in the circumstances to a suggestion or representation of a certain fact?

(c) *Conduct pointing to what must be treated as a fact*

Estoppel elevates a sort of legal fiction to the status of fact for the purposes of the relations between the parties. What then if the 'fact' which the respondent State is alleged to have suggested by its conduct is not a fact, but a legal assertion or conclusion?[118]

One view of estoppel is that it is part of a wider category of concepts, including tacit agreement, acquiescence, preclusion, etc., which can relate to matters of fact or of law. In his dissenting opinion in the *Temple of Preah Vihear* case, Judge Sir Percy Spender expressly included 'situations of law' in the sphere of operation of concepts of this kind:

> A State may of course recognize—or acquiesce in—any fact or situation either of

[116] *ICJ Reports*, 1962, pp. 27, 19.

[117] *ICJ Reports*, 1989, p. 44, para. 54.

[118] This was not so in the *ELSI* case, when it was sought to exclude the application of the rule of exhaustion of local remedies on the grounds of an estoppel; the Chamber treated the matter as an alleged representation, not that the local remedies rule was inapplicable, but that local remedies had been exhausted, a matter of fact, or of national law treated as fact.

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law or fact and its intention to do so may be evidenced expressly or by implication. The recognition may become the source of a legal right or obligation to the extent to which it provides an essential element in the establishment of a legal right or obligation, as for example in preclusion or prescription. It may provide evidence of a fact or a state of facts, the probative value of which depends upon all the surrounding circumstances. It may afford aid in the interpretation of a document or conduct.'[119]

The *Nicaragua* v. *United States* case has already been referred to; in that case the claim of the United States was that:

> Having . . . 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.'[120]

Whether or not the pre-war Nicaraguan declaration of acceptance of jurisdiction of the Permanent Court was effective after the coming into force of the 1946 Statute, so that Nicaragua could itself have been sued, on that basis, by any other State having deposited a declaration, was a question not of fact but of law. As the Court stated in the *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)* case:

> The existence of jurisdiction of the Court in a given case is . . . not a question of fact, but a question of law to be resolved in the light of the relevant facts,'[121]

and for that reason there could be no burden of proof, to show that there was, or that there was not, jurisdiction. The Court, however, continued: 'The determination of the facts may raise questions of proof.'[122]

In the *Nicaragua* v. *United States* case, it must be taken that the starting point of the United States argument was that Nicaragua's pre-war declaration *was* valid so that in the post-war optional clause system it *was* bound; this, as shown above, is essential to a claim of estoppel. Nicaragua had, it was said, 'consistently represented to the United States of America that Nicaragua was not bound by the Optional Clause, and . . . the United States relied upon those Nicaraguan representations'.[123] The reason why there was doubt as to the status of Nicaragua *vis-à-vis* the optional clause was because Nicaragua had never ratified the Protocol of Signature of the Statute of the Permanent Court. If Nicaragua had represented to the United States that it had not ratified that Protocol when in fact it had, then an estoppel could, it is suggested, have arisen whereby the Court would resolve the question of law, its jurisdiction in relation to Nicaragua, on the basis of the 'pseudo-fact' that the Protocol of Signature had not been ratified. But Nicaragua had accurately presented the facts to the United States; it had however accompanied that presentation with a statement of its

[119] *ICJ Reports*, 1962, p. 130.
[120] *ICJ Reports*, 1984, p. 413, para. 48.
[121] *ICJ Reports*, 1988, p. 76, para. 16.
[122] Ibid.
[123] *ICJ Reports*, 1984, p. 413, para. 48.

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opinion—for it could be no more than that—that in consequence of those facts it was not bound by a subsisting declaration under the optional clause.

In the *Border and Transborder Armed Actions* case brought by Nicaragua against Honduras, an even more striking instance of an alleged estoppel of this kind was put forward, but not examined by the Court, which based its judgment on other grounds. Honduras had in 1960 accepted the jurisdiction of the Court under the Optional Clause 'for an indefinite term'. In May 1968, shortly before Nicaragua instituted proceedings, Honduras deposited a fresh declaration containing reservations which would—apparently—have excluded Nicaragua's claim from the purview of the declaration. Nicaragua claimed that the 1960 declaration, being 'for an indefinite term', was irrevocable, or revocable only on notice, and that Nicaragua could therefore found jurisdiction upon it. In support of its case, Nicaragua was able to point to a protest made by Honduras itself when in 1973 El Salvador sought to withdraw and replace a pre-war declaration of acceptance of jurisdiction made without limit of time.

Possibly to the embarrassment of Honduras, Nicaragua was able to quote the very terms of Honduras' letter of protest:

> Leading authorities on international law take the position that a declaration not containing a time limit cannot be denounced, modified or broadened unless right to do so is expressly reserved in the original declaration and that, accordingly, new reservations cannot be made unless this requirement has been fulfilled.
>
> To say otherwise would mean accepting the notion that a State can unilaterally terminate its obligation to submit to the jurisdiction of the Court whenever that suits its interests, thus denying other States the right to summon it before the Court to seek a settlement of disputes to which they are parties. This could well undermine the universally applicable principle of respect for treaties and for the principles of international law; . . .[124]

The implications of treating a statement of this kind as an estoppel, committing Honduras in respect of its own acceptance of jurisdiction, as urged by Nicaragua, are somewhat disturbing. Apart from the fact that the statement was not addressed to Nicaragua, and Nicaragua did not apparently act on it to its detriment, is it acceptable that a State which has once publicly expressed a view of the law on a particular point should be held to it even if it is incorrect?—and for purposes of estoppel it must be assumed to be so.

Against this it may be recalled that in the *Asylum* case in 1950,[125] Colombia was able to cite official Government communiqués issued in 1948 by Peru expressing the same view of the law (as to the right of the State granting asylum to qualify the offence) as was being advanced by Colombia in the proceedings and disputed by Peru in 1950.[126] Peru similarly referred to

[124] Reproduced in Rosenne, *Documentation on the International Court of Justice* (1979), p. 362; quoted in the counter-memorial of Nicaragua, para. 80.

[125] Discussed by Fitzmaurice, this *Year Book*, 29 (1952), p. 58; *Collected Edition*, I, p. 127.

[126] *Pleadings*, vol. 1, pp. 37–9.

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a Report prepared by the Colombian Foreign Ministry, inconsistent with Colombia's stand in the proceedings. The Court dismissed all these pieces of evidence as irrelevant, with the brief statement that:

> The Court, whose duty it is to apply international law in deciding the present case, cannot attach decisive importance to any of these documents.[127]

Whether the idea of acquiescence or the idea of preclusion is applied, it is difficult to accept that a State is bound in its own affairs by a view of the law which it asserted against another State on a previous occasion. Curious consequences for the development of customary law would follow. Suppose that a State has protested against an extension of maritime jurisdiction claimed by another State at a time when that extension is gaining ground but has not yet become recognized by general customary law; once that recognition has been achieved, is the State which protested to remain, so far as regards its own maritime jurisdiction, locked into the previous customary-law regime?

In his separate opinion in the *Nuclear Tests* case Judge Gros drew attention to the fact that the proceedings brought by Australia against France to bring about the cessation of nuclear tests were inconsistent with Australia's earlier attitude to, and co-operation with, similar tests carried out by the United Kingdom on Australian territory.[128] Judge Gros did not however draw the conclusion that Australia was estopped from objecting to the French tests: his view was that

> Active participation in repeated atmospheric [nuclear] tests over several years in itself constitutes admission that such tests were in accordance with the rules of international law.[129]

This, it is suggested, is a more convincing analysis. Particularly in a field governed by customary law, where State practice is constitutive of law, the conduct of the applicant State is at least as valuable as that of any other State as evidence in support of a particular rule. It may however be dangerous to succumb to the temptation to give it more weight, simply because it emanates from the applicant State. Considerations of good faith in an individual case—rejection of a policy which blows first hot and then cold—must not be allowed to distort the development of general customary law.

It may be suspected that the dissenting opinion of Judge Lachs in the *North Sea Continental Shelf* cases fell into this trap. The question was whether the Federal Republic of Germany was bound by the equidistance rule in Article 6 of the 1958 Geneva Convention on the Continental Shelf, to which it was not a party. Judge Lachs attached decisive importance to a

[127] *ICJ Reports*, 1950, p. 278.

[128] *ICJ Reports*, 1974, pp. 279–81. The Australian Government had, with remarkable frankness, explained in its application that the change of attitude resulted from a change of government: ibid., pp. 279–80, para. 5.

[129] Ibid., p. 281, para. 8.

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Proclamation made by the German Government on 22 January 1964, which referred to 'the development of general international law, as expressed in recent State practice and in particular in the signing of the Geneva Convention on the Continental Shelf'.[130] Judge Lachs commented on this:

> Here an opinion is expressed as to the character and scope of the law on the continental shelf. It constitutes in fact a value-judgment on the state of the law on the subject. Indeed it is emphatically implied that the mere signing of that instrument, at a time when it had not yet entered into force, was evidence of general international law. The Federal Republic viewed its own signature as a constituent element of that evidence, thus attaching to it far more importance than is normal in the case of signatures to instruments requiring ratification. If words have any meaning, these could be understood solely as the recognition by the Federal Republic that the Geneva Convention reflected general international law . . .
>
> The proclamation is, therefore, as binding upon the Federal Republic today as it was at the time it was made. A value-judgment of so final a nature may not be revoked. It should therefore be viewed as an unequivocal expression of *opinio juris*, with all the consequences flowing therefrom. Indeed, if it may be claimed that the *opinio juris* of certain other States is in doubt or not fully proven, this is certainly not the case of the Federal Republic. This is a decisive point in the present cases.[131]

The last two sentences quoted suggest that Judge Lachs was not convinced that the equidistance rule in the Geneva Convention had become a matter of general customary law, despite his reference to that Convention as having 'attained the identifiable status of a general law'.[132] Could Germany become bound, otherwise than by acquiescence or estoppel, by a purported rule which had not yet attained full customary-law status?

This brings out an aspect of estoppel which has not been specifically noted in the judicial treatment of it at the international level. One of its essential features may apparently be that the fact which is in issue must be one peculiarly in the knowledge of the person or the State against which estoppel is relied on.[133] In the cases before the International Court now being reviewed, this fact has usually been the subjective attitude, in particular the consent, of the respondent State—than which nothing could be more peculiarly or exclusively within the knowledge of that State. If however the question of fact which it is sought to resolve by estoppel is one which the applicant State could perfectly well resolve by itself, then the

[130] *ICJ Reports*, 1969, p. 233.

[131] Ibid., pp. 235–6.

[132] Ibid., p. 232.

[133] Cf. the duty, which Fitzmaurice suggested should be universal in international relations, to act *uberrimae fidei*, a duty which, as he conceded, is applicable in English law only 'when one of the parties in order to assess the risk or other material factors involved, is obliged to rely on information supplied by the other party and lying peculiarly, or exclusively within that party's knowledge': Fitzmaurice, this *Year Book*, 35 (1959), p. 210; *Collected Edition*, II, p. 614. See also *Recueil des cours*, 92 (1957–II), pp. 54–5.

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respondent State may retort '*solvitur ambulando*', and repudiate any estoppel.[134]

In short, the problem whether estoppel can relate to a question of law may be resolved by the wider rule that the matter to which the estoppel relates must be one where the applicant State had to, and did, rely on the respondent State.[135] If the facts are known to both States, each can form its own assessment of the legal situation which results from them, and the assertion by one of them that the legal situation is thus and thus—which means no more than that it is the *opinion* of that State that such is the legal situation—cannot be relied on to support an estoppel to that effect.

In the case brought by Nicaragua against the United States the argument of estoppel as applicable to a statement of opinion as to the law was also hinted at as against the United States. The Court was dealing with the question of the effect of Article 36, paragraph 5, of the Statute, and in particular the question whether it operated to validate the pre-war Optional Clause declaration of Nicaragua. The cases of the *Aerial Incident of 27 July 1955*, in one of which the United States had been applicant, were referred to in argument. The Court in the later case explained why its judgment in the *Aerial Incident* case had related to a different point, so that it did not consider that that decision 'provides any pointer to precise conclusions on the limited point now in issue'. It immediately added, however:

> 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.[136]

It is by no means apparent what conceivable weight in the discussion could be attached to the fact that the United States, as litigant in a different case many years previously, had taken a 'particularly broad view' on a matter bearing some tenuous relationship with that under discussion. The passage quoted is no more than a debating point and, it is to be hoped, an isolated *lapsus curiae*.

[134] Cf. the application by Tunisia for the revision of the 1962 judgment in the *Continental Shelf (Tunisia/Libya)* case, where the Court rejected the 'new fact' relied on by Tunisia—the exact co-ordinates of a particular Libyan concession in the area—and took into account 'whether the circumstances were such that means were available to Tunisia to ascertain the details of the co-ordinates of the concession from other sources; and indeed whether it was in Tunisia's own interests to do so' (*ICJ Reports*, 1985, p. 205, para. 23). The Court's discussion of what was required by 'normal diligence', in paragraph 27 of its 1985 judgment, could, it is suggested, be transposed to a situation where estoppel was asserted.

[135] In this sense Martin, *L'Estoppel en droit international public* (1979), pp. 293, 322–3.

[136] *ICJ Reports*, 1984, pp. 405–6, para. 29.

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(d) *Action by the applicant State in reliance on the statement to its detriment*

In the *Temple of Preah Vihear* case, one of the grounds on which Judge Sir Percy Spender dissented was that he considered that France did not rely upon any conduct of Thailand in relation to the frontier map, but on the accuracy of the surveys—made by French officers—on which the map was based. In his view, France 'had not the slightest interest in how Siam reacted to [the map]; there was no reaction she would have expected'.[137] For him, therefore, this essential element of an estoppel was lacking.

The requirement was analysed in the *Barcelona Traction* case, in the 1964 judgment on the preliminary objections, where the Court was strict in requiring that the applicant State should somehow be in a worse position than if it had not acted in reliance on the representations allegedly made by the other State. Spain claimed to be worse off as a result of having refrained from objecting to the discontinuance of the earlier proceedings on the faith of the representation, allegedly made by Belgium, that no further proceedings would be brought.

> Without doubt, the Respondent is worse off now than if the present proceedings had not been brought. But that obviously is not the point, and it has never been clear why, had it known that these proceedings would be brought if the negotiations failed, the Respondent would not have agreed to the discontinuance of the earlier proceedings in order to facilitate the negotiations (the professed object); since it must not be overlooked that if the Respondent had not so agreed, the previous proceedings would simply have continued, whereas negotiations offered a possibility of finally settling the whole dispute. Given that without the Respondent's consent to the discontinuance of the original proceedings, these would have continued, what has to be considered now is not the present position of the Respondent, as compared with what it would have been if the current proceedings had never been brought, but what its position is in the current proceedings, as compared with what it would have been in the event of a continuation of the old ones.[138]

This aspect was also a major flaw in any assertion of an estoppel in the *North Sea Continental Shelf* cases; whatever contradictory indications the Federal Republic might have given of its attitude to the 1958 Geneva Convention, there was no evidence of Denmark and the Netherlands having relied on such indications to their detriment.[139]

The same aspect of estoppel may have been present to the mind of the Court in the *Continental Shelf (Tunisia/Libya)* case in 1962 when it took care to make clear that it was not making a finding of estoppel[140] when it attached decisive importance to the '26° line' dividing the petroleum con-

[137] *ICJ Reports*, 1962, p. 145.
[138] *ICJ Reports*, 1964, pp. 24–5.
[139] *ICJ Reports*, 1969, p. 26, para. 30, *in fine*.
[140] *ICJ Reports*, 1982, p. 84, para. 118.

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cessions granted by the two parties.[141] While the concessions actually granted by each party produced a 'de facto line dividing the concession areas which were the subject of active claims',[142] there was no evidence at all that Libya, the second in time to grant a concession extending to the '26° line', had done so because the Tunisian concession ran up to that line, let alone that it had understood Tunisia to be implying that that was the maximum area claimed.

In the *Temple* case the Court referred to Thailand as having 'for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier'.[143] It is submitted that there is here some departure from the requirements of an estoppel, at least on a strict interpretation of those requirements. The benefit to Thailand is not material; what is required is a change in the relative positions of the parties, as on a see-saw, whereby the one profits from the other's detriment. France, and Cambodia, equally with Thailand enjoyed the benefit of the 1904 treaty. Furthermore, the benefit which would be relevant is not the benefit *of the treaty*, which Thailand would have had in any event, but the separate benefit *of the representation* that Thailand accepted the map.[144]

(4) *Relationship between estoppel, preclusion and acquiescence*

The cases examined support the view expressed by the Chamber in the *Gulf of Maine* case that

> acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion.[145]

The close relationship between the two is accentuated in such cases by the circumstance that, even where estoppel was pleaded or discussed, what was sought to be established was an acceptance or consent of the respondent State. Estoppel is however not in principle limited in this way: the fact which the respondent State is to be precluded from denying can be any fact within its actual or presumed knowledge, and does not have to be a fact as to its own state of mind. There is here a radical difference, at the theoretical level, between estoppel and acquiescence, one, however, which has not manifested itself in practice during the period under review.

The other essential distinction is that pointed out by Fitzmaurice, and quoted at the beginning of this section, namely that acquiescence presumes a consent to have existed, on the basis of the factual circumstances, but the

[141] As emerged during the proceedings on the subsequent application for revision and interpretation, the Court was given, and acted upon, a rather over-simplified picture of the position; but the discrepancies later highlighted do not affect the present discussion.

[142] *ICJ Reports*, 1982, p. 84, para. 117.

[143] *ICJ Reports*, 1962, p. 32.

[144] Cf. the Court's analysis of the 'change of position' requirement in the *Barcelona Traction* case (p. 44, above).

[145] *ICJ Reports*, 1984, p. 305, para. 130.

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presumption may be overturned by proof of the contrary;[146] whereas estoppel recognizes the possibility that the consent (or other fact) was non-existent—indeed virtually takes it for granted that that was so—but excludes any proof which would defeat the estoppel.

In the *Temple* case, as we have seen, the Court in effect found both an initial acquiescence and a subsequent estoppel.[147] The *King of Spain* case is more difficult to categorize: the Court in the judgment did not use any of the terms estoppel, preclusion or acquiescence. Judge *ad hoc* Urrutia Holguin apparently classifies the Court's finding as one of acquiescence,[148] and observes also that 'the theory of estoppel cannot be invoked against Nicaragua'.[149] The Court refers to 'the fact that the designation of the King of Spain as arbitrator *was freely agreed to* by Nicaragua . . . ',[150] which is a finding of acquiescence; but the same paragraph concludes that 'it is no longer open to Nicaragua to rely on' its procedural objections, which is terminology more appropriate to preclusion. Similarly, with regard to the question of the validity of the award, the Court found that 'Nicaragua, by express declaration and conduct, recognized the Award as valid', but continues 'and it is no longer open to Nicaragua to go back upon that recognition'.[151] Bearing in mind that the Court does not discuss any reliance by Honduras on Nicaragua's conduct resulting in a change of position, it was appropriate to regard the case as one of acquiescence.

The time element is likely to be more material in cases of acquiescence than in cases of estoppel. If there has been reliance on a statement leading to a change of the relative position of the parties, the time it has taken for this to occur is not relevant; but it may not be easy to say how many years of silence justify a conclusion of acquiescence.

The curious aspect of the *King of Spain* case is that although more than fifty years elapsed between the arbitral award being made by the King and the matter being brought to the International Court, the validity of the King's designation was in fact challenged less than six years after the award. The time taken before proceedings were taken to settle the dispute seems to

[146] Thus in the *Temple* case, Sir Percy Spender in his dissenting opinion regarded the conduct of Siam in relation to the frontier map as no more than evidence of a possible admission, and continued:

> 'Were any such admission the only evidence in this case it could well be conclusive. But it is not the only evidence. There is a great deal more. The task of the Court is to ascertain the true facts. It may in doing so be influenced by an admission established by the conduct of Siam. It cannot however be controlled by it if other evidence negatives or modifies or is inconsistent with the admission which a recognition may establish. The recognition is not conclusive' (*ICJ Reports*, 1962, p. 131).

He made it clear that if the elements of an estoppel had been present, the recognition would have been conclusive: but in his view they were not.

[147] Conceptually this is an inconsistency, but the structure of the judgment is the not uncommon one of 'belt and braces', whereby arguments are cumulated in order to attract the strongest possible majority.

[148] *ICJ Reports*, 1960, p. 228, heading (*b*).

[149] Ibid., p. 236.

[150] Ibid., p. 209.

[151] Ibid., p. 213.

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have carried some weight in the Court's thinking: as A.L.W. Munkman points out,

> it might be thought that excessive stress was laid on a failure to protest against an award for five and a half years—a relatively short period—and a considerable delay in instituting proceedings for settling the dispute.[152]

It may be, however, that the five and a half years amount to a 'relatively short period' only in comparison with the subsequent 45 years of inaction; if the five and a half years were, in the circumstances, enough to support a finding of acquiescence, subsequent delays are irrelevant.

(5) *Estoppel in relation to treaty commitments*

When the question which it is hoped to resolve by appeal to the concepts of acquiescence or estoppel is one of treaty interpretation, application of these concepts overlaps with the established rule of recourse to the subsequent practice of the parties as a means for interpretation of the treaty. As we have seen, this occurred in the *King of Spain* case, in connection with the definition of the date from which the ten-year period of validity of the treaty should run..

A major complicating factor in the *Temple* case was the relationship between the map, to which Thailand was bound by either acquiescence or preclusion, and the 1904 treaty, which provided for the frontier in the disputed area to follow the watershed, which the line on the map, it was generally recognized, did not. Could the treaty between the parties be varied by a deemed consent derived from application of the principle of preclusion? The Court's answer to this was that the acceptance of the map by the parties 'caused the map to enter the treaty settlement and to become an integral part of it'.[153] The obvious difficulty with this view was that the map contradicted the treaty; for this reason, it was not possible to appeal, as in the *King of Spain* case, to the rule as to interpretation of a treaty by subsequent practice of the parties. However, in the Court's view:

> It cannot be said that this process involved a departure from, and even a violation of, the terms of the Treaty of 1904, wherever the map line diverged from the line of the watershed for, as the Court sees the matter, the map (whether in all respects accurate by reference to the true watershed line or not) was accepted by the Parties in 1908 and thereafter as constituting the result of the interpretation given by the two Governments to the delimitation which the Treaty itself required. In other words, the Parties at that time adopted an interpretation of the treaty settlement which caused the map line, in so far as it may have departed from the line of the watershed, to prevail over the relevant clause of the treaty.[154]

[152] 'Adjudication and Adjustment — International Judicial Decision and the Settlement of Territorial and Boundary Disputes', this *Year Book*, 46 (1972–3), p. 96.

[153] *ICJ Reports*, 1962, p. 33.

[154] Ibid., pp. 33–4.

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The point is explained perhaps more clearly by Judge Sir Gerald Fitzmaurice:

> . . . I cannot accept the plea so eloquently urged on behalf of Thailand that any adherence to the Annex I line would have involved a departure from a solemn treaty obligation. This surely begs the question; for as the Judgment says, it is always open to governments, in their bilateral relations, to agree on a departure of this kind, provided they do so knowingly, or (as I think was Thailand's case here) in circumstances in which they must be held to have accepted, and as it were discounted in advance, the risks or consequences of lack, or possible lack, of knowledge. In the present case, the conduct of each Party, over what was an important matter of common concern to both, was, in my opinion, evidence of, or amounted to, a mutual agreement to accept a certain line as the frontier line. What seems to me therefore really to have occurred was not in the legal sense a departure from the treaty provision concerned, but the mutual acceptance of a certain result as being its actual outcome, irrespective of the precise conformity of that outcome with the treaty criterion.[155]

This and some further arguments used by the Court pertain to the subject of treaty interpretation, and will, as such, be discussed in a later article. For present purposes, dealing with acquiescence and preclusion, the following may be said.

One interpretation of the silence of Siam is to read it as saying, on the basis that the treaty provided that the frontier was to follow the watershed, two things: (1) the line on the map follows the watershed; (2) I accept the map line as the treaty frontier. An alternative interpretation is to substitute the following: (1) the line on the map does not follow the watershed; (2) but since the line is otherwise an appropriate line, I accept the map line as the treaty frontier. The third interpretation is that of the Court: I accept the map line, whether or not it follows the watershed, as the treaty frontier.

The difficulty with the first interpretation is that (1) is an incorrect representation, not of Siam's attitude, but of geographical fact, the truth or otherwise of which was perfectly ascertainable by Cambodia, so that it did not need to rely on the representation by Siam. The second interpretation is perfectly workable; but it does not correspond to the historical facts, since the discrepancy between the map line and the watershed line was apparently not discovered until a survey in 1934–5. The problem with the third interpretation is: how could Cambodia—or the Court—tell that it was this third interpretation that Siam was conveying by its conduct, since outwardly the three would be indistinguishable?

It was in fact argued by Thailand that from 1908 to 1935 it believed that the map line and the watershed line coincided, and therefore that if it accepted the map line, it did so only in that belief. The Court rejected this argument on the facts, since the claim was inconsistent with other claims by Thailand.[156] Had these other claims not been made, however, and had the

[155] Ibid., p. 56.
[156] Ibid., p. 33.

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Court considered that Thailand was under a misapprehension of this nature, the problem referred to above would have required to be solved.

Thailand also contended that an error was committed, an error of which the Siamese authorities were unaware at the time they accepted the map. The Court rejected this contention also:

> It is an established rule of law that the plea of error cannot be allowed as an element violating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put the party on notice of a possible error.[157]

The Court found as a fact that on the face of the map, 'to anyone who considered that the line of the watershed at Preah Vihear ought to follow the line of the escarpment' (which the map line did not), there was everything to put such a person upon enquiry.[158]

There is here a slight, but interesting, extension of the rules as to error in this connection. It is reasonable to expect that a State, before taking the step of giving its consent to some act or instrument, will scrutinize it properly, and it is therefore reasonable that if the circumstances are such as to put the State on notice of a possible error, it is bound to investigate, or lose the opportunity of invoking the error. In sum, this rule is itself a form of presumed acquiescence or preclusion. But where there is in fact no meditated act of acceptance, which ought to have been preceded by such enquiry, but a deemed acceptance attributed to the State on account of silence, it becomes somewhat artificial to pile preclusion on preclusion, as it were, and exclude a plea of error.

3. *The Role of Equity in International Law*

During the period under review there has been a striking increase in references to equity in the work of the Court—not only in the pleadings of the parties, but in the judgments themselves; so much so that one observer has felt able to declare that 'After fifty years of hesitation the World Court has clearly accepted equity as an important part of the law that it is authorized to apply'.[159] Concepts of equity have certainly had a very extensive influence in one particular domain—that of the delimitation of maritime areas; but it is probably premature to see in the decisions of the Court even in that specific field the application of any consistent and mature theory of equity. In matters unconnected with maritime delimitation, equity has been referred to and applied sporadically, but in ways which paradoxically are easier to reconcile with classical concepts of equity than the specialized use of it in disputes over maritime areas.

It had been the writer's intention, when planning this cycle of articles, to

[157] Ibid., p. 26.
[158] Ibid.
[159] Sohn, 'The Role of Equity in the Jurisprudence of the International Court of Justice', *Mélanges Georges Perrin* (1984), p. 311.

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include in the first of the series an extended treatment of the concept of equity as it has appeared and taken shape in the decisions of the Court during the period under review. It became apparent, however, on fuller study of the question, that such a treatment would necessarily involve concentration on the particular field of law in which equitable considerations have played an extremely prominent part—the law of maritime delimitation—and would in addition need to be very long. The writer therefore came to the conclusion that it would make for a better balanced structure of the series of articles to reserve the examination of equity in this specialized context for a later chapter. The present section will therefore be confined to a few observations outlining some of the issues arising on this topic, and mention of some instances of equity having been invoked outside the field of delimitation of maritime territories.

(1) *Equity and* ex aequo et bono

If there is one thing on which the numerous scholars who have written on the subject agree, and one observation which the Court has made over and over again, with—it would seem—the unanimous support of its Members, however much they may disagree on other aspects of equity, it is that a decision in application of equity is not the same thing as a decision *ex aequo et bono*, contemplated by Article 38, paragraph 2, of the Statute as possible with the agreement of the parties.[160] Whether the distinction between the two is in practice as clear as this repeated *dictum* would suggest is another matter, and was doubted as early, in the context of boundary delimitation, as 1972.[161] In 1977, E. Lauterpacht considered that

> It must be appreciated that whether we are discussing a decision *ex aequo et bono* (in traditional terms, a decision completely outside the law) or whether we are considering equity in the new sense of 'equity within the law', we are talking about a situation in which the court is being asked to apply a subjective or discretionary element. The court is not applying the law; it is creating the law for the parties.[162]

For the Court, however, the distinction is vital, in view of the requirement in Article 38, paragraph 2, of the Statute that a decision of this type be taken only with the agreement of the parties.

Judge Sir Robert Jennings, in an extra-judicial capacity, has taken an opposite view to that of Lauterpacht, and emphasized the reality and importance of the distinction between equity and *ex aequo et bono*. His submission is that

there is indeed a difference of great importance between the two kinds of equity,

[160] *ICJ Reports*, 1969, p. 21, para. 17; p. 48, para. 88; 1982, p. 60, para. 71; 1984, p. 278, para. 59; 1985, p. 39, para. 45; 1986, p. 567, paras. 27–8; p. 633, para. 149.

[161] See Munkman, 'Adjudication and Adjustment—International Judicial Decision and the Settlement of Territorial and Boundary Disputes', this *Year Book*, 46 (1972–3), p. 88.

[162] 'Equity, Evasion, Equivocation and Evolution in International Law', *Proceedings of the American branch of the ILA*, 1977–8, p. 45. Judge Koretsky was of the same view in 1969: *ICJ Reports*, 1969, p. 166. Cf. also Weil, *Perspectives du droit de la délimitation maritime* (1988), pp. 180–1.

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which may be expressed shortly in the following way. A decision *ex aequo et bono* could well be made without the need of specifically legal training or skill; indeed may perhaps be made better by one with a different skill. On the other hand, a decision according to equity as part of the law should mean the application to the case of principles and rules of equity for the proper identification of which a legal training is essential. The appreciation and application of equity so conceived is essentially juridical. And this is surely the kind of decision that parties seek, when they have not agreed to ask for a decision *ex aequo et bono*, and when they seek instead a decision according to law, albeit one that is also in accordance with the requirements of equity.[163]

The distinction here made is an interesting one, to which we shall return in a later article; but the essential point here is that both Sir Robert Jennings individually and the Court collectively regard *ex aequo et bono* as an extra-judicial activity, and equity as part of the law. A problem to be studied is therefore whether equity, while part of the law, is somehow different from the rest of law: whether equitable principles, while contained in the body of legal principles, yet have a special character which sets them off from other principles in that wider category.

(2) *Equity as part of the law*

The Court's first general enunciation of the position of equity in international law was made in the *North Sea Continental Shelf* cases, in a celebrated passage[164] which, however, one could have wished more lucidly expressed:

> The Court comes next to the rule of equity. The legal basis of that rule in the particular case of the delimitation of the continental shelf as between adjoining States has already been stated.

This is a reference to the finding earlier in the judgment that one of the 'basic legal notions' which 'have from the beginning reflected the *opinio juris* in the matter of delimitation' was that agreement on delimitation 'must be arrived at in accordance with equitable principles'.[165]

> It must however be noted that the rule rests also on a broader basis. Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable.

This appears to exclude the possibility of an international tribunal having to apply a rule in circumstances in which its results were unjust or 'inequitable'; but it may mean no more than that a judicial decision is deemed, *ex definitione*, to be a just decision.

Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in

[163] 'Equity and Equitable Principles', *Schweizerisches Jahrbuch für internationales Recht*, 42 (1986), p. 30.

[164] *ICJ Reports*, 1969, p. 48, para. 88.

[165] Ibid., p. 46, para. 85.

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considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles.

The concept seems to be that there is a body of ideas which may be designated 'equitable principles', which can, in some legal circumstances but not in all, be made use of because there is a rule of law which authorizes their use. According to the literal meaning of the text, the body of ideas is not necessarily itself part of the corpus of law: the 'considerations lying . . . within the rules' are, apparently, not what is invoked (equitable principles) but the invoking mechanism (a rule of law). Thus a rule of international law might call for a matter to be decided by reference to equitable principles, just as a rule of international law might call for a matter to be decided by reference to a system of national law.[166]

There is consequently no question in this case of any decision *ex aequo et bono*, such as would only be possible under the conditions prescribed by Article 38, paragraph 2, of the Court's Statute.

The reference to *ex aequo et bono* emphasizes *a contrario* that the Court is, in applying equitable principles, exercising its normal powers. It also suggests, however, that there is, at least, some kinship between the application of equitable principles and *ex aequo et bono*, even though while equitable principles are part of the law and legitimate, *ex aequo et bono* was born on the wrong side of the blanket.

The twofold basis referred to by the Court for the application of equitable principles in the *North Sea Continental Shelf* cases is to be noted, as it is at the root of some, at least, of the confusion which has subsequently surrounded the question. According to the Court, a customary law rule had arisen from State practice whereby the continental shelf was to be delimited by agreement in accordance with equitable principles. There was no *a priori* reason why the principles applied for the delimitation should have had to have anything legal about them; a customary rule could have arisen whereby delimitation was to be effected according to geological principles (natural prolongation?) or geometrical principles (equidistance?). In the context of, for example, the Truman Proclamation—the *fons et origo* of the expression—'equitable principles' probably meant no more than 'on a fair-shares basis'.[167]

The Court could have left it at that: once it had found that there was a customary-law rule of specified content, it had no need to justify the content of the rule in any way. However it went on to offer a 'broader basis' for the rule, first by referring to the duty of a Court to give decisions which are just 'and therefore in that sense equitable'; but the role of the Court was not in question; it was for the parties to arrive at an agreement 'in accordance

[166] Judge Morelli, though his approach is a different one, expresses the point as the '*renvoi* to equity by the legal rule': ibid., p. 213.

[167] Judge Koretsky thought that the reference in the Truman Proclamation 'means nothing more than calling upon neighbouring States to conclude agreements': ibid., p. 166.

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with equitable principles', and while the Court regarded itself as entitled to give some guidelines,[168] it was not itself deciding what the result—which should be equitable—should be. The Court then reverted to the 'rule of law that calls for the application of equitable principles'—by the parties, not by the Court—, namely the existence of a custom to that effect.

Up to this point it should have been clear that the 'equitable principles' were not part of the *depositum juris* being applied by the Court; they were in a separate box, so to speak, which the Court was authorizing or directing the parties to open, and to employ its contents so as to agree their delimitation. However, when giving 'some degree of indication as to the possible ways in which [equity] might be applied in the present case',[169] the Court was clearly influenced by ideas of *legal* equity, not merely layman's equity—general fairness: in particular some of its observations[170] suggested the role of equity as corrective of injustice resulting from the application of rigid rules—eminently a jurisprudential concept.

This aspect, as well as the distinction between 'equitable principles' and legal rules, was underlined in the separate opinion of Judge Ammoun, who linked for this purpose international law with Roman law:

> Thus it is necessary to make a distinction between the principle of equity in the wide sense of the word, which manifests itself, in the phrase of Papinian, *praeter legem*, as a subsidiary source of international law in order to remedy its insufficiencies and fill in its logical lacunae; and the settlement according to independent equity, *ex aequo et bono*, amounting to an extra-judicial activity, in the expression of the same jurisconsult, *contra legem*, whose role is, with the agreement of the parties, to remedy the social inadequacies of the law.[171]

However, Judge Ammoun considered that on this point he was differing from the judgment which, in his view, was envisaging 'abstract equity'.[172]

The possibility of the Court deciding in equity was raised, in a very different context, in the *Barcelona Traction* case; the circumstances of that case will be examined elsewhere.[173] What may be noted for present purposes is that the Court, while making no pronouncement of principle on the role of equity, and rejecting Belgium's claim based on equity, did apparently recognize that in certain circumstances a right of diplomatic protection might be based on 'considerations of equity',[174] which therefore (presumably) would form part of international law.

In the *Fisheries Jurisdiction* cases, the Court found the existence of an obligation on the parties to negotiate to bring about 'an equitable apportionment of the fishing reserves' in the disputed area, and added:

[168] Ibid., p. 50, para. 92.
[169] Ibid.
[170] Ibid., p. 49, para. 89; p. 49, para. 91.
[171] Ibid., p. 139, para. 37.
[172] Ibid.
[173] Below, p. 59.
[174] *ICJ Reports*, 1970, p. 48, para. 92.

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it is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law.[175]

Once again the Court held that international law directed the parties to a box marked 'equity', the contents of which might or might not themselves form part of the law;[176] and it was sufficient that the solution *derived from* the applicable law.

In the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, the Court was not merely asked, as in the *North Sea* cases, to indicate the relevant principles and rules of international law, but also to 'clarify the practical method for their application'; in fact, it virtually drew the parties' line for them. Furthermore, it was expressly directed in the Special Agreement to 'take its decision according to equitable principles'.[177]

After discussing the 'equitable principles' which it considered it was bound to apply, the Court, made the following general statement of its conception of equity:

> Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it. In the course of the history of legal systems the term 'equity' had been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law. Moreover, when applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice. Application of equitable principles is to be distinguished from a decision *ex aequo et bono*. The Court can take such a decision only on condition that the Parties agree (Art. 38, para. 2, of the Statute), and the Court is then freed from the strict application of legal rules in order to bring about an appropriate settlement. The task of the Court in the present case is quite different: it is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result. While it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice.[178]

It is clear from this passage that the 'equity' or 'equitable principles' which have to be applied to achieve a delimitation are no longer imported from outside the law, by way of the operation of *renvoi*; they are part of the equity within the law itself. It is possible that the increased role which the

[175] *ICJ Reports*, 1974, p. 33, para. 78; p. 202, para. 69. Judge de Castro considered that it was within the powers of the Court itself to 'decide according to principles of equity' and indicate the solution, but that to do so would not be 'a wise course': p. 103.

[176] E. Lauterpacht, loc. cit. above (n. 162), p. 4, criticizes the Court for failing to indicate why, in terms of applicable law, it was necessary to 'reach an equitable solution'. The answer probably lies in the feeling that the solution to a dispute must *ex definitione* be equitable – cf. the *North Sea dictum* as to the decision of a court of justice.

[177] *ICJ Reports*, 1982, p. 23 (Libyan translation of the Special Agreement).

[178] Ibid., p. 60, para. 71.

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Court was requested to play in the delimitation has something to do with this. There is in the first place the magnetic attraction of the corpus of equity (of ill-defined content) contained within international law in matters other than maritime delimitation. What is more, it is no longer a matter of parties agreeing on what they think is fair, in the light of suggestions from the Court, but of the Court applying equitable principles. Admittedly, it was directed to do so by the Special Agreement; but there is no hint in the judgment that this was regarded as a direction to apply some sort of *lex specialis* which would otherwise have been outside its reach.

There is some confirmation of this movement from laymen's equity to lawyer's equity to be found in the judgment in the case of the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*. The Court there reproduces 'a much-quoted *dictum*' from the *North Sea* cases:

> In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.[179]

To which it adds the following gloss:

> Yet although there may be no legal limit to the considerations which States may take account of, this can hardly be true for a court applying equitable procedures. For a court, although there is assuredly no closed list of considerations, it is evident that only those that are pertinent to the institution of the continental shelf as it has developed within the law, and to the application of equitable principles to its delimitation, will qualify for inclusion. Otherwise, the legal concept of continental shelf could itself be fundamentally changed by the introduction of considerations strange to its nature.[180]

In short, States may determine their delimitation on a basis of *ex aequo et bono*, but the Court, even when applying equitable principles, must confine itself to what is within the body of law.

With the judgment of the Chamber formed to deal with the *Frontier Dispute*, the presence of equity *within* the body of international law became the subject of explicit judicial declaration:

> It is clear that the Chamber cannot decide *ex aequo et bono* in this case. Since the Parties have not entrusted it with the task of carrying out an adjustment of their respective interests, it must also dismiss any possibility of resorting to equity *contra legem*. Nor will the Chamber apply equity *praeter legem*. On the other hand, it will have regard to equity *infra legem*, that is, that form of equity which constitutes a method of interpretation of the law in force, and is one of its attributes.[181]

The Chamber quotes the sentence from the *Fisheries Jurisdiction* judgments

[179] *ICJ Reports*, 1969, p. 50, para. 93.
[180] *ICJ Reports*, 1985, p. 40, para. 48.
[181] *ICJ Reports*, 1986, pp. 567–8, para. 28.

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referring to the need to find 'an equitable solution derived from the applicable law'. What that solution was will be noted elsewhere.

(3) *Equity as corrective or constitutive of law*

If equitable principles are part of the corpus of law, it may be asked what distinguishes them from other rules of law—what is the mark of an equitable rule as distinct from a legal rule? As the Court observed in 1969, the decisions of a Court, based on law, are to be regarded as just, and in that sense equitable.

One possible answer is that equitable rules do not and cannot operate independently, to create rights and obligations; they are a moderating or correcting mechanism in relation to 'strict' rules of law. This is an interpretation of equity which has a respectable ancestry, back to the Ethics of Aristotle—the idea of equity as 'a correction of law where it is defective owing to its universality'.[182] It is the sense of equity *praeter legem* referred to by Judge Ammoun, in the passage quoted above, and by the *Frontier Dispute* Chamber. It is also deeply rooted in English law, as Sir Gerald Fitzmaurice recalled in his separate opinion in the *Barcelona Traction* case[183] where he quoted the definition of equity given in Snell.[184] Sir Robert Jennings, in the article quoted, suggests that one of the lessons which international law stands to learn from the experience of English law is 'that the rules of equity in a developed form are seen as additional to, and complementing rules of law, and thus refining it in its application to particular cases or for particular new purposes'.[185]

Chronologically, the next case in which equity was considered was the *Barcelona Traction, Light and Power Co.* case in 1970; but since this raises somewhat different aspects of equity, consideration of it will be deferred for the moment.

When the 1982 judgment in the *Tunisia/Libya* case was given, only three Members of the 1969 Court, which had given the *North Sea* judgment, were still sitting (Judges Forster, Gros and Lachs). One of them, Judge Gros, attached a dissenting opinion in which he complained that 'the way the Court set about the search for an equitable delimitation' was 'contrary to the concept of the role of equity in the delimitation of the continental shelf adopted by the Court in its 1969 Judgment'.[186] For Judge Gros, 'A court of justice only has recourse to equitable principles if faced with a legal situation such that the result obtained by applying the rules of law on the delimitation . . . appears inequitable on account of . . . geographical features'.[187] He continues:

A court of justice does not modify a delimitation because it finds subjectively

[182] 'ἐπανόρθωμα νόμου, ᾗ ἐλλείπει διὰ τὸ καθόλου'.
[183] *ICJ Reports*, 1970, p. 85, para. 36.
[184] *Snell's Principles of Equity* (26th edn. by Megarry and Baker, 1966), pp. 5–6.
[185] Loc. cit. above (n. 163), p. 28.
[186] *ICJ Reports*, 1982, p. 148, para. 9.
[187] Ibid., p. 149, para. 13.

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that it is less advantageous to one party than to the other, for this would be to embark upon the vain task of equalizing the facts of nature; it notes, having taken into consideration all the factors contemplated by the applicable law, that some of those factors, which are relevant, have disproportionate or inordinate effects which, perhaps, may generate inequity—which remains to be demonstrated. Only then, after this has been shown to be the case, comes the problem of balancing the equities as between the two Parties . . . and their application to the construction of the delimitation line.[188]

Somewhat further on in his opinion, Judge Gros declares: 'Equity is not a sort of independent and subjective vision that takes the place of law'.[189]

The passage in the judgment on which his dissent presumably focused was the statement that the Court did not consider that it was required

as a first step, to examine the effects of a delimitation by the equidistance method, and to reject that method in favour of some other only if it considers the results of an equidistance line to be inequitable.[190]

In other words, for Judge Gros, the function of equity, as contemplated in the 1969 judgment, was essentially corrective rather than constitutive; it was necessary to apply equitable considerations where the results to which the legal rules pointed seemed to be lacking in fairness.[191] This conception of the operation of equity in the international field was however flatly contradicted by Judge Jiménez de Aréchaga in the *Tunisia/Libya* case. He referred to the contention

that equity is to be viewed as a discretionary or moderating influence superadded to the rigour of formulated law; that it consists of the correction of a general rule when that rule, by reason of its generality, works hardship in a concrete case and produces results which are felt to be unfair,[192]

and commented:

There is no denying that this is a current conception of equity, which may be a correct one in the municipal law field. However, it is not the conception of equity applicable to continental shelf delimitation, as proclaimed by the Court in 1969 and developed by the [Anglo-French] arbitral tribunal in 1977.[193]

Judge Jiménez de Aréchaga's own view of the role of equity, at least as regards maritime delimitation, was as follows:

To resort to equity means, in effect, to appreciate and balance the relevant circumstances of the case, so as to render justice, not through the rigid application of

[188] Ibid., p. 150, para. 13.

[189] Ibid., p. 153, para. 19.

[190] Ibid., p. 79, para. 110.

[191] This was also the view of Ch. De Visscher, writing in 1972 (*De l'équité dans le règlement arbitral ou judiciaire des litiges de droit international public*, p. 5): 'La fonction de l'équité apparaît tantôt comme corrective, tantôt comme supplétive de la règle du droit.'

[192] *ICJ Reports*, 1982, p. 105, para. 19.

[193] Ibid., para. 20. The same view is firmly stated in Jiménez de Aréchaga's paper on 'The Conception of Equity in Maritime Delimitation', *International Law at the Time of its Codification* (Milan, 1987), vol. 2, p. 238.

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general rules and principles and of formal legal concepts, but through an adaptation and adjustment of such principles, rules and concepts to the facts, realities and circumstances of each case. As was well stated by the 1977 Court of Arbitration, equity is 'to be looked for in the particular circumstances of the present case' . . . In other words, the judicial application of equitable principles means that a court should render justice in the concrete case, by means of a decision shaped by and adjusted to the relevant 'factual matrix' of that case. Equity is here nothing other than taking into account of a complex of historical and geographical circumstances the consideration of which does not diminish justice but, on the contrary, enriches it.[194]

The judgment of the Chamber formed to deal with the *Gulf of Maine* case does not advance the present discussion: it concentrated strictly on the law of maritime delimitation, and did not comment in any general way on the role of equity in the law. It defined what it regarded as the 'fundamental norm' established by customary law in this field, and this contains the element that the delimitation is to achieve 'an equitable result'.[195] Judge Gros again dissented, and stated in his dissenting opinion that he incorporated into it a number of paragraphs of his dissenting opinion in the *Tunisia/Libya* case, including the passages from that opinion quoted above.[196]

Thus in the field of maritime delimitation any conception of equity as a corrective mechanism has tended to fade away in the face of a conception of equitable principles as specially flexible rules of law. We are therefore driven back to the query: why equity, rather than an adjustment of the law?

(4) *Why equity?*

If international law in a particular field comprises a number of clearly established rules, and a case arises which is not covered by any of those rules, but in which considerations of fairness point to a particular conclusion, why can the law not be extended by analogy? Why is it necessary to invoke the idea of equity in order to justify extending or adapting the law to the particular case? A possible answer may be the reluctance of the international judge to give even the appearance of legislating. Where law derives from the practice of States creative of custom, States in a particular situation not directly covered by practice and precedent may be induced by considerations of analogy, and indeed of fairness and justice, to adopt a novel solution, which, as an element of practice, contributes to the growth of law in an equitable direction.[197] But it is a bolder step for an international judge to assert that in the circumstances before him, States would

[194] *ICJ Reports*, 1982, p. 106, para. 24.
[195] *ICJ Reports*, 1984, p. 300, para. 112.
[196] Ibid., p. 378, para. 28.
[197] Schwarzenberger, 'Equity in International Law', *Year Book of World Affairs*, 1972, p. 346, considers that 'The movement from primitive and archaic legal systems to mature and developed legal systems tends to be accompanied by a change in emphasis from *jus strictum* to *jus aequum*', and that this is paralleled in the development of international law. The *jus aequum* however remains a *jus*, not a system of equity, even if more imbued with ideas of reasonableness and good faith than the *jus strictum*.

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have reacted in such a way, since the very existence of the dispute is there to show that the two States before him did not—or at least one of them didn't. A judge cannot openly anticipate custom; if he is to go where custom has not yet gone, he needs an embodiment of his sense of justice to bolster his conclusions—and that is equity. Thus purely fortuitous circumstances may dictate whether a given development of the law in a particular field will come to pass as a development of customary law—as State practice—or as an equitable complement to the law—by judicial decision.

It is of course true that the absence of a rule of customary law may be other than fortuitous. It may be that, on closer examination, the lack of rule is in fact a negative rule, that States have shown, if only by inaction, that they did not consider it appropriate to adopt the rule which, to the judge, seems to be dictated by equity. Even if there is no 'negative practice' of this kind, the judge must tread warily.

In the *Barcelona Traction* case, the point in issue, expressed in simplest terms, was whether, in the event of injury by State A to a corporation (specifically, a limited liability company) whose national State was State B, State A could be required to make reparation to State C for the damage suffered by its nationals, shareholders in the corporation. For the purposes of discussion, it is to be assumed that no (or insufficient) practice, in the sense of successful diplomatic claims in comparable circumstances, could be relied on to found a customary-law rule of diplomatic protection of shareholders.[198]

The Court dismissed the claim, in effect on the basis that there was no right of action in the circumstances—which is, as noted above, a finding that there *is* a legal rule to the effect that there *is not* a right of action. Although the Court observed that 'International law may not, in some fields, provide specific rules in particular cases',[199] its finding was in no way equivalent to a *non-liquet*.[200]

The Court did in addition examine the question whether 'considerations of equity do not require that [Belgium] be held to possess a right of protection' of its shareholder nationals.[201] In its Memorial, Belgium had observed:

> Mais ce n'est pas seulement l'application des règles précises déduites ci-avant de la pratique et de la jurisprudence internationales, qui qualifie le Gouvernement belge pour l'introduction de la présente demande, c'est aussi l'équité,[202]

[198] There is in fact some evidence of relevant practice, in particular lump-sum settlement agreements involving shareholders' claims; and this aspect of the judgment was vigorously criticized by Lillich, who accuses the Court of having been 'perfunctory' in its efforts 'to ascertain and apply customary prescriptions': 'The rigidity of Barcelona', *American Journal of International Law*, 65 (1971), p. 525. The practice had already been discussed by Judge Wellington Koo at the preliminary objection stage of the case: *ICJ Reports*, 1964, p. 63.

[199] *ICJ Reports*, 1970, p. 38, para. 52.

[200] This aspect will be considered further below, at pp. 81 ff.

[201] *ICJ Reports*, 1970, pp. 48–50, paras. 92–101.

[202] Memorial of Belgium, para. 328, *Pleadings*, vol. 1, p. 161.

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and the Memorial went on to quote a passage from an arbitral award of Max Huber:

> Le droit international qui, dans ce domaine, s'inspire essentiellement des principes de l'équité n'a établi aucun critère formel pour accorder ou refuser la protection diplomatique à des intérêts nationaux liés à des intérêts appartenant à des personnes de nationalités différentes.[203]

This reliance on equity disappeared subsequently from the arguments of Belgium, following the presentation of the Spanish preliminary objections; the suggestion seems however to have been that equity is part of the law on diplomatic protection, not merely required to correct or supplement it.

The Court first ruled that Belgium had no *jus standi* to exercise diplomatic protection of shareholders where no rights (as distinct from interests) of the shareholders had been prejudiced; this part of the judgment will be considered later. The Court then turned to 'considerations of equity', and observed:

> 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 has been 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.
>
> 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.
>
> 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.[204]

The two stages in the *Barcelona Traction* judgment, whereby equity was turned to only after the law had been found not to afford the Belgian Government a remedy, suggest that the Court was influenced by the idea of equity as corrective or supplemental in effect, the view which later decisions seem to have banished—at least so far as maritime delimitation is concerned. But it remains unclear why if 'it is necessary that the law be applied reasonably', it could not be held simply that the law itself might

[203] *Ziat, Ben Kiran* case, *UN Reports of International Arbitral Awards*, vol. 2, pp. 729–30, quoted in Memorial of Belgium, loc. cit.

[204] *ICJ Reports*, 1970, p. 48, paras. 92–4 (numbering omitted).

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provide protection for shareholders in appropriate cases. One explanation may be that tentatively advanced above: the difficulty of finding the existence of a customary-law rule in the absence of specific practice.

It may be significant that Judge Jessup, in his separate opinion, apparently makes no distinction between rules of international law deriving from equitable considerations and rules of international law *tout court*. Judge Jessup recognizes three 'exceptions' to a general rule providing for diplomatic protection of the corporation itself: where the corporation has the nationality of the respondent State; where the corporation has been wound up; and in case of direct injury to the shareholders.[205] Of these three, Judge Jessup observes that the rationale of the first 'seems to be based largely on equitable considerations', and adds that 'the result is so reasonable it has been accepted in State practice'.[206]

Still more striking is the remarkably prudent attitude displayed in the separate opinion of Sir Gerald Fitzmaurice. He there recognized that

> the present state of international law leads to the inadmissible consequence that important interests may go wholly unprotected, and that what may possibly be grave wrongs will, as a result, not be susceptible even of investigation.[207]

After quoting authority to support the view that 'international law is to be applied with equity', he referred to the Court's judgment in the *North Sea Continental Shelf* cases as having introduced 'the considerations which led it to found its decision in part on equitable considerations' and added '*as it might well have done in the present case also*'.[208] The commentator is left wondering why it didn't, or at least why Judge Fitzmaurice did not dissent, holding that it should have done.

In conclusion, we may revert to the distinction, advanced above, between the development of customary law by extension of practice, which only States can do, and completion of customary law by equitable filling-in, which is the role of the judge. The judge must state and apply customary law as he finds it; he cannot, if the *Barcelona Traction* judgment reflects general judicial law, apply, as custom, what he thinks would be a good practice but which States apparently have not yet got round to adopting. The two spheres of action are so far distinct; but can equity form a part of customary law? May States by custom create law which requires recourse to equitable considerations? It is difficult to say that they cannot, but it is a thesis worth exploring that it is better that they should not. This does not mean that States may not be guided by concepts of fairness and justice in deciding how to act where the law leaves them a discretion; but it is the act in itself, as an element of practice, that makes the contribution to international customary law. The role of equitable principles is to push the

[205] Ibid., pp. 191-4, paras. 50–6.
[206] Ibid., pp. 191–2, para. 51.
[207] Ibid., p. 84, para. 35.
[208] Ibid., p. 85, para. 36 (emphasis added).

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custom-created law in an appropriately just direction; they are not themselves part of that law.

The obvious instance is the Truman Proclamation, as interpreted and applied in the *North Sea Continental Shelf* cases. When the Proclamation declared that the boundary of the shelf 'shall be determined by the United States and the State concerned in accordance with equitable principles', it was in effect looking forward to an accumulation of practice which would implement the vague idea of 'equitable principles' and produce customary law. Unfortunately, when the Court was called upon in 1969 to say what was that customary law, it was unable to find that the application of equity had, up to that time, produced anything concrete which had attained sufficient acceptance to rank as customary law. The Court was therefore forced back on the very terms of the Proclamation, and allowed the 'equitable principles' (of undefined content) to move from the sphere of influence on the making of law into the sphere of law proper. This must have appeared justified—indeed, the judgment did so justify it—on the grounds that the application of equitable principles in appropriate circumstances was a normal judicial function. What may have been overlooked was that it was precisely that—a judicial function, not one appropriate for consensual law-making by the subjects of law, if only because what is equitable is such a subjective matter—one State's equity is another State's inequity.[209] To this may be ascribed many of the difficulties that have subsequently arisen in marine delimitation—but that is another story.[210]

4. *Application of Certain General Legal Maxims*

(1) *The possession of rights involves the performance of the corresponding obligations*

This principle was mentioned by Fitzmaurice in his very first article,[211] by reference to the *dictum* in the advisory opinion on the *International Status of South West Africa* that 'To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified'.[212] In the opinion in the *Namibia* case, the Court reverted to this principle, but in a different form, when, referring to the relationship established between the United Nations and each Mandatory Power with the entry into force of the Charter, it stated that

> One of the fundamental principles governing the international relationship thus established is that a party which disowns or does not fulfil its own obligations can-

[209] A similar point — or the same point seen from a different angle — is made by Prosper Weil in his brilliant study *Perspectives du droit de la délimitation maritime* (1988), pp. 118–23; as he observes, 'La différence entre [les] deux visages de l'équité — celle des gouvernements qui négocient une délimitation et celle du juge qui la décide — est fondamentale' (p. 122).

[210] To be considered further in a later article.

[211] This *Year Book*, 27 (1950), p. 8; *Collected Edition*, I, p. 8.

[212] *ICJ Reports*, 1950, p. 133.

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not be recognized as retaining the rights which it claims to derive from the relationship.[213]

While this is a logical development, or corollary, of the 1950 *dictum*, its precise scope is less well-defined. To take treaty law as a parallel, there can be no doubt that a party to a treaty cannot claim to retain the rights it derives from the treaty while at the same time denying its obligations thereunder; but it is less certain in what circumstances to disown or fail to fulfil such obligations will have the effect of bringing about a forfeiture of the treaty rights.

The Court in fact transferred the debate on to the terrain of treaty relationships. After reciting the relevant parts of General Assembly Resolution 2145(XXI), it continued:

> In examining this action of the General Assembly it is appropriate to have regard to the general principles of international law regulating termination of a treaty relationship on account of breach. For even if the mandate is viewed as having the character of an institution, as is maintained, it depends on the international agreements which created the system and regulated its application.[214]

Thus the Court does not elaborate on the practical implications, outside the realm of treaty law, of the general principle it enunciated. Whatever the academic interest of such an elaboration might have been, it has to be conceded that it would probably be of little practical impact, since examples of relationships involving rights and obligations which are not in some way conventional or treaty-derived do not spring to mind.[215]

(2) Pacta tertiis nec nocent nec prosunt

Good faith, in the broad sense requiring the observance of *pacta*, reaches the limit of its application when the *pactum* in question was concluded by the States other than the State whose conduct is in issue: hence the principle that *pacta tertiis nec nocent nec prosunt*.

In considering the application of this principle, it will be convenient to begin with the most recent case in which it has been considered in a decision: the judgment of the Chamber formed to deal with the *Frontier Dispute* case between Burkina Faso and Mali. The section of frontier between those two States which the Chamber was asked to define terminated to the east where it met the frontier of Niger. Mali contended that

> the tripoint Niger–Mali–Burkina Faso cannot be determined by the two Parties

[213] *ICJ Reports*, 1971, p. 46, para. 91. Unusually in the Court's practice, this sentence constitutes a discrete numbered paragraph in itself, which suggests that the Court regarded it as an important statement of principle.

[214] *ICJ Reports*, 1971, p. 46, para. 94.

[215] Another interesting speculation is whether the *déchéance* of the Mandatory's rights for failure to meet its obligations would necessarily be irreversible, or whether South Africa might have had a *locus paenitentiae*, and on putting its house in order, could resume *de jure* control of the territory.

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without Niger's agreement, nor can it be determined by the Chamber, which may not affect the rights of a third State not a party to the proceedings.[216]

The Chamber, after first satisfying itself that the Special Agreement, on a proper interpretation, did give expression to a common intention of the parties that the Chamber should define the frontier throughout the whole of the disputed areas, found as follows:

> The Chamber also considers that its jurisdiction is not restricted simply because the end-point of the frontier lies on the frontier of a third State not a party to the proceedings. The rights of the neighbouring State, Niger, are in any event safeguarded by the operation of Article 59 of the Statute of the Court, which provides that 'The decision of the Court has no binding force except between the parties and in respect of that particular case'. The Parties could at any time have concluded an agreement for the delimitation of their frontier, according to whatever perception they might have had of it, and an agreement of this kind, although legally binding upon them by virtue of the principle *pacta sunt servanda*, would not be opposable to Niger. A judicial decision, which 'is simply an alternative to the direct and friendly settlement' of the dispute between the Parties (*PCIJ*, Series A, No. 22, p. 13), merely substitutes for the solution stemming directly from their shared intention, the solution arrived at by a court under the mandate which they have given it. In both instances, the solution only has legal and binding effect as between the States which have accepted it, either directly or as a consequence of having accepted the court's jurisdiction to decide the case.[217]

While this may appear a novel extension of the *pacta tertiis* principle, it is in fact no more than a wide interpretation of the concept of *pactum*. If two States agree on a frontier line which has been defined by, e.g., the recommendation of a conciliator, it is their agreement which gives the line whatever validity it has, and that cannot include validity as against a third State not party to the agreement. If the same two States agree that a Court shall define the frontier, the only difference, from the point of view now under consideration, is that the agreement precedes the definition of the line, instead of following it;[218] it is still the agreement which gives the line validity.[219]

In this sense, it could well be contended that the provision of Article 59 of the Statute, in so far as it limits the binding force of a judgment to the parties to the case, is itself an application of the *pacta tertiis* principle.

The Chamber did also examine the question 'whether in this case, considerations related to the need to safeguard the interests of the third State concerned require it to refrain from exercising its jurisdiction to determine the whole course of the line';[220] this, however, was an issue relating to the

[216] *ICJ Reports*, 1986, p. 576, para. 44.
[217] Ibid., pp. 577–8, para. 46.
[218] Cf. Zafrulla Khan in *ICJ Yearbook*, 1971–2, pp. 129–30.
[219] Even for the parties the decision of the Court need not be accepted, but may be set aside by a further agreement between the parties; see the remarks on *jus cogens* and *jus dispositivum* in Chapter II, section 3, below.
[220] *ICJ Reports*, 1986, p. 578, para. 48.

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proper exercise of the powers of the Court rather than to the *pacta tertiis* rule, and will therefore be examined in a later article.

Apart from this aspect, the *dictum* in the *Frontier Dispute* case is a classic instance of the *pacta tertiis* principle in straightforward circumstances. Greater difficulty arises when the *pactum* of the parties is imbued by international law with a special, status-creating, character, as in the case of agreements delimiting the continental shelf. The Chamber in the *Frontier Dispute* case referred to this aspect, in order to 'distinguish' it; but before quoting the passage, it will be convenient to retrace the history of the problem.

In the *North Sea Continental Shelf* cases, it will be recalled that the relative positions of Denmark, the Federal Republic of Germany and the Netherlands were such that an equidistance line could be drawn between the two 'outer' States—Denmark and the Netherlands—from a point on the median line between the three States and the United Kingdom, on the other side of the North Sea, up to a point fairly close inshore, where the line would have to bifurcate into an equidistance line Denmark/Federal Republic of Germany and an equidistance line Federal Republic of Germany/Netherlands.[221] The 'outer' States had concluded a delimitation agreement establishing this line, and claimed that it was opposable also to the Federal Republic of Germany,[222] as an equidistance line, on the basis either of the 1958 Geneva Convention on the Continental Shelf or of customary international law. The Court however found that the agreement was not so opposable, both because Denmark and the Netherlands were neither 'opposite' nor 'adjacent' States as contemplated by the Geneva Convention, and because the equidistance provision in the Convention was not opposable to the Federal Republic of Germany.[223]

Pausing there, we may note that the *pacta tertiis* rule was, apparently, considered so fundamental that it did not need to be mentioned: for the Court it was clear that the validity of the delimitation agreement against the Federal Republic of Germany was *entirely* dependent on the opposability to the Federal Republic of Germany of the equidistance rule. The Denmark/Netherlands *pactum* was injurious to the interests of the Federal Republic of Germany if it had a lawful claim to the areas which the *pactum* divided between the parties to it.

The Chamber in the *Frontier Dispute* case referred in its judgment to this aspect of the *North Sea* cases. After observing that

> The legal considerations which have to be taken into account in determining the location of the land boundary between parties are in no way dependent on the position of the boundary between the territory of either of those parties and the

[221] See the map (No. 3) on p. 16 of *ICJ Reports*, 1969.

[222] In fact they went further, and claimed that it was valid *erga omnes*, but no other State would have had an interest in challenging it.

[223] *ICJ Reports*, 1969, pp. 27–8, paras. 35–6.

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territory of a third State, even where, as in the present case, the rights in question for all three States derive from one and the same predecessor State,[224]

the Chamber went on to say that

> On the other hand, in continental shelf delimitations, an agreement between the parties which is perfectly valid and binding on the treaty level may, when the relations between the parties and a third State are taken into consideration, prove to be contrary to the rules of international law governing the continental shelf (see *North Sea Continental Shelf, ICJ Reports 1969*, p. 20, para. 14; pp. 27–28, paras. 35–36). It follows that a court dealing with a request for the delimitation of a continental shelf must decline, even if so authorized by the disputant parties, to rule upon rights relating to areas in which third States have such claims as may contradict the legal considerations—especially in regard to equitable principles—which would have formed the basis of its decision.[225]

The Chamber was apparently here alluding to the problems that had arisen in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* as a result of the unsuccessful attempt to intervene in the proceedings. The issues involved were not simple; and in the present article that case will be considered only in so far as it has some relevance to the *pacta tertiis* principle.

In the proceedings on the application of Italy to intervene, Italy had urged 'the impossibility, or at least the greatly increased difficulty of the Court effecting a delimitation between Libya and Malta in the absence of Italy from the proceedings'.[226] It had pointed out that 'the terminal points of the delimitation ultimately to be effected between the Parties will lie in the high seas, and it may prove that they will have to be tripoints or even quadripoints'[227]—i.e., that the delimitation would link up with delimitations with Italy or Tunisia. So far as the intervention was concerned, the Court held that this was irrelevant:

> . . . the question is not whether the participation of Italy may be useful or even necessary to the Court; it is whether, assuming Italy's non-participation, a legal interest of Italy is *en cause*, or is likely to be affected by the decision;[228]

and the Court held that it was not. However, the Court also stated that it 'cannot wholly put aside the question of the legal interest of Italy as well as of other States of the Mediterranean region, and they will have to be taken into account' in the eventual judgment.[229] A little further on in its decision the Court said:

> The future judgment will not merely be limited in its effects by Article 59 of the Statute: it will be expressed, upon its face, to be without prejudice to the rights and

[224] *ICJ Reports*, 1986, p. 578, para. 47.
[225] Ibid.
[226] *ICJ Reports*, 1984, p. 24, para. 39.
[227] Ibid.
[228] Ibid., p. 25, para. 40.
[229] Ibid., para. 41.

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titles of third States. Under a Special Agreement concerning only the rights of the Parties, 'the Court has to determine which of the Parties has produced the most convincing proof of title' (*Minquiers and Ecrehos*, *ICJ Reports 1953*, p. 52), and not to decide in the absolute; similarly the Court will, so far as it may find it necessary to do so, make it clear that it is deciding only between the competing claims of Libya and Malta.[230]

At this stage, therefore, the Court appeared to be contemplating that by the effect of Article 59, and the *pacta tertiis* principle underlying it, whatever the Court decided would leave Italy free to press such claims to continental shelf areas as it saw fit, including any areas which the Court might, with all due verbal reservations, have allocated to Malta or Libya.[231] This emerges in particular from the dissenting opinion of Judge Sir Robert Jennings, where he criticized the Court's 'very broad interpretation' of Article 59, whereby '. . . every decision is to be analogous to a bilateral agreement, and *res inter alios acta* for third States . . . ',[232] and asks:

> does this mean that the Court in effect disables itself from making useful and realistic pronouncements on questions of sovereignty and sovereign rights (and the latter is what we are in fact dealing with in this case)? 'Sovereign rights' that are opposable only to one other party comes very near to a contradiction in terms. A relative decision on continental shelf rights would seem especially odd coming from a Court which laid down 'non-encroachment' as one of the governing principles of the applicable law (*ICJ Reports 1969*, para. 101 C (1)); and lays it down, moreover, specifically in relation to delimitation by agreement.[233]

Against this, and in support of the Court's approach, it may be urged that the point is not that 'sovereign rights' are only opposable to one other party, but that, however valid such rights are *erga omnes*, the Court can only declare them to be valid, with binding effect as *res judicata*, in relation to the other party or parties to the proceedings. That is the whole sense of Article 59. This does not mean that the Court is necessarily obliged to word its judgments in that fashion: it may declare, as it did in the *Minquiers and Ecrehos* case, that 'sovereignty' over a defined area 'belongs to' a particular State;[234] but that does not prevent a third State from subsequently disputing that sovereignty.

This may be the normal operation of the principle; but the law of the continental shelf has developed in ways that complicate the matter not a little.[235] In the first place, there is the emphasis laid from the outset—the Truman Proclamation—up to and including the Montego Bay Convention,

[230] Ibid., pp. 26–7, para. 43.

[231] The Court was not called upon to draw a delimitation line, but it was required by the Special Agreement to say how the principles and rules which it found applicable should in practice be applied.

[232] *ICJ Reports*, 1984, p. 158.

[233] Ibid.

[234] *ICJ Reports*, 1953, p. 72.

[235] The development of the law of maritime delimitation in general will not be treated exhaustively in this series of articles; but we shall have more to say on it in later sections or later articles.

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on the primary role of agreement in determination of continental shelf boundaries. Recourse to a Court is therefore, in a special sense, no more than a substitute for direct settlement, as the Permanent Court observed;[236] but paradoxically judicial settlement of continental shelf disputes is thereby made the more difficult because the Court is expected to put itself in the place of the parties, and write their agreement for them. *Pace* Sir Robert Jennings, this is a reason for insisting on the non-opposability to third States of judicial solutions in such cases. Secondly, the parties, and therefore the Court, are required to have regard to all relevant circumstances; and as Sir Robert trenchantly remarks, 'it is difficult to imagine a more relevant circumstance than the legal rights of a geographically immediate neighbour'.[237] Thirdly, if considerations of proportionality come into play, the area in which they do so has to be defined, which may involve looking at surrounding claims or interests.[238]

The essential difference, it is suggested, between an agreement between two States on a particular matter, and a judgment given in proceedings between the same two States on the same matter, lies not in the effect of the agreement or the judgment, but in the considerations that go to its making. If two States, A and B, agree that sovereignty over a given territory belongs to State A, they may choose to disregard—because neither of them accepts them—the rival claims of State C to that territory. This does C no injury, because the agreement is *res inter alios acta*. If however the Court is asked to decide, in proceedings between A and B, in which C does not participate, whether A has sovereignty, then the Court cannot ignore C's claims if they are before it, through an intervention or otherwise.

> Another circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power.[239]

It is for this reason that Judge Sir Robert Jennings was entirely right in pointing to the impact which the Court's judgment would inevitably have on the interests of Italy, Article 59 of the Statute notwithstanding.[240]

Whether, or how far, the Court is obliged to give consideration to the possible claims of States not parties to the proceedings is not clear; in the *Eastern Greenland* case quoted above, the context shows that the only other Power which the Permanent Court of International Justice had to consider as a possible claimant was the other party to the case.

The case of the *Monetary Gold Removed from Rome in 1943*, though it related to ownership of moveable property, might suggest that there could be circumstances in which sovereignty claimed by a third State 'would not

[236] *PCIJ*, Series A, No. 22, p. 13, quoted in the *Frontier Dispute* judgment (p. 64, above).
[237] *ICJ Reports*, 1984, p. 154, para. 21.
[238] See the *Continental Shelf (Tunisia/Libya)* judgment, *ICJ Reports*, 1982, p. 91, para. 130.
[239] *PCIJ*, Series A/B, No. 53, p. 46; quoted in *ICJ Reports*, 1984, p. 26, para. 43.
[240] *ICJ Reports*, 1984, p. 158, paras. 28–9.

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only be affected by a decision, but would form the very subject-matter of the decision',[241] so that jurisdiction could not be exercised; but the parallel appears doubtful to say the least. It was not Albania's title to the gold which was in question before the Court, but 'whether Albania has committed any international wrong against Italy'[242] justifying Italy in intercepting the gold: and it was this that the Court could not decide without the consent of Albania.

The Chamber in the *Frontier Dispute* seems to have had no qualms about competing claims by Niger in the neighbourhood of the eastern terminus of the frontier line, apparently because no indication had been brought to its notice that there were any such claims; and the general satisfaction with its judgment expressed in African circles suggests that it was justified in the course it took.

When the Court, having excluded the intervention of Italy, gave its decision in the *Malta/Libya* delimitation in 1985, the chickens came home to roost. The Court noted that it was informed of the claims of Italy, and that it had virtually promised Italy that its interests would be safeguarded; it noted also that both parties agreed

> in contending that the Court should not feel inhibited from extending its decision to all areas which, independently of third party claims, are claimed by the Parties to this case, since if the Court were to exclude any such areas as are the subject of present or possible future claims by a third State it would in effect be deciding on such claims without jurisdiction to do so.[243]

It decided, however, to limit the area to which its judgment would be addressed, on the following grounds:

> The Court notes that by the Special Agreement it is asked to define the legal principles and rules applicable to the delimitation of the area of continental shelf 'which appertains' to each of the Parties. The decision of the Court will, by virtue of Article 59 of the Statute, have binding force between the parties, but not against third States. If therefore the decision is to be stated in absolute terms, in the sense of permitting the delimitation of the areas of shelf which 'appertain' to the Parties, as distinct from the areas to which one of the Parties has shown a better title than the other, but which might nevertheless prove to 'appertain' to a third State if the Court had jurisdiction to enquire into the entitlement of that third State, the decision must be limited to a geographical area in which no such claims exist.[244]

The Court's response to the request of the parties not to limit its judgment in this way was, more or less, 'Vous l'avez voulu, Georges Dandin'; having opposed the intervention sought by Italy, they had only themselves to

[241] *ICJ Reports*, 1954, p. 32.
[242] Ibid.
[243] *ICJ Reports*, 1985, p. 25, para. 20.
[244] Ibid., para. 21.

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thank if the eventual judgment was more restricted than they would have wished.

This latter argument was also used to meet the obvious objection that the result of the Court's restraint was to enable a third State to restrict the scope of the proceedings:

> It has been questioned whether it is right that a third State—in this case, Italy—should be enabled, by virtue of its claims, to restrict the scope of a judgment requested of the Court by Malta and Libya; and it may also be argued that this approach would have prevented the Court from giving any judgment at all if Italy had advanced more ambitious claims. However, to argue along these lines is to disregard the special features of the present case. On the one hand, no inference can be drawn from the fact that the Court has taken into account the existence of Italian claims as to which it has not been suggested by either of the Parties that they are obviously unreasonable. On the other hand, neither Malta nor Libya seems to have been deterred by the probability of the Court's judgment being restricted in scope as a consequence of the Italian claims. The prospect of such a restriction did not persuade these countries to abandon their opposition to Italy's application to intervene . . .[245]

The reference to 'the special features of the present case' is heartening; for it is submitted that it would be unfortunate if the reasoning in this decision were to be treated as a general rule of judicial propriety for cases where there are competing claims by States not before the Court.

Even so limited in its impact, however, the reasoning prompts doubts, particularly the suggestion that a decision 'stated in absolute terms' could only be made in respect of an area in which no rival claims existed.[246] A first point is that it is difficult to understand the distinction, in the context of the continental shelf delimitation, between areas which 'appertain' to a State and 'areas to which one of the Parties has shown a better title than the other'. Both the distinction and the whole idea of a 'better' title seem inconsistent with the whole underlying concept of the rights *ab initio* over the natural prolongation of the land territory. More material to the present discussion is the idea that outside influences can prevent the Court from stating its decision 'in absolute terms'. It was in effect urged above that the Court should, indeed must, state its decision in every case in absolute terms; but that the principle underlying both the *pacta tertiis* rule and Article 59 of the Statute operates to ensure that its effects are not absolute.

The *Frontier Dispute* Chamber was, it is suggested, in the right of it when it referred to a 'presumption' that the parties have exclusive sovereign rights up to the limit of their claims, and added:

> However, this is no more than a twofold presumption which underlies any boundary situation. This presumption remains in principle irrebuttable in the

[245] Ibid., p. 28, para. 23.

[246] On the factual level, it is worth noting that the Court was not fully informed as to Tunisian claims.

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judicial context of a given case, in the sense that neither of the disputant parties, having contended that it possesses a common frontier with the other as far as a specific point, can change its position to rely on the alleged existence of sovereignty pertaining to a third State; but this presumption does not thereby create a ground of opposability outside that context and against the third State. Indeed, this is the whole point of the above-quoted Article 59 of the Statute.[247]

The Court had also to deal with the question of the effects of a judgment on third parties in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*; this was, however, in the special context of the United States 'multilateral treaty reservation' which referred to a class of States parties to a multilateral treaty which were 'affected by the decision'.[248] Since if even one State were to be 'affected', this would suffice to bring the reservation into effect,[249] the Court concentrated its attention on the position of El Salvador. It found that El Salvador would be 'affected' by a decision of the Court on the claims of Nicaragua based on the United Nations Charter:

> 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.[250]

The significant sentence in this passage is that in which the Court stated that it would not make any finding on whether El Salvador could lawfully exercise the right of individual self-defence; the Court might have added that in any event, Article 59 would prevent that question being determined by the Court's decision on the United States claim of self-defence. It might even be said that *legally* El Salvador would not, in view of the effect of Article 59, be 'affected' in any event; but the multilateral treaty reservation had to be interpreted as intended to have some effect, and too strict an application of Article 59 would have rendered it meaningless.

[247] *ICJ Reports*, 1986, p. 579, para. 49.

[248] Text of reservation in *ICJ Reports*, 1984, pp. 421–2, para. 67. The interpretation whereby it was the 'treaty' and not the 'parties' to which the word 'affected' applied might have been attractive, but was unfortunately found to be unsustainable: ibid., p. 424, para. 72.

[249] *ICJ Reports*, 1986, p. 34, para. 48.

[250] Ibid., p. 36, para. 51.

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(3) *Approbation and reprobation*

It has been suggested[251] that this equitable doctrine, or a principle of international law analogous to it, played some part in the decision of the Court on the reservation to the accession of Greece to the 1928 General Act in the *Aegean Sea Continental Shelf* case. The doctrine in equity is, broadly, that a party who bases its claims on a particular deed or instrument must take the instrument as he finds it, and cannot rely on such part of it as supports his case, while inviting the Court to disregard some other part of it which he considers less favourable.

The Court had to determine whether a dispute over the continental shelf said to be appurtenant to Greek islands in the Aegean fell within a reservation excluding jurisdiction over disputes 'relating to the territorial status' of Greece. Greece had relied on the intertemporal principle to assert that the term 'territorial status' could not have been intended to refer to the continental shelf which, as a legal concept, was unknown at the date of the reservation (1931). The Court had however already found,[252] when it reached the stage in its judgment at which it discussed this argument, that the expression 'territorial status' had been used 'as a generic term denoting any matters comprised within the concept of territorial status under general international law' so that

> 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.[253]

The Court then noted that the asserted basis of jurisdiction was Article 17 of the General Act, referring to disputes as to the 'respective rights' of the parties, and continued:

> 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' (*PCIJ*, Series B, No. 4, p. 24).[254]

The Court also noted that the islands involved in Greece's claim included some which had only been ceded to Greece subsequently to the date of the reservation, and observed that

> 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

[251] Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn., 1984), p. 126: cf. Elias, 'The Doctrine of Intertemporal Law', *American Journal of International Law*, 74 (1980), p. 301.

[252] This finding will be discussed below, in connection with the intertemporal principle in general.

[253] *ICJ Reports*, 1978, p. 32, para. 77.

[254] Ibid., p. 33, para. 78.

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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'.[255]

Although the language used by the Court at this point in its judgment is perhaps ambiguous, it seems clear from the context that the operation in which the Court was engaging was that of seeking to determine the intention of Greece as author of the reservation, for purposes of its interpretation. In other words, the Court was not rejecting the Greek submission on the grounds that it involved a simultaneous approbation and reprobation; nor was it saying that it is impermissible, in a unilateral instrument of this kind, so to draft the text that the substantive scope of the instrument will be defined by the law in force at the time of its being invoked, and at the same time to define an exception in terms which tie it to the state of the law at the time of its adoption. It was saying that it is unlikely that such a result would have been intended, and therefore it can be assumed that it was not intended.[256]

Whether the rule excluding approbation and reprobation is part of international law must, for the present, be regarded as unsettled.

(4) *States will be presumed to use the most appropriate means of creating rights or obligations*

This principle, which does not appear to have received earlier judicial endorsement, is one eminently of good sense rather than equity: it may be stated more briefly and vividly as postulating that when the door is open, entry by the window is to be presumed improper, or at least unlikely.

Fitzmaurice did in his first article formulate a general principle that

> where a particular process is contemplated for achieving a given result, whether in consequence of a treaty obligation or of an obligation arising from a general rule of international law, the result in question cannot properly be arrived at by substituting a different process for the one contemplated, even though it is due to the default of one of the parties subject to the obligation that the regular process cannot be employed.[257]

He was however addressing himself more to situations in which the intention of the States concerned was not in doubt, but the validity of the step taken was questionable—the specific instance he had in mind being the constitution of the Commissions in the *Peace Treaties* case—, in other words whether entry by the window is permissible when the door is shut. The approach in the cases now to be examined has been more concerned with

[255] Ibid.

[256] The next following paragraph, which compares the reservation under examination with another reservation to the same accession, is more clearly worded:

> '. . . 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*': ibid., p. 33, para. 79 (emphasis added).

[257] This *Year Book*, 27 (1950), p. 8; *Collected Edition*, I, p. 8.

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establishing the intentions of a State which is alleged to have employed an unusual means to a particular end.

In the *North Sea Continental Shelf* cases, Denmark and the Netherlands argued that the Federal Republic of Germany, which had signed but not ratified the 1958 Geneva Convention on the Continental Shelf, had become bound by that Convention

> in another way, —namely because, by conduct, by public statements and proclamations, and in other ways, the Republic has unilaterally assumed the obligations of the Convention; or has manifested its acceptance of the conventional régime; or has recognized it as being generally applicable to the delimitation of continental shelf areas.[258]

The Court first approached this contention on the basis that what was being suggested was that the conduct relied on showed that the Federal Republic intended by this means to become bound by the Convention (it turned later to the possibility—not here material—of an estoppel, i.e., that whatever the Federal Republic had intended, its conduct had created an impression of an expectation). On this assumption,

> —that is to say if there had been a real intention to manifest acceptance or recognition of the applicability of the conventional régime—then it must be asked why it was that the Federal Republic did not take the obvious step of giving expression to this readiness by simply ratifying the Convention. In principle, when a number of States, including the one whose conduct is invoked, and those invoking it, have drawn up a convention specifically providing for a particular method by which the intention to become bound by the régime of the convention is to be manifested—namely by the carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way.[259]

The Court buttressed its argument with what must have appeared a *reductio ad absurdum*:

> Indeed if it was a question not of obligation but of rights,—if, that is to say, a State which, though entitled to do so, had not ratified or acceded, attempted to claim rights under the convention, on the basis of a declared willingness to be bound by it, or of conduct evincing acceptance of the conventional régime, it would simply be told that, not having become a party to the convention it should not claim any rights under it until the professed willingness and acceptance had been manifested in the prescribed form.[260]

The same principle was applied by the Chamber formed to deal with the *Frontier Dispute* between Burkina Faso and Mali. It was faced with the

[258] *ICJ Reports*, 1969, p. 25, para. 27.

[259] Ibid., p. 25, para. 28.

[260] Ibid., pp. 25–6, para. 28. The Court also argued that even if the FRG had ratified the Convention, it could have entered a reservation excluding the equidistance rule, but as Judge Lachs (dissenting) pointed out, the statements relied on referred to 'the Convention as a whole with no exception or reservation' (ibid., p. 236).

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argument of Burkina Faso that Mali, as a result of a unilateral statement by its Head of State,[261] had committed itself to accepting in advance as binding the report on the disputed frontier to be produced by a Mediation Commission. The Chamber referred to the special circumstances in which, in the *Nuclear Tests* cases, a unilateral declaration had been held to create a binding obligation, and explained:

> The circumstances of the present case are radically different. Here, there was nothing to hinder the Parties from manifesting an intention to accept the binding character of the conclusions of the Organization of African Unity Mediation Commission by the normal method: a formal agreement on the basis of reciprocity.[262]

In the meantime, however, the same—or a closely analogous—principle had been appealed to, without success, by the United States in the jurisdictional phase of the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*. Nicaragua had argued that

> Nicaragua's conduct over a period of 38 years unequivocally constitutes consent to be bound by the compulsory jurisdiction of the Court by way of a recognition of the application of Article 36, paragraph 5, of the Statute to the Nicaraguan Declaration of 1929. Likewise the conduct of the United States over a period of 38 years unequivocally constitutes its recognition of the essential validity of the Declaration.[263]

To this, the United States objected that the contention of Nicaragua was

> flatly inconsistent with the Statute of the Court, which provides only for consent to jurisdiction to be manifested in specific ways: . . . The Statute provides the sole basis on which the Court can exercise jurisdiction under Articles 36 and 37. In the particular case of Article 36, paragraph 5, the Statutes of the two Courts provide a means for States to express their consent, and Nicaragua did not use them.[264]

In effect, what the United States was saying was that if Nicaragua really consented to the jurisdiction, it should have made a new declaration under Article 36, paragraph 2, the normal means of doing so, rather than relying on a precarious structure of recognition of the continuing validity of an expired declaration. It is interesting in this connection to recall the Court's *reductio ad absurdum* in the *North Sea Continental Shelf* cases, its observations on the position of a State which actively claimed *rights* which it could have obtained by the normal means, but which it asserted on the basis of an alternative legal construct. Although in form Nicaragua was asserting that it was bound by its 1929 declaration, what it was in effect doing was relying on that declaration in order to assert a right to sue the United States.

[261] This statement has already been examined in relation to the question of good faith as the source of the validity of unilateral declarations at p. 19, above.

[262] *ICJ Reports*, 1986, p. 574, para. 40.

[263] *ICJ Reports*, 1984, p. 411, para. 43.

[264] Ibid., para. 44.

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The Court did not accept the United States contention; it based its reasoning essentially on a finding that Nicaragua's situation had been 'wholly unique'. It referred to Nicaragua's absence of protest 'against the legal situation ascribed to it by the publications of the Court, the Secretary-General of the United Nations and major States':

> 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 [its] sponsors) regarded [it] as more reliable than [it] really [was].[265]

The United States argument brings out the fact that the principle now under discussion can be given two interpretations: constitutional or volitional. Where there is a recognized means of achieving a particular end, it may be said that no other method is permitted by law; or it may be said that it will be presumed that States who wish to achieve that end will use the means provided, and there is a presumption against the conclusion that a State which acted in some other way was intending nevertheless to achieve the same end. The Court's finding in the *North Sea Continental Shelf* cases appears to be based at least primarily on the second interpretation, though the language used suggests that both ideas were in the Court's mind. In particular, the *reductio ad absurdum* mentioned above seems to be based on the idea that, no matter what the intentions of the State concerned had been, it would not be *allowed* to claim rights by the back door, as it were.

The United States argument in the *Nicaragua* case leans much more heavily on the constitutional conception, that what Nicaragua claimed to do was forbidden, or at least not permitted, by the Statute. The Court, however, answered it, in effect, on the consent basis, by saying that what would otherwise have been odd behaviour, from which consent or intention to be bound could not properly be deduced, was not so odd in view of the unique situation in which Nicaragua found itself.

Chapter II:

International Rights and Obligations

1. *The Completeness of the Law and the Nature of Legal Rights: International Law as Constitutive or Regulatory of such Rights*

During the period under review, the Court had to deal with a number of questions on which not only was the law uncertain, but it was unclear

[265] Ibid., p. 412, para. 46. The French text makes clear that it is the information (*informations* in French) of which the reliability was in question, not the sponsors. The English, by using the plural, apparently to follow the French, suggests the opposite.

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whether international law had reached the areas in issue at all. Its decisions in these cases are therefore of great interest from the standpoint of the development of international law, both by the Court's own decisions and by the growth of custom. Two aspects will have to be considered: the question whether there are in fact areas where the law lays down no rights or obligations—the problem of *lacunae* in the law; and the question whether international legal rules are restrictive against a background of State freedom of action, or justificatory against a background of restriction of action—the *Lotus* problem.[266] Each problem arises when the Court is faced with a case *primae impressionis*.

The definition of a case *primae impressionis* is not, in the international field, as simple as it looks: for present purposes, we may perhaps define such a case as one in which the question is not whether the facts are such as to attract the application of a recognized rule of law, nor the modalities of application of such a rule, but one where the applicant has to rely on an alleged new rule or the application by extension or by analogy of an existing one.

(1) Lacunae *in the law and the question of* non-liquet

In general, when an international tribunal is faced with such a case there are a number of courses it can follow. A court in such circumstances may accept the applicant's contention that an existing rule may apply by analogy or extension. It may also find that a new rule has come into existence through the normal customary law processes, and that all that has been lacking is a definition of its crystallization, which a court decision can supply. It can also reject the claim on the ground that there is no rule justifying it, which is tantamount to saying that there *is* a rule of international law excluding an applicant from recovery in such circumstances. Thus in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, when the Court stated that

> 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 . . .,[267]

it was in effect declaring the existence of a rule that a State is free to determine for itself its level of armaments. Finally a Court may—according to one view, not universally accepted—decide that the claim must be dismissed because international law simply does not regulate the issues in question: i.e., declare a *non-liquet*.

The attitude of the Court in the *North Sea Continental Shelf* cases suggests that it was guided by a presumption against the existence of gaps in

[266] Cf. Fitzmaurice, this *Year Book*, 30 (1953), pp. 7–17; *Collected Edition*, I, pp. 138–48, under the heading 'The Bases and Foundation of State Rights. International Law as Constitutive or Merely Regulatory of Such Rights'.

[267] *ICJ Reports*, 1986, p. 135, para. 269.

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the law. It was, as it found, faced with a situation in which the major international convention on the matter was not applicable, because one of the parties to the case was not a party to the convention; and the delimitation method provided for in the convention was not applicable as a mandatory rule of customary law.[268] The Court's examination of State practice, from which the latter conclusion had been drawn, had shown the comparative paucity of practice, and the difficulty of drawing conclusions from it as to the existence of a 'general practice accepted as law'.[269] In these circumstances, it was at least arguable that, outside the ambit of the 1958 Geneva Convention,[270] there was no legal regulation of the delimitation of continental shelf areas. The Court, however, stated firmly:

> But as between States faced with an issue concerning the lateral delimitation of adjacent continental shelves, there are still rules and principles of law to be applied; and in the present case it is not the fact either that rules are lacking, or that the situation is one for the unfettered appreciation of the Parties. Equally, it is not the case that if the equidistance principle is not a rule of law, there has to be as an alternative some other single equivalent rule.[271]

The customary law rules which the Court found established may be criticized as somewhat tenuously supported,[272] but this is not necessarily to be explained by a firm position of principle as to the propriety of a *non-liquet*. Independently of the question whether, as a matter of general legal theory, an international tribunal has the power to declare a *non-liquet*, it is evident that for the Court to have done so in the *North Sea* cases would have been both a severe blow to its prestige and a severe setback to the law of the sea.

In the *North Sea Continental Shelf* cases, a finding that there was no established customary law governing the delimitation of the continental shelf, i.e., a *non-liquet*, was perfectly possible in theory. In view of the form in which the matter was brought before the Court, this would indeed have constituted an unusually pure form of *non-liquet*, since both parties would have been left exactly where they were. In cases of a more normally adversarial nature, a *non-liquet* may be barely distinguishable in its effects from a rejection of the plaintiff's claim on the grounds that no rule supports it, which is tantamount, as we have seen, to a finding that there *is* a rule

[268] *ICJ Reports*, 1969, p. 46, para. 83.

[269] Ibid., pp. 43–5, paras. 75–80.

[270] The existence of a multilateral convention laying down rules in a particular field, unless expressly or impliedly codificatory, in itself suggests a lack of regulation of that field, prior to the Convention, or as between non-parties.

[271] *ICJ Reports*, 1969, p. 46, para. 83.

[272] Essentially, the Court's finding was that the '*opinio juris* in the matter of delimitation' was reflected in the principles

> 'that delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles' (ibid., p. 46, para. 85).

It is difficult to see how practice could support an *opinio juris* that agreement was a matter of obligation (cf. ibid., para. 78 *in fine*); and subsequent developments have shown the almost infinite flexibility which can be given to the idea of 'equitable principles'. This aspect will be examined further in a later article.

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which *does not* endorse it. This may be illustrated by reference to the *Barcelona Traction* case. Before considering this aspect, however, the *Frontier Dispute* case will be considered, since it raises the possibility of another pure form of *non-liquet*, that of the inadequacy of the available material to support any legal conclusion justifiable by reference to the applicable law.

The frontier which the Chamber had in that case to establish was agreed by the parties to be identical with the pre-independence colonial boundary; and it was equally an agreed postulate that such boundary had been determined and existed throughout the whole of the disputed area. The Chamber had however to grapple with inadequate or conflicting records and maps in its search for the boundary, and it had to bear in mind that, where the parties advanced two different versions of the line, it could well be that neither was correct. Thus the Court declared:

> The Special Agreement of 20 October 1983 by which the case was brought before the Court deals with the question of the burden of proof only in order to make it clear that it is not prejudged by the written procedure there provided for (Art. 3, para. 2). In any event, however, in a case such as this, the rejection of any particular argument on the ground that the factual allegations on which it is based have not been proved is not sufficient to warrant upholding the contrary argument. The Chamber has to indicate the line of the frontier on the basis of the documents and other evidence presented to it by the disputant Parties. Its task is further complicated by the doubts it has expressed above regarding the sufficiency of this evidence.[273]

A particularly thorny problem was the location of a pool referred to in the documents as a reference point and called the pool of Kétiouaire; other documents referred to a pool called Kébanaire. After exhaustive analysis of the evidence, the Chamber concluded that 'there is insufficient information available to the Chamber for it to identify or to locate either of these two pools'.[274] The Chamber's dilemma was that it had as a matter of law to determine the position of the French administrative frontier of the colonial period, which the parties insisted was complete and completely delimited; but the evidence simply did not enable it to determine what had been the position of a particular sector of that frontier.[275] The Chamber was then faced with essentially the same problem as was encountered by the King of the Netherlands in 1831 in the arbitration concerning the *North Eastern Boundary*[276]—that the available evidence did not enable him to lay down the boundary in accordance with law. Like the arbitrator in that case, the Chamber did not pronounce a *non-liquet*, but proceeded to determine the boundary in the way which seemed most appropriate.

[273] *ICJ Reports*, 1986, p. 588, para. 65.
[274] *ICJ Reports*, 1986, p. 629, para. 141.
[275] *ICJ Reports*, 1986, p. 629, para. 142.
[276] Moore, *International Arbitrations*, vol. 1, pp. 119–36; discussed in Lauterpacht, *The Function of Law in the International Community* (1934), pp. 127–30. Cf. the *Guatemala/Honduras Boundary* arbitration, where the problem was, as in the *Frontier Dispute*, to determine the line of the *uti possidetis*: *UN Reports of International Arbitral Awards*, vol. 2, p. 1325.

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The Chamber was in fact able to refer to an agreement concluded at local level in 1965,[277] and in the application of equity[278] to take account, not of the agreement itself, which had not been ratified at Governmental level, but 'of the circumstances in which the agreement was concluded'.[279] Had it not been for the fortuitous existence of the 1965 Agreement, what course could the Chamber have adopted? Neither side had proved its case for drawing the line in a particular position, and the evidence did not enable the Chamber to reach a firm conclusion on any other position. Should it have followed the example of the King of the Netherlands, and drawn a compromise line in an open exercise of its discretion, or should it have declined to indicate the frontier line in that area? The latter course would, it is suggested, have been preferable, unless a *non-liquet* is excluded for reasons of principle.[280] The parties could have been left to agree a line, or to conclude a new special agreement giving the Chamber power to decide *ex aequo et bono*.

Before leaving the subject of *non-liquet*, the *Northern Cameroons* case may also be noted. The Republic of Cameroon claimed that the United Kingdom had committed breaches of the Trusteeship Agreement for the Trust Territory of the Northern Cameroons; it was however recognized that that Agreement had been validly terminated by General Assembly resolution before the proceedings were instituted. The Court found that it could not adjudicate upon the merits of the claim, essentially because any judgment it gave would be not susceptible of any compliance or execution. When the Court thus declined to entertain the claim because the judgment could not have any 'forward reach',[281] its action may perhaps, without too great a stretch of the imagination, be assimilated to the category of *non-liquet*. A *non-liquet*, if permissible at all, would be justified by the 'silence of the law'. The Court observed that

> in this case there is a dispute about the interpretation and application of a treaty—the Trusteeship Agreement—which has now been terminated, is no longer in force, and there can be no opportunity for a future act of interpretation of that treaty in accordance with any judgment the Court might render.[282]

It is arguable that the law has nothing to say about the interpretation of an extinct treaty, so that the Court was being asked to judge in a field where there was no longer any law to be declared.[283] This is, however, admittedly, an extension of the *non-liquet* concept; and the Court was probably wise to base its decision on considerations of the 'proper limits of its judicial

[277] *ICJ Reports*, 1986, p. 631, para. 146.
[278] Ibid., p. 633, para. 149.
[279] Ibid., *in fine*.
[280] See the Lauterpacht/Stone controversy, referred to below.
[281] *ICJ Reports*, 1963, p. 37.
[282] Ibid.
[283] On the other hand, the Court in *Western Sahara* did regard its opinion on the status of the territory in 1884 as 'based on law': *ICJ Reports*, 1975, p. 37, para. 73.

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function'.[284] In this latter respect, the judgment will be further studied in a later article.

In the *Barcelona Traction* case, already outlined above, the Court's approach took as starting point the idea that an international claim could be brought by a State on behalf of a national if a right, not a mere interest, of that national had been infringed. One of the ways in which Belgium expressed its contentions was as follows; it argued 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.[285]

The reply of the Court contains two separate strands of argument, not wholly consistent with each other. The first is that there can be no diplomatic protection unless a right under municipal law has been infringed; and shareholders have no right, in that law, to redress for injury done to the company. The other strand is that 'the position of the company rests on a positive rule of both municipal and international law'.

Paragraph 42 of the judgment has this to say on shareholders' rights:

> 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.[286]

In paragraph 52, the Court rejects the Belgian argument on this ground:

> 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.[287]

This latter passage may be merely somewhat over-condensed and elliptic; but it does give cause to suspect a confusion of thought. Shareholders are

[284] Ibid., p. 38.
[285] *ICJ Reports*, 1970, p. 37, para. 51.
[286] Ibid., p. 35, para. 42.
[287] Ibid., p. 38, para. 52.

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subjects of law in their own, and indeed probably in virtually all, municipal legal systems, but not in international law. There is no reason in theory why States should not previously have taken up the cause of nationals oppressed in their capacity as shareholders, but—on the premises of the judgment—this was not the case. Companies too are subjects of law in municipal legal systems; and diplomatic and judicial claims had been successfully made on behalf of companies. But the rights of shareholders discussed in paragraph 42 are of a kind that only a municipal system could confer, because they are rights of a constitutional or quasi-constitutional nature 'to protect the company against abuse by its management or the majority of the shareholders'. If an international action were brought on these lines, it not only could but—it is submitted—must terminate in a *non-liquet*. The weakness of this paragraph of the judgment is, in short, that it confuses the absence of a rule in a given field with the presence of a rule that there is no right of action in that field.

Furthermore, the law of international responsibility and of diplomatic protection is of customary origin, and a tribunal cannot declare the existence of a customary rule which might exist but does not yet exist.[288] But is it a sufficient answer to the Belgian contention to say (as the Court in effect does) that while there have been numerous successful claims for injuries to companies, there have been none for injury done to shareholders in analogous circumstances? The interpretative principle of *analogia legis*[289] has, as Fitzmaurice has observed,[290] been recognized by the Court; applying it, one might argue that the essence of the customary-law rule is the recognition of diplomatic protection where nationals of the protecting State have suffered harm by the action of the respondent State; and that the nature, in municipal law, of their interests which have been harmed is a secondary element.

The Court concedes that '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'.[291] The judgment of the Court thus goes some way to recognize that the state of international law as regards protection of shareholders' rights is not entirely satisfactory: and Judge Fitzmaurice, in his separate opinion, was quite open about this: 'International law must in consequence be regarded as deficient and under-

[288] '. . . the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislation has laid it down': *Fisheries Jurisdiction*, *ICJ Reports*, 1974, pp. 23–4, para. 53.

[289] Cf. Gény, *Méthodes d'interprétation et sources en droit privé positif* (2nd edn.), vol. 1, pp. 304 ff.; Zajtay, 'Sur le raisonnement par analogie comme méthode d'interprétation du droit', *Liber Amicorum B.C.H. Aubin*, p. 307.

[290] This *Year Book*, 27 (1950), p. 18; *Collected Edition*, I, p. 18.

[291] *ICJ Reports*, 1970, p. 47, para. 89. It is in fact ironic that the judgment which contains a broad hint of disagreement with the 1966 judgment in the *South West Africa* case — see below — should in fact be capable of being summarized in a sentence from that judgment: 'Rights cannot be presumed to exist merely because it might seem desirable that they should': *ICJ Reports*, 1966, p. 48, para. 91.

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developed in this field . . .';[292] and he indeed suggests that the law ought to provide:

an enlightened rule [which], while recognizing that the national government of the company can never be *required* to intervene, and that its reasons for not doing so cannot be questioned even though they may have nothing to do with the merits of the claim, would simply provide that in such event the government of the shareholders may do so—particularly if, as is frequently the case, it is just because the shareholding is mainly foreign that the government of the company feels that no sufficient national interest exists to warrant intervention on its own part.[293]

As Rosalyn Higgins has trenchantly observed, Judge Fitzmaurice:

seems to regard it as no part of his, or the Court's, function to develop law so as to provide 'an enlightened rule' rather than a 'deficient and under-developed' one . . . International law can never develop beyond the rudimentary state if the Court feels that the distinction between *lex lata* and *lex ferenda* forever prevents it from applying international law in a progressive manner in hitherto untested situations.[294]

However, what is also striking about the position taken up by Fitzmaurice and, less overtly, by the Court is its resemblance to the scenario postulated by Lauterpacht for a Court confronted with the need to choose between applying an unsatisfactory rule or pronouncing a *non-liquet*. In his paper entitled 'Some Observations on the Prohibition of "Non-Liquet" and the Completeness of the Law', Sir Hersch discussed in detail the possibility that, rather than pronounce a *non-liquet*, an international tribunal should apply a rule of law recognized to be unsatisfactory, and couple its decision with a recommendation for its improvement.

Is it in conformity with the judicial character of a pronouncement that, while leaving no doubt as to the law as declared by it and as indisputably binding upon the parties, it should—if it deems it necessary—draw attention to the shortcomings of the law thus declared and the necessity of its amendment? Is it consistent with its function that it should indicate directly—or indirectly by the manner of its reasoning—what ought to be the substance of any such change?[295]

Lauterpacht's view, though expressed in guarded terms, was that these questions should be answered in the affirmative.

The *Barcelona Traction* decision, however, also attracts the criticism expressed by Professor Julius Stone in his reply to Lauterpacht's paper.[296]

[292] *ICJ Reports*, 1970, p. 78, para. 25.

[293] Ibid., pp. 77–8, para. 24.

[294] Rosalyn Higgins, 'Aspects of the Case Concerning the Barcelona Traction Light and Power Co. Ltd.', *Virginia Journal of International Law*, 11 (1970–1), p. 341.

[295] *Symbolae Verzijl* (1958), p. 212; cf. also Fitzmaurice, this *Year Book*, 37 (1961), pp. 16–17; *Collected Edition*, II, pp. 649–50.

[296] Stone, '*Non Liquet* and the Function of Law in the International Community', this *Year Book*, 35 (1959), p. 124.

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He points out that in effect Lauterpacht was regarding it as a likely situation

> that the Court would disapprove of the content of the rule which it has itself fashioned to deal with the case. For in the characteristic case where the *non liquet* issue is worth discussing the context of the rule to be applied, and therefore the result to be reached, would *ex hypothesi* be sufficiently absent or indeterminate to give the court ample room for choice.[297]

This is evidently exactly the criticism addressed by Rosalyn Higgins to the 1970 judgment as glossed by Fitzmaurice.

(2) *International law as constitutive or regulatory of States' rights*

The question whether there may be areas of international relations which are not regulated, or fully regulated, by international law was also in the background of the two *Fisheries Jurisdiction* cases; the claims presented to the Court in these cases involved the question whether it is sufficient justification for a State to show that an action which has been challenged is 'not contrary to international law'[298] rather than having to show that the action is authorized or permitted by a positive rule of international law.

The United Kingdom and the Federal Republic of Germany had each asked the Court to declare that Iceland's claim to a zone of exclusive fisheries jurisdiction extending 50 miles from baselines round its coasts was 'without foundation in international law and invalid' (United Kingdom) or 'has, as against the Federal Republic of Germany, no basis in international law'.

The decision of the Court was expressed in terms of the non-opposability of the Icelandic extension of fisheries jurisdiction to the two applicant States, because of the existence of established fishery rights enjoyed by them. From the discussion in Chapter I, section 3(2), above, it will be apparent that even if the Court had chosen to express its decision in more absolute terms, this would have been without legal effect in the relations between Iceland and any other State that chose to object to the extension.[299] The characteristic of the judgment as rendered which was regarded by a number of Members of the Court as vital[300] was not in fact the way in which the operative clause was expressed, but the reasoning underlying that clause. The key passages in the judgment are these:

> The provisions of the Icelandic Regulations of 14 July 1972 and the manner of

[297] Loc. cit. (previous note), at p. 148.

[298] The expression used in the operative part of the judgment in the *Fisheries* case (*ICJ Reports*, 1951, p. 143), and criticized by Fitzmaurice.

[299] In fact, as Judge Ignacio-Pinto pointed out, it need not even have led to a different effective decision, since the Court could, after stating that Iceland's extension of jurisdiction was invalid as a matter of general law, have gone on to devise a solution based on Iceland's exceptional situation: *ICJ Reports*, 1974, p. 36.

[300] See the Joint Separate Opinion of Judges Forster, Jiménez de Aréchaga, Nagendra Singh and Ruda, ibid., p. 45.

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their implementation disregard the fishing rights of the Applicant . . . The Applicant is therefore justified in asking the Court to give all necessary protection to its own rights, while at the same time agreeing to recognize Iceland's preferential position. Accordingly, the Court is bound to conclude that the Icelandic Regulations . . . are not opposable to the United Kingdom, and the latter is under no obligation to accept the unilateral termination by Iceland of United Kingdom fishery rights in the area.[301]

That the Court could have gone further and considered the general validity of the Icelandic Regulations is indicated by the opening words of the following paragraph 'The findings stated by the Court in the preceding paragraph *suffice to provide a basis for the decision of the present case . . .*'.[302] What the Court was saying in effect is: whether or not the Icelandic Regulations are contrary to general international law, they certainly cannot be invoked against the applicants, so we do not need to consider the wider issue.

For this reason, the judgment itself did not have to tackle the question of principle whether the rules of international law are prohibitory against a background of freedom, or permissive against a background of restriction of action. Nevertheless, the *Fisheries Jurisdiction* cases are of interest in this respect, particularly as regards the nature and status of the legal rule asserted at various periods, and in various forms and fora, fixing the limit of the territorial sea, or of fishing or exclusive economic zones, at a defined distance from appropriate baselines—3 miles, '6 miles + 6 miles', 12 miles, 50 miles, or still higher figures.[303]

Lauterpacht, writing in 1950, when the trend towards wider and wider claims by coastal States was just beginning, took the view that there was a prohibitive rule determining the limit at which the high seas began, and therefore the limit of coastal State claims, and that this was virtually a matter of *jus cogens*. Discussing the role of protest with regard to unilateral claims to submarine areas, he suggested that, in general, protest against claims going beyond recognized limits was not necessary 'if the action of the state claiming to acquire title is so wrongful in relation to any particular state or so patently at variance with general international law as to render it wholly incapable of becoming the source of a legal right'; and the instance he gives is directly in point:

Thus, for instance, if a state were to proclaim an exclusive right of navigation, jurisdiction or exploitation on what is regarded by the generality of states as part of the high seas, the absence of protest would hardly make any difference to the legal position—in the same way as the manifest illegality of any other action would

[301] Ibid., p. 29, para. 67.

[302] Ibid., para. 68 (emphasis added).

[303] It should be emphasized that the present discussion is not intended to describe how the law of the sea has developed, but merely to consider, in the context of that law, the theoretical problems associated with the development of law in the light of observations made by the Court and its Members during the period under review.

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preclude it from becoming a valid basis for precedent. *Ab injuria jus non oritur.* There are acts which are so tainted with nullity *ab initio* that no mere negligence of the interested state will cure it.[304]

If correct, this view would signify the near-impossibility of any development of customary law in the direction of extended claims of the coastal State. It is not clear whether Lauterpacht would have regarded as valid express agreements between States recognizing a claim to exclusive rights of a coastal State over part of the high seas. If such agreements were valid *inter partes*, a succession of them could presumably constitute a recognition that claims of this kind, while not valid *erga omnes*, were no longer an *injuria* incapable of producing rights; at that point, absence of protest would begin to be significant and effective for the development of customary law.

Subsequent developments of the practice of coastal State claims would seem to exclude the possibility of a rule of *jus cogens* which would deprive of even potential validity any purported extension beyond the established limit, having a paralysing effect on the development of customary law in the field. A rule which has itself developed by way of practice reaching further and further, as a rule of customary law, can hardly be assumed to provide that no further development in the same direction is possible. It would however be an over-simplification of the development of the law of the sea to regard it as a steady outward push by coastal States at the expense of the *res communis*.[305]

When discussing the *Fisheries* case in 1954, Fitzmaurice suggested by way of fundamental principle that

> a State the legal validity of whose action is challenged must be prepared to show *either* that the action is justified by international law . . . *or* that the action is in a field which international law does not purport to regulate at all.[306]

Referring to the celebrated *dictum* in the judgment in that case that

> The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law . . .[307]

he observed that the delimitation of sea areas outside the recognized limits of territory could not be said to be 'a field which international law does not purport to regulate'; and that accordingly it was not sufficient to show that a claimed delimitation was 'not contrary to international law'.

[304] 'Sovereignty over Submarine Areas', this *Year Book*, 27 (1950), pp. 397–8. For reasons which he explained, Lauterpacht did not in fact consider that this was the case as regards proclamation of sovereignty over *submarine* areas, which he considered to be 'not inconsistent with existing law'; but this was his approach as regards exploitation of the sea itself.

[305] See, for example, O'Connell, 'Trends in the Law of the Sea', *Proceedings and Papers of the Fifth Commonwealth Law Conference* (1977), p. 415.

[306] This *Year Book*, 30 (1953), pp. 10–11; *Collected Edition*, I, pp. 141–2.

[307] *ICJ Reports*, 1951, p. 132.

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In such situations as this, the controversy surrounding the Permanent Court's decision in the *Lotus* case is not yet resolved or exhausted. Is the approach to cases in which the law appears unsettled or dubious to be that 'restrictions upon the independence of States cannot . . . be presumed';[308] that 'the rights of States [have], by virtue of their sovereignty, to be regarded as absolute except in so far as restricted by some positive prohibition of international law' as Fitzmaurice expressed it; or is the position rather, as he himself held, that such an approach

> leads in the final analysis to anarchy, since in the absence of any clearly proved restricting rule it makes the rights and actions of States dependent in the last resort on their own will and nothing else.[309]

The question of the applicability of the *Lotus* principle—or its antonym—in the field of extensions of maritime jurisdiction into high seas areas was specifically discussed by Judge Dillard in the *Fisheries Jurisdiction* cases, who saw them as raising questions of 'State autonomy and freedom of State action and presumptions flowing from such concepts'.[310] He described the attitude of Iceland as equivalent to a contention that

> Because of the wide divergence in State practice, . . . there is no law or at least a lacuna in the law viewed as a body of restraints on State conduct, and therefore the law does not prevent the extension by each State of its exclusive fisheries jurisdiction.[311]

So interpreted, this would amount to a philosophy of freedom of State action except where there can be shown to be a prohibitive rule (which may of course be deduced from the existence of a permissive rule in favour of some other State, the rights conferred by such permissive rule having a counterpart in the obligations of the prohibitive rule). Judge Dillard however goes on to re-express the presumed Icelandic approach in somewhat different terms:

> She is not claiming an exception to an *established* rule, but a different kind of rule, namely a permissive rule which, in the absence of a specific rule to the contrary, permits the coastal State in a special situation to extend unilaterally its jurisdiction to an extent that it deems reasonable.[312]

The reference to a 'special situation' is in fact only consistent with a permissive rule; conceptually, if States are free to extend their fisheries jurisdiction unless there is a conflicting right or prohibitive rule, this must be the general case, and the restriction must be the exception or 'special situation'.

[308] *PCIJ*, Series A, No. 10, p. 18. Lauterpacht indeed thought that the principle so stated was almost a tautology: *The Development of International Law by the International Court*, p. 361.
[309] This *Year Book*, 30 (1953), p. 9; *Collected Edition*, I, p. 140.
[310] *ICJ Reports*, 1974, p. 59.
[311] Ibid., pp. 58–9.
[312] Ibid., p. 59.

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Judge Dillard went on to express his own position on the question of States' freedom of action:

> Borrowing from Lauterpacht, I would put the matter as follows: if the exercise of freedom trespasses on the interests of other States, then the issue arises as to its justification.[313]

The difficulty with this approach is the definition of the 'interests of other States';[314] they are presumably not rights,[315] but they are apparently something entitled to protection. If they are so protected, then there must be a correlative obligation to respect them; from which it must be concluded that there is a prohibitive rule in existence.

Judge de Castro came to 'the pessimistic conclusion that there is in international law no binding and uniform rule fixing the maximum extent of the jurisdiction of States with regard to fisheries' but continued: 'From this conclusion it has been deduced that there is a legal vacuum, but in my opinion this deduction is not based on conclusive reasons.'[316] Further on in his opinion, he apparently based himself on an implied presumption against State freedom of action in this domain:

> The high seas are regarded as *res omnium communis*, and the use of them belongs equally to all peoples. The appropriation of an exclusive fishery zone in an area hitherto considered as part of the free seas is equivalent to deprivation of other people of their rights. The extension of its jurisdiction over the adjacent sea by a coastal State presupposes a reduction of the freedom of fishing of other States, and such respective increase and loss of power *calls for legal justification*.[317]

Judge de Castro's escape from the dilemma presented by the

> conflict which is emerging between the principle of the freedom of the high seas with regard to fisheries, and the trends in favour of extension of the zone of jurisdiction of coastal States[318]

was to extend the scope of custom to find a place for the concepts of 'special rights, preferential rights and historic rights':

> In order to be binding as a legal rule, the general conviction (*opinio communis*) does not have to fulfil all the conditions necessary for the emergence of a custom.[319]

The joint separate opinion of five judges (Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda) in the *Fisheries Jurisdiction* cases, however, held that a general practice had developed around a proposal made at the 1960 Conference on the Law of the Sea, whereby 'an

[313] Ibid.; the reference is to *The Development of International Law by the International Court*, p. 361.

[314] The expression appears in the 1958 Geneva Convention on the High Seas, by which States, in exercising their freedom of fishing, are to 'pay reasonable regard to the interests of other States'.

[315] Cf. the distinction made in the *Barcelona Traction* judgment, *ICJ Reports*, 1970, p. 36, para. 46.

[316] Ibid., p. 95.

[317] *ICJ Reports*, 1974, p. 97 (emphasis added).

[318] Ibid., p. 97.

[319] Ibid., p. 100,

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exclusive fishery zone beyond the territorial sea has become an established feature of contemporary international law'.[320] They continued:

> It is also true that the joint formula voted at that Conference provided for a 6 + 6 formula, i.e., for an exclusive 12-mile fishery zone. It is however necessary to make a distinction between the two meanings which may be ascribed to that reference to 12 miles:
>
> (*a*) the 12-mile extension has now obtained recognition to the point that even distant-water fishing States no longer object to a coastal State extending its exclusive fisheries jurisdiction zone to 12 miles; or, on the other hand,
>
> (*b*) the 12-mile rule has come to mean that States cannot validly extend their exclusive fishery zones beyond that limit.
>
> . . . In our view, the concept of the fishery zone and the 12-mile limit became established with the meaning indicated in . . . (*a*) above . . .[321]

What, however, is the significance of a 'limit' of a defined number of miles from baselines round the coasts being set by international law?

Whatever limit may be set by general international law, unless this is to be treated as a matter of *jus cogens* (which, as noted above, seems to be no longer a tenable view), it will always remain open to the coastal State to conclude agreements with other States as to their action, or refraining from action, in a further area outside the limit, tantamount to a recognition of a special status for that further area, or of rights—of a treaty-law nature—of the coastal State over it.[322] In their joint opinion in the *Fisheries Jurisdiction* cases, the five judges in fact list a number of examples.[323]

It must follow, however, that what can be done by specific agreement can equally be done by tacit acceptance; that a State which enters into an agreement of restraint, implying special rights of a coastal State over an area beyond some 'established' limit set by international law, can equally, if it so wishes, simply refrain from protest if the coastal State asserts a claim to such rights over that area. Accordingly, the coastal State must equally be free to assert such a claim, not as being in conformity with existing law (though the coastal State may, by way of 'window-dressing', assert that it is), but so that it can take its chance of acceptance or protest on the part of other States interested.

[320] Ibid., p. 46.

[321] Ibid., pp. 46–7; a similar distinction is made by Judge de Castro, ibid., pp. 86, 90.

[322] This would, however, appear to be no longer the case as regards 'the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction', the definition of the 'Area' in the United Nations Convention on the Law of the Sea (Art. 1 (1)), since not only is the Area proclaimed to be 'the common heritage of mankind' (Art. 136), but Article 311(6) provides that

> 'States parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in Article 136 and that they shall not be party to any agreement in derogation thereof'.

Whether or to what extent the Convention is generally binding as a reflection or crystallization of customary law is a question not here examined.

[323] *ICJ Reports*, 1974, p. 50, footnote. The five judges also point out that certain particularly influential coastal States can offer more inducements to enter into such agreements than others; they therefore reject such evidence as practice in support of an alleged customary-law rule.

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When the five judges in their joint opinion discuss the possibility that the 12-mile rule might mean 'that States cannot *validly* extend their exclusive fishery zones beyond that limit', the question remains: what is the sense of the word 'validly'? The 1958 Geneva Convention on the High Seas had already provided that 'The high seas being open to all nations, no State may *validly* purport to subject any part of them to its sovereignty'.[324] If we exclude the possibility of a rule of *jus cogens*, which would strike down the agreements listed by the five judges for extension of fishery limits by conventional (in the sense of treaty-law) means, the meaning must be that an extension of jurisdiction beyond the established limit will have no intrinsic validity, so as to be opposable *erga omnes*; its validity will, at least initially, be relative, within a finite number of bilateral relationships, between the coastal State and individual consenting—or non-protesting—States.

It must follow further, *a contrario*, that if the established limit has any meaning at all, it must be the furthest distance to which jurisdiction may be extended in a way which *does* have intrinsic validity; the furthest extension which is not dependent on acceptance or lack of protest by other States considered individually.[325] It is thus in a sense a *minimum* limit rather than a *maximum*, though it must also remain open to the coastal State to claim jurisdiction over a more restricted area if it so wishes.

This is the view expressed in the separate opinion of Judge Sir Humphrey Waldock in the *Fisheries Jurisdiction* cases, that ever since the failure of the Hague Codification Conference of 1930,

> The prevailing opinion was that . . . the 3-mile limit remained a limit which could be said to be generally accepted and, therefore, *ipso jure*, valid and enforceable against any other State; but that a claim in excess of that limit could no longer be said to be *ipso jure* contrary to international law and invalid *erga omnes*; and that the validity of such a claim as against another State would depend on whether it was accepted or acquiesced in by that State . . . In the absence of clearly established general rules, the legal issue has continued to present itself in terms of the opposability of the claim to each other State rather than of the absolute legality or illegality of the claim *erga omnes*; in other words, in terms of the acceptance or acquiescence of other States.[326]

The use of such an expression as 'not contrary to international law' may therefore be, at the very least, a linguistic convenience to convey the difference between asserted extensions of jurisdiction within and without the

[324] Emphasis added. However, the term 'high seas' was defined to mean 'all parts of the sea that are not included in the territorial sea or internal waters', which would appear to be what Sir Ian Sinclair has, in another context, called an 'ambulatory' or 'shifting' definition ('The Concept of a Continental Shelf', *Proceedings and Papers of the Fifth Commonwealth Law Conference* (1977), p. 450); if the generally-recognized territorial sea were to expand, presumably the high seas as so defined would shrink, and the Convention regime remain formally intact. In this sense see also Judge de Castro in *ICJ Reports*, 1974, pp. 92–3.

[325] For simplicity's sake, this leaves out of account the position of the 'single recalcitrant State' — the State which has stood out consistently against a developing rule, and retains exemption from it, as was the case of Norway in the *Fisheries* case.

[326] *ICJ Reports*, 1974, pp. 119–20, paras. 34–5.

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established limit. An extension within the limit, which may not legally—or 'validly'—be opposed, may be said to be one which is supported by a rule of positive international law. An extension which goes beyond the established limit is not contrary to international law, in the sense that the act of asserting the extension is not a breach of international law; but no rule of positive international law requires other States to respect it.

In the course of Fitzmaurice's discussion of the *Fisheries* case, he regarded it as an important point that

> so soon as it is admitted that international law governs the question of the breadth of the territorial sea, it follows automatically that international law must also prescribe *a* standard maximum breadth, universally valid and obligatory in principle, even though variations may be allowed in particular cases, e.g. on the basis of long continued (historic) usage. If this is not so, then international law would *not* govern the question of the extent of the territorial sea, since there is no practical difference between saying that international law prescribes no standard breadth for that sea, and saying that States are free to determine the breadth as they please.[327]

This can be accepted, in the light of subsequent developments, only on the basis that the word 'obligatory' refers to the duty of third States to accept the standard maximum breadth, not to a duty of the coastal State not to purport to go beyond it. It is doubtful, however, whether this was what Sir Gerald had in mind.

Although the Court, by dealing with the *Fisheries Jurisdiction* cases in terms of opposability, did not have to tackle the *Lotus* controversy directly, it made a *dictum* which is of much greater significance in this respect than might appear. To appreciate this, reference has first to be made again to Fitzmaurice's article of 1954, in which he took the view that a positive permissive rule of law must be shown to exist. One of Fitzmaurice's reasons for thinking this was that if the presumption were in favour of unfettered sovereignty, 'the outcome of a great many disputes would depend largely on the accident of which side was plaintiff and which defendant';[328] the defendant would only have to show that its action was 'not contrary to international law'. It is suggested however that this argument is not conclusive, since the reverse situation would arise if it were essential that the State challenged be able to show that its action was justified by a positive rule of law. In the field of unsettled legal regulation where our hypothesis is laid, any presumption places either the plaintiff or the defendant in a position of strength. The conclusion must surely be that such presumptions as to the

[327] This *Year Book*, 31 (1954), p. 385; *Collected Edition*, I, p. 215. This passage was regarded by Judge de Castro as so rigid as to be a *reductio ad absurdum*: *ICJ Reports*, 1974, p. 95.

[328] This *Year Book*, 30 (1953), p. 11; *Collected Edition*, I, p. 142. An argument on these lines had in fact been advanced by Sir Eric Beckett as counsel for the United Kingdom in the *Fisheries* case, but it was there addressed to the problem of the burden of proof: *Pleadings*, vol. 4, pp. 32–3. Beckett did also contend that there should be a presumption in favour of freedom of the seas, which was equivalent to requiring Norway to prove the legality of its baseline system; ibid., pp. 33–4.

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existence or otherwise of a rule of law, while possibly valuable as an aid to legal ratiocination, cannot be used, or can only in the last resort be used, as a basis for decision; and this is the essential justification of the principle *jura novit curia*.

In fact the Court in the *Fisheries Jurisdiction* cases, when commenting on the difficulties resulting from the absence of the respondent from the proceedings, observed that

> The Court however, as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.[329]

By thus dismissing the application of the concept of the burden of proof, the Court was also debarring itself from resting its decision on the application of a presumption. If a presumption is to be employed as an element in the reasoning of a decision, then—unless it is an absolute presumption, in which case it is itself a rule of law—the question whether or not the party against whom it operates has succeeded in reversing it is a question of burden of proof.[330] If therefore the Court asserts that 'the law lies within the judicial knowledge of the Court', and that it will not impose a burden of proof, it cannot then find that there is a presumption either of the legal or of the illegal character of the conduct of the respondent to which the claim is directed. Unless the law is in fact found to be certain, the only course remaining would appear to be a *non-liquet*; and the *Fisheries Jurisdiction* judgments therefore seem, perhaps surprisingly, to suggest that the Court would contemplate declaring a *non-liquet* if circumstances so required.

2. *International Legal Obligations* erga omnes *and the* actio popularis

This concept may be said to have developed wholly within the period under review, at least as far as its recognition and application by the Court

[329] *ICJ Reports*, 1974, p. 9, para. 17. Fitzmaurice regards the latter sentence as a 'rather startling remark', and explains it as follows:

> 'The intended meaning (though not well expressed) must have been that the law is the law, and is whatever it is, whether or not the party concerned manages to establish its propositions, whereas the onus of establishing allegations of fact lies on the party making them and failure to do so may *per se* be deemed to negative the allegations':

'The Problem of the "Non-Appearing" Defendant Government', this *Year Book*, 51 (1980), p. 108, footnote 7.

[330] The rejection of the burden of proof as a possible determining factor also excludes another approach which might have been of particular applicability in the *Fisheries Jurisdiction* cases, that of the proof of change in the law. Whether or not the *Lotus* approach is adopted in a situation where the

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are concerned.[331] Fitzmaurice's first set of articles did contain a brief section devoted to 'Obligations Owed to the International Community at Large, not to any Particular State as Beneficiary',[332] but this was devoted only to examination of a suggestion by Judge Alvarez in his dissenting opinion in the *Status of South West Africa* case,[333] and a brief discussion whether, for example, the obligation to recognize a new State or government might be regarded as an obligation toward the international community at large.

There is of course a sense in which many (though not all) of the obligations of States in general international law may be said to be obligations *erga omnes*. Thus the requirements of the law concerning the treatment of aliens oblige a State to treat the nationals of all other States in accordance with that law, so that there is, at least, an obligation *in posse* owed to all States. Such obligation however only takes on effective existence when a particular alien is alleged to have been improperly treated; and the obligation is then owed only to the State of his nationality.[334] The essence of the obligation *erga omnes* as developed by the Court since 1970 is that its breach confers a *locus standi in judicio* not merely on the State which has, or whose national has, been injured, but on all States. It is perhaps not so much an obligation *erga omnes* as an obligation of which the breach opens responsibility *erga omnes*.

The key pronouncement on the subject was made in the judgment in the *Barcelona Traction* case. Referring to the obligations of a State concerning the treatment of aliens in its territory, the Court said:

> 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*.
>
> 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*

law in the relevant domain has never been settled with certainty, it might be reasonable to expect that where the law was established with reasonable clarity, but one party asserts that a new rule of law has come into existence, that party should bear the burden of proving it.

[331] In this sense, Seidl-Hohenveldern, for whom the *actio popularis* was unknown in general international law prior to the *Barcelona Traction* judgment: 'Actio popularis im Völkerrecht?', *Communicazioni e studi*, 14 (1975), p. 805. On the other hand, it has been suggested that the concept, analogous to that of 'absolute rights' in some continental legal systems, has always been part of international law, but has been obscured by the voluntarist approach: Ruiz, 'Las obligaciones *erga omnes* en derecho internacional publico', *Homenaje al Professor Miaja de la Muela* (1979), p. 222; *sed quaere*.

[332] This *Year Book*, 27 (1950), pp. 14–15; *Collected Edition*, I, pp. 14–15.

[333] *ICJ Reports*, 1950, p. 177.

[334] The point is clearly made in a jurisdictional context in the separate opinion of Judge Morelli in the *Northern Cameroons* case, *ICJ Reports*, 1963, p. 146.

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Opinion, ICJ Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character.[335]

The essential distinction, in the Court's thinking, between such obligations *erga omnes* and other obligations of international law appears from the next paragraph of the judgment:

> 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 . . .[336]

The implication *a contrario* is clear: a claim may be brought by any State against any State alleging a breach of an obligation towards the international community as a whole, without the applicant State having to show that it has itself, directly or through its nationals, suffered injury from the alleged breach.

Since there was no suggestion in the *Barcelona Traction* case that Spain had violated any obligation of this character, the passage quoted above must be regarded as an *obiter dictum*; furthermore, from the practical point of view, for this reason neither the facts in the case nor the remainder of the Court's judgment give any further enlightenment as to the application of the principle stated. Such enlightenment can however be gained, paradoxically, from study of an earlier decision, the 1966 judgment in the *South West Africa* cases; it is more or less an open secret that the passage in the *Barcelona Traction* judgment—with its specific reference to 'protection from . . . racial discrimination',[337] was intended as a public disavowal, by the Court in its 1970 composition, of at least one element in the controversial decision given by the (barest) majority of the judges sitting in 1966.[338]

The title of jurisdiction relied on by the applicants in the *South West Africa* cases was Article 7, paragraph 2, of the Mandate for South West Africa, which read:

> The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpret-

[335] *ICJ Reports*, 1970, p. 32, paras. 33–4.

[336] Ibid., p. 32, para. 35. The distinction is based, as Seidl-Hohenveldern points out, on a definition of the 'basic rights of the human person' which excludes rights to personal property, notwithstanding the inclusion of the right to property in the Universal Declaration of Human Rights: '*Actio popularis* im Völkerrecht?', *Communicazioni e studi*, 14 (1975), p. 804.

[337] An interesting explanation put forward for the inconsistency between the *South West Africa* judgment and the *Barcelona Traction dictum* is that the UN Convention on the Elimination of Racial Discrimination had come into force in the meantime: Miaja de la Muela, 'El interés de las partes en el proceso ante el Tribunal internacional de justicia', *Communicazioni e studi*, 14 (1975), p. 558.

[338] See for example Gross, *The Future of the International Court of Justice*, vol. 2, pp. 748–50. Rosalyn Higgins, after noting the apparent inconsistency, comments drily 'One is aware, of course, that the composition of the Court has changed somewhat': 'Aspects of the Case Concerning the Barcelona Traction Light and Power Co. Ltd.', *Virginia Journal of International Law*, 11 (1970–1), p. 330, footnote 8.

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ation 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.[339]

South Africa had contended (Third Preliminary Objection) that the conflict or disagreement which the applicants sought to bring before the Court—essentially over whether the respondent was failing to observe the requirements of the Mandate as regards its treatment of the native inhabitants and administration of the Territory—was not a dispute as envisaged in Article 7, 'more particularly in that the said conflict or disagreement does not affect any material interests of the applicant States or their nationals'.[340]

In support of this proposition, the Respondent contends that the word 'dispute' must be given its generally accepted meaning in a context of a compulsory jurisdiction clause and that, when so interpreted, it means a disagreement or conflict between the Mandatory and another Member of the League concerning the legal rights and interests of such other Member in the matter before the Court; that 'the obligations imposed for the benefit of the inhabitants would have been owed to the League on whose behalf the Mandatory undertook to exercise the Mandate'.[341]

The response of the Court in 1962 to this argument was as follows:

The Respondent's contention runs counter to the natural and ordinary meaning of the provisions of Article 7 of the Mandate, which mentions 'any dispute whatever' arising between the Mandatory and another Member of the League of Nations 'relating to the interpretation or the application of the provisions of the Mandate'. The language used is broad, clear and precise: it gives rise to no ambiguity and it permits of no exception. It refers to any dispute whatever relating not to any one particular provision or provisions, but to 'the provisions' of the Mandate, obviously meaning all or any provisions, whether they relate to substantive obligations of the Mandatory toward the inhabitants of the Territory or toward the other Members of the League or to its obligation to submit to supervision by the League under Article 6 or to protection under Article 7 itself. For the manifest scope and purport of the provisions of this Article indicate that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members.[342]

At the close of its 1962 judgment, the Court included in its summing-up its conclusion that 'the dispute is one which is envisaged in the said Article 7 . . . Consequently the Court is competent to hear the dispute on the merits'. Its formal finding in the operative clause of its judgment was 'that it has jurisdiction to adjudicate upon the merits of the dispute'.[343] The decision was adopted by majority vote; and among the judges voting

[339] Quoted in *ICJ Reports*, 1962, p. 335.
[340] Ibid., p. 343.
[341] Ibid.
[342] Ibid.
[343] Ibid., p. 347.

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against it was Sir Gerald Fitzmaurice, who filed a lengthy dissenting opinion, of which the authorship was shared with Sir Percy Spender.[344]

The context of the 1962 judgment was the question of jurisdiction, and the Court's finding was solely one of jurisdiction. Whether an applicant has a legal right or interest in the subject-matter of the proceedings is normally regarded as a question of admissibility, and was so treated in the *Barcelona Traction* case. Nevertheless the Court, in its 1962 judgment in the *South West Africa* case, had made a *dictum*, if not a finding, that the obligations of the Mandatory in respect of its conduct were owed not only to the League of Nations as an institution, but also to the members individually, and were backed by the jurisdictional clause of Article 7. An obligation owed to the other members of the League is not an obligation *erga omnes*, despite the vocation to universality of membership which characterized the League; but the Court's 1962 interpretation of Article 7 shared one essential feature with the later definition of obligations *erga omnes*. Each of the States to which the obligation was owed would not have, or would not necessarily have, a direct interest in compliance with it, in the sense of direct injury to the State,[345] or to its national, resulting from failure to comply with it.

The 1966 judgment of the Court[346] was based squarely on the question of the existence of a legal right or interest of the applicants appertaining to the subject-matter of the claim. The contention that that question had already been settled by the 1962 judgment was rejected by the Court in a couple of brief paragraphs.[347]

The Court at the outset drew a distinction between two categories of obligations of the Mandatory under the mandate: the duty to respect the special interests of the individual States in the territory (which in the case of the class 'C' Mandate for South West Africa meant no more than respect for the rights of missionaries)—the 'special interest' clauses—and the obligations as to treatment of the natives and administration of the territory

[344] In that opinion, the two judges summed up as follows their view on the Third Preliminary Objection:

'This view is, *first*, that Article 7 must be understood as referring to a dispute in the traditional sense of the term, as it would have been understood in 1920, namely a dispute between the actual parties before the Court about their own interests, in which they appear as representing themselves and not some other entity or interest; and *secondly*, that Article 7 in the general context and scheme of the Mandate, was intended to enable the Members of the League to protect their own rights and those of their nationals, and not to enable them to intervene in matters affecting solely the conduct of the Mandate in relation to the peoples of the mandated territory' (ibid., pp. 558–9).

They did not express any view on the implications of the Court's statement that the League Members 'were understood to have a legal right or interest in the observance by the Mandatory' of *all* its obligations under the Mandate.

[345] It would of course be fair to express the matter also by saying that, where *erga omnes* obligations are concerned, the fact that all States are interested in their observance means that each State suffers a symbolic or moral injury from their breach. This does not however affect the point here made.

[346] According to McWhinney (*The International Court of Justice and the Western Tradition of International Law*, p. 39), Sir Gerald Fitzmaurice is 'known' to have been the principal author of the majority judgment: cf. also ibid., p. 69.

[347] This aspect of the case raises questions of *res judicata* and the relationship between jurisdiction and admissibility, to be examined in a later article.

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under the supervision of the League—the 'conduct' clauses. The importance of this was that if there had been no 'special interest' clauses, the jurisdictional clause in Article 7 could only have referred to the 'conduct' clauses; and it would have made no sense to give a procedural right of action before the Permanent Court unless a substantive right or interest was conferred by the Mandate, which the procedure right would protect. As it was,

> Having regard to the situation thus outlined, and in particular to the distinction to be drawn between the 'conduct' and the 'special interests' provisions of the various instruments of mandate, the question which now arises for decision by the Court is whether any legal right or interest exists for the applicants relative to the Mandate, apart from such as they may have in respect of the latter category of provisions;—a matter on which the Court expresses no opinion, since this category is not in issue in the present case. In respect of the former category—the 'conduct' provisions—the question which has to be decided is whether, according to the scheme of the mandates and of the mandates system as a whole, any legal right or interest (which is a different thing from a political interest) was vested in the members of the League of Nations, including the present Applicants, individually and each in its own separate right to call for the carrying out of the mandates as regards their 'conduct' clauses;—or whether this function must, rather, be regarded as having appertained exclusively to the League itself, and not to each and every member State, separately and independently.[348]

The Court's conclusion was that no such right or interest was vested in individual members of the League.

The most material part of the judgment for present purposes was, however, that in which it dealt with what it called the 'necessity' argument. The details of that contention are not here material, but in essence the suggestion was that judicial control of the 'conduct' obligations was a necessary part of the system and could only be secured by reading Article 7 in a wide sense as conferring individual enforcement rights on the members of the League. When rejecting this, the Court said:

> . . . the Court, bearing in mind that the rights of the Applicants must be determined by reference to the character of the system said to give rise to them, considers that the 'necessity' argument falls to the ground for lack of verisimilitude in the context of the economy and philosophy of that system. Looked at in another way moreover, the argument amounts to a plea that the Court should allow the equivalent of an '*actio popularis*', or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the 'general principles of law' referred to in Article 38, paragraph 1(*c*), of its Statute.[349]

[348] *ICJ Reports*, 1966, p. 22, para. 14.
[349] Ibid., p. 47, para. 88.

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To what extent was this finding contradicted by the *dictum* of the Court four years later?

It was not in fact claimed by the applicants that the alleged right of enforcement, being derived from an article of the Mandate which referred to members of the League, was exercisable by any State whatever; if it was asserted to be a 'right resident in any member of a community', that community could only be that of the members of the League of Nations, not the community of States. Furthermore, what was in question was the interpretation of an instrument concluded in 1920; the 'necessity' argument was founded on what was claimed to be an essential part of the structure of the mandate system as originally conceived. Yet the Court specifically stated that its finding was based upon contemporary international law: it refers to 'international law as it stands at present'.[350]

This paragraph of the Court's judgment therefore appears, despite the statement that the 'necessity' argument is simply being 'looked at in another way', to be addressed to a different and wider contention, which had not been specifically advanced, namely that certain at least of the Mandate's 'conduct' obligations were capable of enforcement by a true *actio popularis*, in short, that they were obligations *erga omnes*;[351] and it was thus this contention also that the 1966 judgment summarily rejected.

The *dictum* in the *Barcelona Traction* judgment in 1970, though *obiter*, thus clearly signalled a *revirement de jurisprudence* on this question. The subsequent judicial involvement with the fate of South West Africa, in the request for advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, did not however require the hint given in 1970 to be followed up, since action to enforce what were seen as the obligations of the Mandate was taken by the political organs of the organization, in place of the organs of the League, rather than by States which had been members of the League.

In connection with the concept of international legal obligations *erga omnes*, it is however appropriate to refer also to the declaration made by the Court in the *Namibia* case that

> the termination of the Mandate and the declarations [by the Security Council in resolution 276] of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law: . . .[352]

In the context of the question put to the Court as to the 'legal consequences

[350] See the discussion of the intertemporal law principle below, pp. 128 ff. Presumably however the non-existence of an *actio popularis* in the time of the League would have been regarded as an *a fortiori* case.

[351] Mbaye ('L'Intérêt pour agir devant la Cour internationale de Justice', *Recueil des cours*, 209 (1988–II), pp. 316–18) rejects the identification of the right to rely on an obligation *erga omnes* with an *actio popularis*.

[352] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports*, 1971, p. 56, para. 126.

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for States' of the situation in Namibia, the practical question to which the above finding was addressed was that of the consequences for non-members of the United Nations.[353]

In the operative part of its advisory opinion, the Court indicated in succession the legal consequences for South Africa, for member States and for non-member States; South Africa was declared to be 'under obligation to withdraw its administration from Namibia immediately . . .'. One possible view of the declaration quoted above is that South Africa was under an obligation *erga omnes*, of the kind contemplated in the *Barcelona Traction* judgment, to withdraw from Namibia, such that any State could seek the enforcement of that obligation, without being required to show an individual legal interest in the matter. In the absence of any subsisting jurisdictional provision binding on South Africa, however, the point could not be tested.

The *Barcelona Traction dictum*, however, found an echo when in 1986 the Court was occupied with the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*. Before considering the judgment in that case it is, however, necessary to revert a moment to two passages in the *Barcelona Traction* judgment, one of which was quoted above, but the implications of which have not yet been considered. After listing examples of what the Court saw as international obligations *erga omnes*, the Court continued:

> Some of the contemporary 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, ICJ Reports 1951*, p. 23); others are conferred by international instruments of a universal or quasi universal character.[354]

Later in its judgment it added a further qualification:

> 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.[355]

There are thus, it seems, two mutually exclusive classes of rights of international protection: those which are conferred by 'international instruments of a universal or quasi-universal character',[356] and those which have

[353] The action taken by the General Assembly and the Security Council and the obligations of member States will be discussed in a later article under the heading of international organizations.

[354] *ICJ Reports*, 1970, p. 32, para. 34.

[355] Ibid., p. 47, para. 91.

[356] The term 'quasi' is often useful legal shorthand, but this is an instance where more precision would have been desirable. The Court goes on to refer to the European Convention on Human Rights, which is hardly of a 'universal' character, unless the meaning is universality within a particular group of States of some homogeneity.

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entered into the body of general international law. The latter do confer on States the capacity to protect victims of infringement irrespective of their nationality; the former do not—or at least, whether they do or not depends on the specific provision of the instruments referred to. Why this distinction should exist is not clear, nor is the relationship of the two categories: for example, would the conclusion of a new universal or quasi-universal instrument providing only for protection by the national State of the victim destroy or restrict a pre-existing universal right?

In view of this apparent withdrawal on the question of human rights, and of the existence of 'international instruments' of at least a 'quasi-universal character' dealing with the other subjects mentioned by the Court—slavery, racial discrimination—it may be doubted whether these passages can be relied on to support any customary-law right to invoke an *erga omnes* obligation, except in the case of genocide.[357] If this is so, the 1970 *dictum* is little more than an empty gesture. A right of protection conferred by a multilateral treaty derives its validity from the treaty, not from a principle that 'in view of the importance of the rights involved', all States have 'a legal interest in their protection'.[358]

In the 1986 judgment in the case brought by Nicaragua against the United States, the Court, when discussing allegations made in United States Government circles against the Government of Nicaragua which, to some extent, appeared to have been advanced as justifying the actions of the United States against the latter Government, noted 'that Nicaragua is accused . . . of violating human rights'.[359] Let it be recalled that in 1970 the Court had given, as one of its examples of international legal obligations *erga omnes*, those deriving 'from the principles and rules concerning the basic rights of the human person'.[360] Consistently with this approach, in 1986 the Court continued:

> 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.[361]

The Court thus appeared to be suggesting that Nicaragua was subject, along with all other States, to an international obligation *erga omnes* to

[357] Even in the case of genocide, it does not appear necessarily to follow that because, as the Court stated in 1951, 'the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation', the principles may be invoked by any State to bring a claim alleging genocide, even if no national of the applicant State has been harmed.

Leo Gross observes on the other hand that

'If the pronunciamento were to be taken seriously'—a striking qualification—'it would be difficult to imagine anything more likely to discourage States from accepting the compulsory jurisdiction of the Court': *The Future of the International Court of Justice*, vol. 2, p. 749.

[358] *ICJ Reports*, 1970, p. 32, para. 33.

[359] *ICJ Reports*, 1986, p. 134, para. 267.

[360] *ICJ Reports*, 1970, p. 32, para. 34.

[361] *ICJ Reports*, 1986, p. 134, para. 267.

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respect human rights, not dependent on the existence of a specific treaty commitment. The United States, which was not appearing in the proceedings, had however not presented any formal counterclaim against Nicaragua on this (or any) ground. However, in the next sentences of its judgment, the Court apparently resiled from any suggestion of a customary-law right of action in this field:

> 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 . . . 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 . . . 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.[362]

This paragraph is capable of two distinct interpretations. The more restrictive view would be that the Court is in effect saying that, in respect of protection of human rights, the only obligations *erga omnes* are those created by universal or quasi-universal international conventions. The alternative interpretation is that there exists an obligation *erga omnes* in this field, but that if in respect of a particular State it is embodied in a convention providing mechanisms for ensuring its observance, no claim can be brought parallel to the operation of those mechanisms.

It was—unfortunately for commentators—unnecessary for the Court to spell its meaning out further, as the matter was before it only in the context of the possibility of human rights violations by Nicaragua being pleaded as a justification of the actions of the United States. The Court continued:

> 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.[363]

Either interpretation of the Court's approach in fact points up a certain lack of coherence in the system propounded in the *Barcelona Traction* judgment. If the rights involved are of such importance that 'all States can be held to have a legal interest in their protection', then the existence or otherwise of an international convention is irrelevant unless, first, it provides for enforcement of the rights in question and, secondly, participation in it is not merely quasi-universal but universal. This was not even true of the

[362] Ibid.
[363] Ibid., para. 268.

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Genocide Convention of 1951, and is not true today of any relevant convention.

The conclusion which has, it appears, to be accepted is that obligations *erga omnes* as to which 'compulsory rights of protection have entered into the body of general international law' may still be—with the possible exception of the obligation not to commit genocide—a purely theoretical category.

3. Jus cogens *and* jus dispositivum

(1) Jus cogens *and reservations to multilateral conventions*

In the *North Sea Continental Shelf* cases, the Court was faced with a contention that the 'equidistance principle' in the delimitation provisions (Article 6) of the 1958 Geneva Convention on the Continental Shelf had, through positive law processes, come to be regarded as a rule of customary international law; it regarded its negative conclusion on this point as confirmed by

> the fact that Article 6 is one of those in respect of which, under the reservations article of the Convention (Article 12) reservations may be made by any State on signing, ratifying or acceding—for, speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted;—whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour. Consequently, it is to be expected that when, for whatever reason, rules or obligations of this order are embodied, or are intended to be reflected in certain provisions of a convention, such provisions will figure amongst those in respect of which a right of unilateral reservation is not conferred, or is excluded.[364]

As the present writer has pointed out elsewhere,[365] there is here some apparent confusion between the generality of a rule of law and its classification as *jus cogens* or otherwise. While it is true that 'general or customary law rules and obligations' must 'by their very nature . . . have equal force for all members of the international community', in the sense that if they do not, they cannot be general rules at all, but at most rules of local or special customary law, this requirement is satisfied if the rules in question are generally recognized as such by the members of international community; it does not also imply that they must in all cases be observed, and can in no circumstances be waived or excluded by agreement between two or more States. The whole significance of the distinction between *jus dispositivum*

[364] *ICJ Reports*, 1969, pp. 38–9, para. 63.

[365] *International Customary Law and Codification*, p. 120. In the same sense: Zemanek, 'Die Bedeutung der Kodifizierung des Völkerrechts für seine Anwendung', *Festschrift Verdross*, p. 584; Lang, *Le Plateau continental de la Mer du Nord*, p. 98.

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and *jus cogens* is that rules of law falling within the former category may freely be varied or excluded by agreement in the relations between two or more States, provided the position of third-party States is in no way prejudiced.

(2) Jus cogens *and the decision of a court*

Is a decision of an international tribunal, or, more specifically, of the International Court of Justice, necessarily a matter of *jus cogens* so far as regards its statement of the law between the parties? The generally recognized declaratory, rather than constitutive, nature of an international judicial act would suggest that the law as declared by the Court is binding on the parties to the same extent after the judgment as it was before; all that has changed is that any doubt as to what that law is has been dissipated. Clearly, neither party can unilaterally choose to act otherwise than in accordance with the judgment, but it must be open to the parties to compromise their rights, and indeed to set aside the judgment altogether if such be their common wish.

A different view was, however, expressed by Judge Gros in the case of the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*. The special agreement by which the Court was seised in that case, after entrusting to the Court the task of indicating the principles and rules of international law to determine the parties' respective continental shelves, and of clarifying the practical method for their application, went on to provide in Article 2 that 'the Parties shall meet to apply these principles and rules in order to determine the line of delimitation . . . with a view to the conclusion of a treaty in this respect'.[366] Article 3 provided that if agreement was not reached the parties could go back to the Court for explanations and clarifications.

During the oral proceedings, Judge Gros put a question to both parties, which appears to have somewhat disconcerted them. He asked each Agent to explain the position of his government on the question of the binding force of the judgment, with regard to (a) the principles and rules of international law which might be indicated by the Court, (b) the circumstances which characterized the area, regarded by the Court as pertinent, and (c) any equitable principles which the Court might take into account.[367]

The Agent of Tunisia gave what turned out to be the correct answer: that the Court's judgment on these questions was binding on the parties, in accordance with Article 94, paragraph 1, of the Charter, Article 59 of the Statute, and Article 94, paragraph 2, of the Rules of Court; it would also be final and without appeal in accordance with Article 60 of the Statute.[368] The reply of Libya, however, made no reference to these texts; it began with the words 'Bearing in mind that Libya and Tunisia have agreed in

[366] Libyan translation of the original Arabic: *ICJ Reports*, 1982, p. 23.
[367] *Pleadings*, vol. 5, p. 244.
[368] Ibid., p. 349.

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Article 3 of the Special Agreement . . . to "comply with the judgment of the Court and with its explanations and clarifications" . . .', and then stated that 'The Judgment to be given by the Court in accordance with the Special Agreement will have binding force with regard to the principles and rules of international law found to be applicable . . .'.[369]

Judge Gros interpreted the absence of reference to the Charter and Statute in Libya's reply as deliberate, because to refer to the obligation of compliance deriving from those texts

> would have undermined its contention that the Special Agreement provides for referral, after the Court has delivered judgment, to an unfettered agreement between the Parties which could then adjust the terms of the Judgment.[370]

On the basis of this interpretation, Judge Gros's conclusion is as follows:

> The point is that by taking up such a position, contradicted by Tunisia, Libya was interpreting the Special Agreement as if that instrument were capable of amending the rules of the Charter and Statute, and that is something which goes to the heart of the Court's judicial role. It has been argued that two States can always agree by treaty to modify their legal situation and that the judgment could not make an exception to this rule. This is a somewhat simplistic view of things when what the situation calls for is a decision whether the Court, being thus warned of the intentions of a party, can keep silent in the face of such an opinion. The question was whether, before the judgment which the Parties asked the Court to deliver and which must be binding on them, the Special Agreement could validly have reserved for them the right wholly or partly to modify the Court's jurisdictional act. That is an unacceptable notion for the Court, which does not give States opinions but declares to them, with binding force, what it holds to be the law applicable to the dispute submitted to it. And, having been warned that one of the States felt able to disregard this, while the other State took the opposite position, the Court ought to have asked itself whether it might not thereby be prevented from properly exercising its judicial function.[371]

The majority of the Court was not convinced by this argument; and it is submitted that the majority view is the better one. The distinction between the *Free Zones* case and the *Continental Shelf* case is that in the former case what was asked for was 'a judgment which either of the Parties may render inoperative' (*PCIJ*, Series A, No. 24, p. 14), whereas in the latter case the parties were merely recognizing in advance that the solution to their problem of delimitation dictated by the strict application of the law might, in their shared view, be more satisfactory if subjected to some adjustment. The parallel might more appropriately be drawn with the Special Agreement in the *Serbian Loans* case, which provided not merely for the parties to negotiate on the basis of the Court's judgment, but for the one side or the other to make concessions required by 'considerations of equity'—which,

[369] Ibid., p. 501.
[370] *ICJ Reports*, 1982, p. 144, para. 2.
[371] Ibid.

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presumably, the Court was considered not capable of taking into account in giving its legal judgment.[372]

In the *Northern Cameroons* case, the Court did refer to the fact that, after the judgment is given, the parties 'are in a position to take some retroactive or prospective action or avoidance of action, which would constitute a compliance with the Court's judgment or a *defiance thereof*';[373] but it would be reading too much into this passage to suppose that the Court regarded any action not in accordance with a judgment as necessarily 'a defiance thereof'.

4. *Universality and Uniformity of the Rules of International Law*

The creation of a considerable number of new States through the process of decolonization gave rise to a controversy, now somewhat abated, over the question whether existing rules of general international law are automatically binding on new States. According to one view such a State, having had no part in the formation of customary law rules, was entitled, on attaining independence, to select the rules which it was willing to accept as binding and to reject the rest.[374]

It has never been pleaded before the Court that a given customary rule relied on by one party is unenforceable against the other because the latter, being a new State, has not consented to its application; but an observation of the Chamber in the *Frontier Dispute* case suggests some sympathy with this approach. The Chamber attached considerable importance to the applicability on the African continent of the principle of *uti possidetis juris*, which it classified as 'a principle of a general kind which is logically connected with [this form of] decolonization wherever it occurs'.[375] At the same time, however, the Chamber emphasized the act of will of African States, emphasized by the well-known 1964 Cairo Resolution of the Conference of African Heads of State and of Government, to apply the principle in Africa.

> The essential requirement of stability . . . has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples . . .[376]
>
> Indeed it was by deliberate choice that African States selected, among all the classic principles, that of *uti possidetis*.[377]

[372] *PCIJ*, Series A/B, Nos. 20/21, pp. 15–16.

[373] *ICJ Reports*, 1963, pp. 37–8 (emphasis added). See also *Fisheries Jurisdiction*, p. 134 below.

[374] Cf. separate opinion of Judge Ammoun, *Barcelona Traction, Light and Power Company, Limited, ICJ Reports*, 1970, pp. 329–30; and see Tunkin, 'Remarks on the Juridical Nature of Customary Norms of International Law', *Columbia Law Review*, 49 (1961), p. 428; Sereni, 'I Nuovi Stati ed il Diritto internazionale', *Rivista di diritto internazionale*, 50 (1967), pp. 14–15.

[375] *ICJ Reports*, 1986, p. 566, para. 23; the bracketed words do not correspond to anything in the authentic French text, and may have been left over from an earlier draft.

[376] Ibid., p. 567, para. 25.

[377] Ibid., para. 26.

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There is a logical difficulty here, of which the Chamber indeed seems to have been aware.

> . . . it may be wondered how the time-hallowed principle [of *uti possidetis*] has been able to withstand the new approaches to international law as expressed in Africa, where the successive attainment of independence and the emergence of new States have been accompanied by a certain questioning of traditional international law.[378]

For the Chamber, the problem is one of reconciling two principles of equal validity: the principle of *uti possidetis* and that of the self-determination of peoples. The latter principle would presumably, in the Chamber's thinking, have required the creation of boundaries which better respected the ethnic divisions in Africa. Clearly a requirement, if such there be, that a new State accept the existing rules of general international law cannot require it to accept two mutually contradictory principles. It is, however, not only from a purely academic and jurisprudential standpoint that one may doubt whether general international law can, or does, contain principles which contradict each other.

On a more direct and practical level, it may be observed that if the African States represented at Cairo had the option to adopt or reject the principles of *uti possidetis*, the same option must have been available to States which were not so represented, particularly those which attained independence subsequently. The principle of *uti possidetis* is however of such a nature that it must be applied universally (or at least universally within a continent) or not at all. More weight should therefore be attached to the Chamber's declaration of the universality of the principle than to its interpretation of the application of the principle in Africa as a matter of State consent.

The Chamber also proceeded on the basis that the principle declared at the Cairo conference and the pre-existing principle of the *uti possidetis* were identical. This may however not be so. The touchstone is the applicability of the principle to maritime boundaries; if the colonial power had not claimed or fixed such boundaries, it is difficult to see how the *uti possidetis* principle could apply to them. It has, however, been authoritatively stated that the Cairo pledge applies 'not just to those borders established by treaty or existing on dry land'.[379] It is in any event questionable whether the *uti possidetis* principle applies to boundaries between colonial possessions of one State and the territories, or colonial possessions, of another State. The essence of the *uti possidetis* principle is that it resolves the problem of boundaries which, prior to independence of the State concerned, were purely internal and administrative.

[378] Ibid., pp. 566–7, para. 25.

[379] Jiménez de Aréchaga, separate opinion, *Continental Shelf (Tunisia/Libya), ICJ Reports*, 1982, p. 131. See also the disputed arbitral award between Guinea-Bissau and Senegal in the pending case of the *Arbitral Award of 31 July 1989*.

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5. *The Limits of Reaction to Unlawful Conduct*

This heading is intended to refer to a question which is wider than that of the concepts of retorsion and reprisals in international law, and which arose in such wide form before the Court in the period under review. The question is: in what circumstances, and to what extent, may what would otherwise be an unlawful act by State A against State B be justified by the previous commission by State B of an unlawful act, against State A or otherwise? In the tortuous wording of the International Law Commission's draft on State Responsibility, the underlying principle is expressed as follows:

> The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State.[380]

Although dealt with by the ILC under the heading of State responsibility, this is a question of general international law; it is clearly distinct from the problem in treaty-law of termination or suspension of the operation of a treaty by one party as a consequence of its breach by the other party, dealt with in Article 60 of the Vienna Convention on the Law of Treaties, and comes under the heading of 'State Responsibility' only because of the idiosyncratic approach to the subject by the ILC Special Rapporteurs.

In the *Barcelona Traction* case, the Court based its 1970 judgment on the lack of Belgian *jus standi* to bring the claim, and had therefore no need to examine the merits of the Belgian claim and the Spanish defence. It however included in its judgment a final paragraph in which it stated:

> 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 considerations were substantiated, the truth of the latter would in no way provide justification in respect of the former.[381]

The Spanish allegations of violations of Spanish law by the Barcelona Traction group were the subject of a penetrating question from the bench put by Sir Gerald Fitzmaurice. After pointing out that if the Spanish Government contended that the actions of its authorities and its courts involved no violations of law, the past conduct of the company had no relevance at all, he continued:

[380] Text and commentary in *Yearbook of the ILC*, 1979, vol. 2, pt. 2, p. 115.
[381] *ICJ Reports*, 1970, pp. 50–1, para. 102.

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Secondly, there is the contrary view put forward on behalf of the Belgian Government, that the acts of the Spanish authorities and courts were irregular. This the Spanish Government denies. But does it, while maintaining its denial, invoke the past conduct of the company as an element which would, in law, justify irregularities on the Spanish side should any have occurred? If this is *not* the Spanish attitude, then again what is the exact relevance of this conduct, juridically, the conduct of the company, except indirectly, as affording an explanation of matters that might otherwise be obscure?

Finally, there is the line taken by Professor Jiménez and to some extent, though in a slightly different way, by Professor Weil, namely that the company's conduct precludes or estops the Belgian Government from complaining at what happened and that its claim should be rejected on that ground alone. Taken to its logical conclusion, this approach would involve the rejection of the Belgian claim irrespective of the truth of the allegations of irregularity made against the Spanish courts and authorities—and even if these allegations should be true. In short, on this view, it would, strictly, become irrelevant to enquire into the correctness of these allegations since, whether they were correct or not, the Belgian claim could not succeed.[382]

A first reply to this question was given by the Spanish Agent, Mr Castro-Rial, who emphasized that Spain had denied that any violation of laws had been committed by the Spanish courts and authorities.[383] He also emphasized in what respect the conduct of the Barcelona Traction group had directly influenced the events complained of as unlawful acts of Spanish authorities. He continued however:

Le Gouvernement espagnol estime en effet qu'en droit international la conduite répréhensible du particulier protégé peut, dans certaines circonstances, conduire à rendre irrecevable la protection diplomatique exercée par l'Etat de ce dernier . . . Néanmoins, le Gouvernement espagnol n'a pas, en l'occurrence, soulevé une exception préliminaire supplémentaire faisant appel à la doctrine dite des *clean hands*. La force des autres moyens développés par le Gouvernement espagnol dans ce procès le dispense, en effet, de demander à la Cour de rejeter la demande belge pour le motif que la société n'aurait pas les mains propres.[384]

A further reply to Sir Gerald's question was given by Mr Jiménez de Aréchaga, who explained that the reason why the conduct of the Barcelona Traction undertaking had been discussed was the following:

It is our contention that in this case such conduct is relevant to the decision whether or not the Spanish authorities did commit those violations of international law for which they stand accused.

Mr Lauterpacht cited the *Massey* case . . . against such a view. But that case can be distinguished. There, the alleged misconduct of the victim had no influence on the course of the judicial proceedings, which were in the premises rightly branded as a 'denial of justice'. Here, the conduct of the enterprise directly influenced the administrative decisions and the shape and sequence of the Spanish judicial pro-

[382] *Pleadings*, vol. 9, p. 671.
[383] Ibid., vol. 10, p. 371.
[384] Ibid., p. 372.

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ceedings. If we are to have recourse to authority, I wish to cite the opinion of the Belgian author Mr Salmon. After an analysis of no less than 55 arbitral awards he reaches the opposite conclusion to Mr Lauterpacht. He writes 'l'indignité ou la conduite blâmable du réquérant peut conduire le tribunal international à repousser sa demande au fond ou à ne lui accorder qu'une indemnité réduite'. ('Des mains propres comme condition de recevabilité des réclamations internationales', *Annuaire français de droit international*, vol. X, 1964, p. 265.) He also states that this is 'un moyen de défense au fond' (ibid., p. 261).[385]

He emphasized that this contention was being put forward, not as a belated preliminary objection, but as a 'defence on the merits'.

The question here of interest is: did the Spanish argument, irrespective of whether it was to be classified as a preliminary objection or defence on the merits, amount to a contention that the actions of the Spanish authorities were justified, or 'cured', by the wrongful behaviour in Spain of the Barcelona Traction group? Taking a broad view, it might be said that if conduct of the complainant State (or its protected nationals) can validly be set up to block an international claim before a judicial tribunal, it effectively operates to invalidate that claim; if conduct otherwise wrongful cannot legitimately be complained of by the State where nationals have suffered from it, it is arguable that it is not 'wrongful' in any meaningful sense.[386]

However, whether this is so or not in general, in the particular circumstances of the *Barcelona Traction* case, the distinction between a procedural bar and a ground of exculpation of the Spanish authorities was clear. This was because, as Mr Lauterpacht, counsel for Belgium, pointed out,[387] the Spanish authorities were not aware of the allegedly wrongful conduct of the Barcelona Traction group until after the events complained of by Belgium. Counsel for Belgium quoted Bin Cheng to the effect that it is

> a principle of logic as well as of law that something which is not known at the time of an action or decision, but only learned of subsequently, cannot be invoked as a motive for such action or decision.[388]

In this light, the *dictum* of the Court in the *Barcelona Traction* judgment—which at first sight appears to be a remarkable foray into the merits which the Court had found it could not examine—proves to be unrelated to

[385] Ibid., pp. 507–8.

[386] If a digression be permitted: a question which might be pursued as of considerable theoretical interest is whether there may exist in international law obligations analogous to the 'obligations naturelles' of French law—obligations which cannot be enforced through the courts, but nevertheless have a recognized existence in law (see Carbonnier, *Droit civil*, vol. 2, pp. 288–90). For example, the debtor who voluntarily pays a debt which is time-barred cannot claim his money back on the ground that there was no debt; he continued, after the period of prescription expired, to be under an 'obligation naturelle'. In addition, 'Ce peut être pareillement une obligation naturelle que de réparer un dommage que l'on a causé à autrui dans des conditions qui excluaient l'existence d'une responsabilité juridique . . .': Carbonnier, op. cit., p. 289.

[387] *Pleadings*, vol. 10, p. 254.

[388] *General Principles of Law as applied by International Courts and Tribunals*, p. 90.

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the actual issue between the parties, and of no assistance in determining what, in the Court's view, are the limits of infringement of international law rendered permissible by way of reaction to illegal conduct of another State.

In the case of *United States Diplomatic and Consular Staff in Tehran*, the Court was able without difficulty to find that Iran had committed serious breaches of its obligations toward the United States under the 1961 and 1963 Vienna Conventions on Diplomatic and Consular Relations. It then turned to the fact that 'on the Iranian side, in often imprecise terms, the idea has been put forward that the conduct of the Iranian Government . . . might be justified by the existence of special circumstances'.[389] The Iranian Foreign Minister had written a letter to the Court claiming that the question brought before it by the United States

> only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately, and which involves, *inter alia*, more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms.[390]

He also attributed to the United States an alleged complicity on the part of the CIA in the *coup d'état* of 1953 and the restoration of the Shah to the throne of Iran.

The Court first noted that these allegations had not been properly pleaded, nor presented as a counterclaim, and no evidence had been presented in support of them. It then continued, however:

> In any case, even if the alleged criminal activities of the United States in Iran could be considered as having been established, the question would remain whether they could be regarded by the Court as constituting a justification of Iran's conduct and thus a defence to the United States' claims in the present case. The Court, however, is unable to accept that they can be so regarded. This is because diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions.[391]

The Court pointed out that a diplomat who abuses his function can be declared *persona non grata*, and that there is also the 'more radical remedy' of breaking off of diplomatic relations.

The rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are, by

[389] *ICJ Reports*, 1980, p. 37, para. 80.
[390] Ibid., p. 8, para. 10.
[391] Ibid., p. 38, para. 83.

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their nature, entirely efficacious, for unless the sending State recalls the member of the mission objected to forthwith, the prospect of the almost immediate loss of his privileges and immunities, because of the withdrawal by the receiving State of his recognition as a member of the mission, will in practice compel that person, in his own interest, to depart at once.[392]

This is a very elegant construction; but, with respect, it somewhat misses the main point raised by the Iranian letter. Iran's complaint was not so much against the individual diplomats whom it seized—in fact it admitted that some of them might be found innocent of the crimes it alleged[393]—nor even entirely against the Embassy itself, as a 'nest of spies'. It was objecting to the alleged interference by the United States in its affairs, conducted to some extent, but not exclusively, through the Tehran Embassy. Thus its main complaint did not fall within the ambit of 'diplomatic law' at all.

The Court in fact almost appears to be reasoning as though the intangibility of diplomats were justified by the possibility of declaring them *persona non grata* if they misbehave (or, indeed, even if they don't). The true position is surely the reverse: as the Court itself observes, 'the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established régime . . .'[394] and the possibility of getting rid of an undesirable diplomat by a declaration of *persona non grata* is a corollary of this principle, not the other way round.

What is missing from the judgment in the *United States Diplomatic and Consular Staff in Tehran* case, in that part of it devoted to the Iranian theses, is a clear statement that the attack on the Embassy and the seizure of the diplomats could not be justified by any 'crimes' attributed to the United States, whether such 'crimes' were committed through the agency of the Tehran Embassy, or of individual diplomats stationed there, or not. It is, however, possible to attach some significance to the Court's silence on the point, in view of the declared position of Judge Tarazi, one of the judges who dissented on the major provisions of the operative part of the judgment. In his dissenting opinion Judge Tarazi suggested that by permitting the ex-Shah of Iran to enter its territory, the United States had committed a 'serious fault'; and he quoted French law to suggest that this fault absolved the defendant from responsibility.[395] This daring construction seems to have been tacitly rejected by the majority of the Court.

In the same case, the Court considered that it could not 'let pass without comment'[396] the attempted rescue operation set in motion by the United States on 24–25 April 1980, while the case was pending before the Court.

[392] Ibid., p. 40, para. 86.
[393] *Pleadings*, pp. 89; 130; 202, 203.
[394] *ICJ Reports*, 1980, p. 40, para. 86.
[395] Ibid., p. 62.
[396] Ibid., p. 43, para. 93.

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This operation was presented by the United States as an exercise of its inherent right of self-defence, and was reported to the Security Council as such.[397] The Court commented on it with disfavour in so far as it was undertaken during pending judicial proceedings, and contrary to the terms of an Order indicating provisional measures; the Court regarded it as 'an operation . . . of a kind calculated to undermine respect for the judicial process in international relations'.[398] The Court was however careful to emphasize

> that neither the question of the legality of the operation of 24 April 1980, under the Charter of the United Nations and under general international law, nor any possible question of responsibility flowing from it, is before the Court.[399]

The Court thus rejected the view expressed by Judge Morozov in his dissenting opinion that 'the Applicant has forfeited the legal right as well as the moral right to expect the Court to uphold any claim for reparation'.[400]

Since the Court regarded the legality of the operation as outside its purview, it will not be commented on here, save to remark that its characterization by the United States Government as an act of self-defence—which is not entirely self-evident—suggests that that Government would not with confidence have advanced the view that the operation was justified by the Iranian seizure and retention of the hostages, independently of the question of self-defence.

In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, however, the United States, which in its turn was to decline to appear and present its case on the merits before the Court, did advance some arguments (in addition to its central plea of collective self-defence, the Court's treatment of which will be examined in a later article) partaking of the nature of retaliation.[401] The Court's finding on proportionate counter-measures involving the use of force requires to be quoted in full:

> 248. The United States admits that it is giving its support to the *contras* in

[397] *Pleadings*, p. 486.
[398] *ICJ Reports*, 1980, p. 43, para. 93.
[399] Ibid., para. 94.
[400] Ibid., p. 53.
[401] Before dealing with possible United States claims to retaliation, mention may be made of an obscure sentence in the judgment which appears to relate to the matter now under discussion. The Court records the existence of two organizations carrying on armed struggle against the Sandinista Government of Nicaragua, the FDN and the ARDE. Later in the judgment, after declaring that the Court 'considers as established the fact that certain transborder military incursions into the territory of Honduras and Costa Rica are imputable to the Government of Nicaragua', it adds:

> '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' (*ICJ Reports*, 1986, p. 187, para. 164).

No conclusion is drawn from this, but the text seems designed to suggest that the presence of these bodies on the borders might constitute a justification, or at least a mitigating circumstance. Such quasi-findings by implication are, it is suggested, out of place in a judicial judgment.

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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 . . . 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.[402]

The Court thus recognizes the legality of recourse to 'proportionate counter-measures' provided these are taken solely by the State which has been the victim of the acts requiring response, and provided they do not amount to 'intervention involving the use of force'. When the counter-measures are a response to a use of force, the significance of the term 'proportionate' becomes doubtful. The Court seems to have come near to saying that a response to the use or threat of force must either fulfil the condition of legitimate self-defence or be illegal; but some intermediate action remains as at least a theoretical possibility.

By way of alternative justification of United States support of the *contras* it was suggested that 'the present Government of Nicaragua is in violation of certain alleged assurances given by its immediate predecessor'.[403] The Court found that these assurances related to matters *prima facie* within the domestic jurisdiction of Nicaragua, and that the assurances were not intended to amount to a legal undertaking, and that they were not given to the United States, but to the Organization of American States. As though these reasons were not enough, the Court added:

> Moreover, even supposing that the United States were entitled to act in lieu of the Organization, it could hardly make use for the purpose of methods which the Organization could not use itself; in particular, it could not be authorized to use force in that event. Of its nature, a commitment like this is one of a category which, if violated, cannot justify the use of force against a sovereign State.[404]

This also suggests that there are *some* commitments the breach of which would justify the use of force, otherwise than in self-defence.

[402] *ICJ Reports*, 1986, p. 127, paras. 248–9.
[403] Ibid., pp. 88–9, para. 167.
[404] Ibid., p. 133, para. 262.

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CHAPTER III:

RELATIONSHIPS BETWEEN LEGAL ORDERS

1. *The Relationship between International and National Law*

(1) *Supremacy of international law*

The question of the relationship between international law and the various systems of national law was dealt with by Fitzmaurice under the heading of 'The supremacy of international over national law',[405] such supremacy being treated as a principle, to which exceptions were, indeed, only apparent. The wider title used for the present section does not imply any questioning or weakening of the principle of such supremacy;[406] but in the period under review a number of cases have raised questions of the content, or the applicability, of national law in circumstances in which the supremacy principle was not of direct relevance.

The Court has however not lacked opportunities of giving effect to the supremacy principle, but in most cases that principle has been so evident a foundation for the determination of the case that it has not been found necessary to state it. Thus, for example, in the *Fisheries Jurisdiction* cases, the extension of fisheries jurisdiction by Iceland complained of by the United Kingdom and the Federal Republic of Germany was effected by an Icelandic legislative text—the 'Regulations concerning the Fishery Limits off Iceland'. It was, however, an unquestioned postulate throughout the case that, so far as the Court, deciding in international law, was concerned, the rules of international law prevailed over the precepts of Icelandic legislation.[407]

[405] This *Year Book*, 30 (1953), p. 25; 35 (1959), p. 183; *Collected Edition*, I, p. 156; II, p. 587.

[406] Fitzmaurice in fact was strongly of the view that, since international law and national law are each supreme *in their own sphere*, the question of the supremacy of the one over the other did not really arise, and was part of the monist/dualist controversy which for him was 'largely sterile'. As he explained in his course at the Hague Academy in 1957:

> 'The very question of supremacy as between the two orders, national and international, is irrelevant, as is also that of the existence of some superior norm or order conferring supremacy. National law is not and cannot be a rival to international law in the international field, or it would cease to be national and become international, which, *ex hypothesi*, it is not. National law, *by definition*, cannot govern the action of, or relations with, other States. It may govern or fetter the action of its own State in such a way that the latter cannot fulfil its international obligations, but again, by definition only at the national level and without legal effect or operation beyond it. Formally, therefore, international and domestic law as *systems* can never come into conflict. What may occur is something strictly different, namely a conflict of *obligations*, or an inability for the State on the *domestic plane* to act in the manner required by international law' (*Recueil des cours*, 92 (1957–II), p. 79, quoted in Fitzmaurice, this *Year Book*, 35 (1959), p. 187; *Collected Edition*, II, p. 591).

[407] In 1969 the Althing (the Icelandic parliament) in fact recognized this when, in its seminal Resolution of 5 May 1969, it declared that 'recognition'—i.e., international recognition—should be obtained of Iceland's rights to a 12-mile fishing zone (*ICJ Reports*, 1974, p. 12, para. 24). On the other hand in 1971 the Prime Minister of Iceland asserted that 'Since there are no generally agreed rules of the width of the territorial limit, it must be in the power of every State to decide its territorial limit within a reasonable distance': quoted in *Pleadings*, vol. 2, p. 230.

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In the case concerning the *United States Diplomatic and Consular Staff in Tehran*, a still more striking example of this unquestioned assumption of the supremacy of international law is to be found in the Court's judgment. Iranian militants, after invading the US Embassy, were holding members of the diplomatic staff as hostages, and had threatened to have some of them submitted to trial before a court or some other body. The Court declared:

> These threats may at present merely be acts in contemplation. But the Court considers it necessary here and now to stress that, if the intention to submit the hostages to any form of criminal trial or investigation were to be put into effect, that would constitute a grave breach by Iran of its obligations under Article 31, paragraph 1, of the 1961 Vienna Convention. This paragraph states in the most express terms: 'A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State.'[408]

Thus no matter what Iranian legislation might provide, international law precluded any criminal trial of the diplomatic staff.

In the *Barcelona Traction* case in 1970 Judge Gros, in a separate opinion, disagreed with the analysis of the relationship between international law and national law employed in the majority judgment, on the ground that it resulted in establishing 'a superiority of municipal law over international law, which is a veritable negation of the latter'.[409] It will however be more convenient to examine this view after the position of the majority in that case has been expounded, in the following section.

In the advisory opinion on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, the Court took, indeed seized, the opportunity of re-emphasizing the supremacy of international law over municipal law. The underlying legal question to which the action of the United States had given rise was the compatibility of United States legislation aimed at closing the office of the PLO Observer Mission with the obligations of the United States under the United Nations Headquarters Agreement. Clearly if there was a conflict, then in the international law sphere the Headquarters Agreement, as a treaty, should prevail. The United States Permanent Representative had however stated in a letter to the Secretary-General that the United States measures against the PLO Observer Mission were taken 'irrespective of any obligations the United States may have under the [Headquarters] Agreement'.[410] This looked very like an attempt to set up municipal legislation as a defence to an allegation of breach of treaty, which could be condemned on the basis of the supremacy of international law; but the Court was not seised of that question. It had only been asked whether there was an

[408] *ICJ Reports*, 1980, p. 37, para. 79.
[409] *ICJ Reports*, 1970, p. 272, para. 9.
[410] *ICJ Reports*, 1988, p. 22, para. 24.

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obligation to arbitrate the question of conflict between the measures taken against the PLO Observer Mission and the Headquarters Agreement.

The Court however dealt with the point in the final paragraph of its advisory opinion. After stating its conclusion that 'the United States is bound to respect the obligation to have recourse to arbitration under Section 21 of the Headquarters Agreement', and quoting the Permanent Representative's statement, it continued:

> If it were necessary to interpret that statement as intended to refer not only to the substantive obligations laid down in, for example, sections 11, 12 and 13, but also to the obligation to arbitrate provided for in section 21, this conclusion would remain intact. It would be sufficient to recall the fundamental principle of international law that international law prevails over domestic law.[411]

The United States had given no other indication that it regarded its internal legislation as exempting it from the commitment to arbitration under Article 21. It is possible to doubt whether the *dictum* quoted was strictly necessary to the Court's advisory opinion; but this in its turn suggests that the Court regarded the supremacy principle as one of such importance that no opportunity should be let pass to emphasize it in the context of cases in which it appeared that it might be threatened.

Judge Oda, in a separate opinion, in fact expressed the view that the real issue was not the 'interpretation or application of the Headquarters Agreement (the terms of Article 21)', but 'whether in operative effect, precedence will be given to the uncontested interpretation or application of that Agreement or to the Anti-Terrorism Act . . .',[412] and regretted that the Court had not had to consider any argument on the 'crucial point' of the supremacy of international law.

Most recently, the supremacy of international law, specifically of treaty law, over national law was an element in the decision of the Chamber formed to deal with the case of *Elettronica Sicula SpA (ELSI)*. It was asserted by the United States that certain action of the Italian public authorities in relation to the ELSI company was contrary to a treaty provision whereby nationals of one party were not to be subjected, in the territory of the other, to 'arbitrary or discriminatory measures'.[413] The argument of the United States rested upon, *inter alia*, the contention that the action in question was 'under both the Treaty and Italian law, . . . unreasonable, and improperly motivated' and that it was 'found to be illegal under Italian domestic law for precisely this reason'.[414] There was some obscurity as to whether it had in fact been 'found to be illegal under Italian domestic law'; but the Chamber's view was in any event that

> the fact that an act of a public authority may have been unlawful in municipal law

[411] Ibid., p. 34, para. 57.
[412] Ibid., p. 41.
[413] *ICJ Reports*, 1989, p. 72, para. 120.
[414] Ibid., p. 73, para. 123.

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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.[415]

The unusual aspect of this finding is that it operates in favour of the State whose national law is in question. The principle of the supremacy of international law has developed in the form of findings that a State cannot rely on its own national law as a defence on the international law level. In the *ELSI* case, on the other hand, the fact that the domestic courts censured an action affecting foreign nationals was not regarded as sufficient to support a claim of breach of treaty.

(2) *Reference by international law to national law: specific systems or 'municipal law' in general?*

In the *Barcelona Traction, Light and Power Company, Limited* case, the Court was faced with the question whether Belgium could claim reparation from Spain for allegedly unlawful treatment by Spain of a Canadian-registered company in which Belgian nationals were shareholders. The point was originally raised by way of preliminary objection, to the effect that:

> the claim advanced by the Belgian Government . . . is definitively inadmissible for want of capacity on the part of the Belgian Government in the present case, in view of the fact that the Barcelona company does not possess Belgian nationality and that in the case in point it is not possible to allow diplomatic action or international judicial proceedings on behalf of the alleged Belgian shareholders of the company on account of the damage which the company asserts it has suffered.[416]

This objection was joined to the merits by the Court's judgment of 1964; but when it was argued as part of the merits, it continued to be treated as a matter of *jus standi*, rather than as a question of the unlawfulness or otherwise, in international law, of Spain's actions. The complications arose because to say whether the actions of Spain were unlawful involved determining *vis-à-vis* what entity they were unlawful. For present purposes, the starting point may be taken to be the assumption that if what was done to the Barcelona Traction company had been done to an individual of Belgian nationality, Belgium would have had a clear international right of action.

The Court first observed that, in order to bring a claim in respect of a breach of an obligation the performance of which is the subject of diplomatic

[415] Ibid., p. 74, para. 124.
[416] *ICJ Reports*, 1964, p. 12.

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protection, a State must first establish its right to do so; quoting the *Reparation for Injuries* case the Court stated that 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.[417]

The Court then continued:

> 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?[418]

The last sentence contains a latent ambiguity. The 'right' of Belgium referred to must clearly be a right conferred by international law. As the Permanent Court observed:

> . . . by taking up a case on behalf of its nationals before an international tribunal a State is asserting its own right, that is to say, its right to ensure in the person of its nationals, respect for the rules of international law.[419]

Are the 'rights' of the Belgian nationals as shareholders, however, to be read as rights conferred by international law or rights conferred by a relevant system of national law? The latter was the position as seen by the Permanent Court in *Chorzów Factory*:

> Rights or interests of an individual the violation of which rights causes damage are always on a different plane to rights belonging to a State, which rights may also be infringed by the same act.[420]

As observed above, the starting point for discussion must be that the respondent State has committed some act, as a result of which nationals of the applicant State have suffered damage. Whether the applicant State has *jus standi* and whether the act committed constitutes a breach of international law are two faces of the same coin.

The Court's approach was to determine this question by asking whether the nationals of the applicant State have suffered injury to a right, as distinct from prejudice to an interest. As the Court recognizes (para. 54), the distinction is to be determined by a system of law; but which?

In the *Oscar Chinn* case, the claim of the United Kingdom was founded

[417] *ICJ Reports*, 1949, pp. 181–2.
[418] *ICJ Reports*, 1970, pp. 32–3, para. 35.
[419] *Serbian Loans, PCIJ*, Series A, Nos. 20–1, p. 17.
[420] *PCIJ*, Series A, No. 17, p. 28.

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partly on the assertion that Belgium had breached general international law by acting in such a way as to injure the acquired rights of Mr Chinn. In his dissenting opinion Judge Sir Cecil Hurst (who agreed with the Court on this point) spelled out the relevant distinction. The effect of the Belgian Government's action was to enable Chinn's rival, the Belgian company Unatra, enormously to undercut the rates he could offer for river transport.

> Chinn possessed no right, either under the Treaty of Saint-Germain or under general international law, which entitled him to find customers in the Congo, i.e. people who were desirous of contracting with him. If the individuals with whom Chinn would have liked to make contracts found that they could get better terms elsewhere for the transport of their merchandise or the repairing of their ships, they had just as much right to contract with persons other than Chinn, as Chinn had to make contracts with them. Consequently, the fact that these other individuals found it to their advantage not to contract with Chinn, involved no violation by them of a right belonging to him. Similarly, the decision of the Belgian Government which rendered it more profitable for these persons to make contracts elsewhere and not with Chinn interfered with no acquired right of his.
>
> If it could be shown on behalf of Chinn that some right which he had already obtained to carry the goods of a particular merchant or to repair the ships of some particular merchant had been infringed by the Belgian Government, as, for instance, if he had had in existence a contract to carry all the goods of such and such a person and the Belgian Government had stepped in and prevented that person, no matter how much he wished to do so, handing over his goods to Chinn to transport, it would be right to say that an acquired right of Chinn had been interfered with, but the facts do not show any such position. Chinn's right to fulfil existing contracts for the transport of goods or the repair of ships, or to secure new contracts to that effect if he could, was never interfered with.[421]

What however did Sir Cecil mean by 'some *right* which he had already obtained'? Presumably, what he had in mind was a contract between Chinn and his customer which would have been (had the Belgian Government not interfered) enforceable under the law of the Congo and in the courts of the Congo. It is difficult to see in what other sense Chinn could be said to have acquired a 'right'.

Thus in 1934, the Court was of the view that economic damage suffered by a national at the hands of a foreign State could not ground an action on the international plane unless a right enjoyed by the national had been interfered with; and in the light of Sir Cecil Hurst's opinion, it seems that the definition of a 'right' in this context is afforded by the appropriate system of national law.

But what is the 'appropriate' system of national law? For Judge Morelli, in his separate opinion in the *Barcelona Traction* case, the answer was evident: it is the law of the respondent State. In his view, each State is required by international law to afford judicial protection to the rights of

[421] *PCIJ*, Series A/B, No. 63, pp. 121–2.

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foreigners, and to respect those rights; and the rights in question are those which the State itself confers on foreigners within its own municipal order.

This provides an indirect way of determining what interests the international rule is intended to protect, given that this rule only protects the interests of foreign individuals or foreign collective entities if those interests already enjoy a certain degree of protection within the municipal legal system. This means that the international rule refers to the municipal legal order in that, to impose upon a State a particular obligation, it presupposes a certain freely adopted attitude on the part of the legal order of that State . . .

There is nothing abnormal in this reference of an international rule to the law of a given State.[422]

Applying this to the situation of a company or corporation having legal personality recognized by the State concerned:

. . . there is on the one hand a set of rights conferred by the municipal order on the company and, on the other hand, within the same legal order, another, quite distinct set of rights conferred on the members. Each set of rights is entitled to its own, distinct international protection.

As has been seen, both these protections afforded by the international legal order presuppose a certain attitude on the part of municipal law, namely a certain manner in which it deals with the rights of the company, on the one hand, and those of the members on the other. In the present case, the State legal order to be considered is the Spanish legal system, that is to say the legal order of the State whose international obligations have to be determined.[423]

Judge Morelli found no difficulty in applying these principles to the case:[424] since Spanish law recognized the legal personality of the Barcelona Traction company, and did not recognize any shareholders' rights over the corporate property, Belgium on behalf of the shareholders could only have claimed for injury done to the rights of the shareholders *vis-à-vis* the company, not for injury done to the Canadian company or to the 'interests' of the shareholders (not amounting to rights in the Spanish legal order) in the company.

Thus for Judge Morelli the relationship of international law to municipal law in this field was one of *renvoi* or reference:[425] in order to ascertain to what extent the nationals of the State exercising protection could be the subject of international protection, it was necessary simply to consult the municipal law of the respondent State to see what rights that law granted to the foreign nationals concerned. Presumably even if the State of incorporation of the company and the respondent State had different rules as to the

[422] *ICJ Reports*, 1970, pp. 233–4.
[423] Ibid., p. 235.
[424] Ibid., p. 236, para. 6.
[425] This approach was criticized by Judge *ad hoc* Riphagen in his dissenting opinion, ibid., p. 338. The term '*renvoi*' is not strictly correct (see next note).

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relationship between shareholders and company, it would be the law of the respondent State which would be the subject of the reference.[426]

This was not however the approach taken in the majority judgment of the Court, which began its analysis of the applicable international law with the following introduction:

> 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.[427]

The penultimate sentence of this passage is clearly an important statement of principle. Setting aside for the moment the question of its implications, we may first enquire what is the legal status of the principle involved: is it a 'general principle of law', or a norm of customary international law?

The Court gives no indication of the nature or source of the principle it states. It does not appear that the principle is necessarily a general one, independent of custom and practice: in the first place, it is by no means inevitable or self-evident, as the different view taken by Judge Morelli makes clear; and secondly, it could in theory be deduced from the practice of State claims, or more pertinently, from the practice of international judicial and arbitral bodies. There are, however, indications that it was not in fact so derived.

In his separate opinion Judge Fitzmaurice mentions an objection:

> that in so far as the doctrine of a right of intervention on behalf of foreign shareholders in a locally incorporated company unable to act for itself, or rendered incapable of so doing, may depend on a number of precedents deriving from cases decided by international tribunals, it will be found on a careful examination of those cases that the 'company' that was concerned was usually more in the nature of a firm, partnership, or other similar association of persons, than of a true separate corporate entity distinct from those persons . . . Where on the other hand, so it is said, a corporate entity really was involved, the capacity to claim on behalf of

[426] It could be that the Courts of the respondent State could apply the law of the State of incorporation to the question of the rights and relationship of the shareholders and the company: this would be true *renvoi* in the sense of the term in private international law.

[427] *ICJ Reports*, 1970, p. 37, para. 50.

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shareholders resulted from the express terms of the treaty, convention or 'compromise' submitting the case to the tribunal,—consequently these cases cannot be cited as implying recognition of any general principle of law allowing of such claims.[428]

Fitzmaurice comments on this:

It may be true that the exact *rationale* of a number of the decisions concerned is not very easy to determine precisely, and lends itself to much controversy, as the course of the written and oral proceedings in both phases of the present case have amply demonstrated.[429]

The Court's justification for its approach appears in effect to be that it is merely applying existing international law to new developments, of a social and economic nature, of which it has to take account as matters of fact. There is however a great difference between applying existing law to, for example, modern technological developments, such as satellites, and applying it to new concepts which only have a meaning or indeed existence in the context of a system of legal relations.

The weakness of the *Barcelona Traction* judgment is that it treats 'municipal law' not as a concept which, to be meaningful, has to be attached to a specific national legal order, but as a sort of pool of legal ideas common to municipal legal systems, to be dipped into when international law itself does not include or directly recognize particular legal institutions.[430]

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.[431]

It is of course true that most legal systems recognize and provide for the creation of corporate entities which are treated as having a legal existence distinct from the persons who have brought them into being, supplied them with assets and directed their affairs. In this sense it is true that international law may have to recognize institutions of municipal law; but in the resolution of any specific dispute, it is impossible to remain on this level of abstraction.

The Court's approach to the question of the protection of shareholders in the *Barcelona Traction* case appears to have been dictated by the desire to

[428] Ibid., p. 74, para. 17.

[429] Ibid., para. 18. The precedents and practice are discussed by Belgium in *Pleadings*, vol. 1, pp. 153–61, vol. 5, pp. 663–88, vol. 8, p. 504, and by Spain in ibid., vol. 4, pp. 723–46, vol. 9, p. 627.

[430] As a Spanish commentator on the judgment observes,

'The company, as an institution, is not comprehensible without its legal framework, and it is to this that the Court refers when it has to define the legal position of the company and its shareholders, and the rights of the former and the latter': Ruiloba Santana, 'Virtualidad del derecho interno en el caso de la Barcelona Traction', *Revista española de derecho internacional*, 23 (1970), pp. 500–1.

[431] *ICJ Reports*, 1970, p. 33, para. 38.

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achieve universality in its ruling. This attitude is in fact betrayed by the terminology used from the outset of the judgment. After referring to corporate personality, in historical perspective, as representing 'a development brought about by new and expanding requirements in the economic field', the Court observes, in the French text, which is the authentic text, of its judgment:

> Il est cependent inutile d'examiner les multiples formes que prennent les différentes entités juridiques dans le droit interne car la Cour ne doit se préoccuper que de celle dont la société en cause dans la présente affaire, la *Barcelona Traction*, offre un exemple—à savoir la société anonyme, dont le capital est représenté par des actions.[432]

It is simply incorrect to say that *Barcelona Traction* was a 'société anonyme'—a creature of French law—, any more than it was an *Aktiengesellschaft* or a *Naamelooze Vennootschap*; it was a limited liability company created under the law of Canada.[433] True, for convenience it had been referred to throughout the case in French—the language of the pleadings and that used by the majority of counsel at the hearings,— as a 'société anonyme'; but it is to be regretted that the Court should have fallen into the trap of supposing that there is no legal difference between the various 'entités juridiques' possessing, under specific systems of municipal law, legal personality.

Thus right from the start the Court was revealing an intention to lay down a principle applicable not only to the effects, in international law, of the relationships between a Canadian company and its shareholders, but to the effects of the parallel relationship involving any municipal-law entity having a legal personality distinct from that of its members or investors. What might thus have been expected was an analysis of the problem in terms of the municipal legal systems involved—those of Spain and Canada—and the identification of the distinction made in those systems between the personality of the corporation and its shareholders, and the absence of an individual right of action of shareholders for the protection of their interests, as the features relevant for determination of the question of international law to be resolved.[434] The solution would thus be capable of generalization to the extent that other systems of municipal law exhibit similar features; but the municipal law to which the Court would have found it necessary to refer would have been an individual existing system,

[432] Ibid., p. 34, para. 40.

[433] The Letters Patent incorporating the company under the Canadian Companies Act, 1906, were produced as Annex 5 to Chapter I of the Spanish Counter-Memorial (not reproduced in the *Pleadings*).

[434] Kearney ('Sources of Law and the International Court of Justice', *The Future of the International Court of Justice*, vol. 2, pp. 679–80) considers that the Court, like its predecessor, was

> 'deciding that a particular legal statement represented a general principle of law, whether specifically so denominated or not, rather than attempting to determine the "proper law" of the issue under consideration'.

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rather than a hypothetical lowest-common-denominator system having a more than usually conceptual existence.[435]

The reason for the approach adopted by the Court may lie in the manner in which the case was pleaded. The question had its origin in a preliminary objection to Belgium's *jus standi*, which focused attention less on the rights to be protected, or the injury suffered, than on the procedural precedents, or lack of them, for an international claim brought on behalf of shareholders. The distinction in municipal law generally between corporate person and shareholders was therefore treated on both sides as axiomatic, as a sort of postulate of the problem; so that it seems that no one ever really stopped to ask *which* system of municipal law was relevant. Professor Virally, during the oral proceedings, put his finger on the weakness when he summed up his understanding of this part of the case presented by Spain as follows:

> . . . un Etat ne peut être rendu internationalement responsable que s'il a porté atteinte aux droits des particuliers. Ces droits sont évidemment définis par l'ordre juridique étatique puisque, sauf exception, l'individu n'est pas un sujet du droit international. En l'espèce, pour que la Belgique puisse intervenir, il faudrait donc qu'il y ait eu violation des droits des actionnaires belges tels que les définit le droit national compétent, dont il n'est d'ailleurs pas précisé si, en l'espèce, c'est le droit canadien, droit de la société, ou le droit espagnol, droit du for.[436]

Nor, in the enormous documentation of the case, does there appear to be any evidence of what Canadian law actually provided on the subject of the rights of shareholders in the event of injury to the company; it appears to have been taken for granted[437] that there is a universal, or quasi-universal, rule that shareholders do not have any right of action or redress in the case of injury to the company.

Judge Gros, in his separate opinion, rejected the view of the majority that, in his words:

> an international court must fall back on [*renvoyer*—the English text does not have

[435] Ruiloba Santana (loc. cit. above (n. 430), p. 514) suggests, as a precedent for the recognition of a body of 'generally accepted rules' as a *tertium genus* lying between international law and individual systems of municipal law, the reference in the judgment of the Permanent Court of International Justice in the *Serbian Loans* case to the conflict of laws:

> 'The rules thereof may be common to several States and may even be established by international conventions or customs, and in the latter case may possess the character of true international law governing the relations between States' (*PCIJ*, Series A, Nos. 20–1, p. 51).

However, as the words 'in the latter case' make clear, it is the convention or custom which confers international status on such rules; and whether a rule of this kind was 'common to several States' or existed (before being taken up into a convention) only in the law of a single State is without legal relevance.

[436] *Pleadings*, vol. 8, p. 512. Cf. Ago, vol. 10, p. 653.

[437] The eminent French conflicts lawyer Franceskakis observes drily that there is no trace of the Court having carried out a study of comparative law on the point, 'tant ces règles paraissaient semble-t-il évidentes': 'Lueurs sur le droit international des sociétés de capitaux; l'arrêt "Barcelona" de la Cour internationale de justice', *Revue critique de droit international privé*, 59 (1970), p. 642.

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the idea of *renvoi*] concepts of municipal law when seeking to define the legal relationships between the company and the shareholder[438]

since, in his view:

the *renvoi* to municipal law leads eventually, as in the present case, to the establishment of a superiority of municipal over international law which is a veritable negation of the latter . . . To consider as a ground for exonerating a State from international responsibility for an alleged denial of justice the fact that its municipal law, or some systems of municipal law, do not feature a shareholder's right of action is not admissible; . . .[439]

Judge Gros refers to 'some systems of municipal law' because he contended that, as a matter of fact, the distinction between shareholder and company, fundamental to the Court's decision, was not such a universal feature of national systems of law.[440]

This however is the key to the divergence of views between Judge Gros and his colleagues. Had it been a question (as it was for Judge Morelli) of the national law of the respondent State failing to furnish a remedy, the basic rule, sometimes referred to as the rule of supremacy of international law, could have found application. This basic rule is however better explained, not as the supremacy of one system over the other, but, in the words of the Permanent Court, as providing that a State 'cannot rely on her own legislation to limit the scope of her international obligations'.[441] For the majority of the Court, however, what mattered was not the provisions of Spanish law, but the fact that, generally if not universally, a shareholder was not considered to have rights to redress under municipal law in the event of injury to the company.

(3) Renvoi *to pre-existing law: the* Frontier Dispute *case*

The idea that international law may in appropriate cases effect a *renvoi* to municipal law was referred to in the judgment of the Chamber formed to deal with the *Frontier Dispute* between Mali and Burkina Faso. It was common ground that the frontier between the two States was defined by the boundary between the two French colonies of Upper Volta and Sudan immediately prior to their accession to independence (application of the principle of the *uti possidetis*):

The line which the Chamber is required to determine as being that which existed in 1959–1960, was at that time merely the administrative boundary dividing two former French colonies, called *territoires d'outre-mer* from 1946; as such it had to be defined not according to international law, but according to the French legislation which was applicable to such *territoires*.[442]

[438] *ICJ Reports*, 1970, p. 272, para. 9.
[439] Ibid.
[440] Ibid., p. 273, para. 11.
[441] *Free Zones of Upper Savoy and the District of Gex, PCIJ*, Series A/B, No. 46, p. 167.
[442] *ICJ Reports*, 1986, p. 568, para. 29.

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The Chamber however found it necessary to add a 'clarification':

> International law—and consequently the principle of *uti possidetis*—applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards. It applies to the State *as it is*, i.e., to the 'photograph' of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title; it stops the clock, but does not put back the hands. Hence international law does not effect any renvoi to the law established by the colonizing State, nor indeed to any legal rule unilaterally established by any State whatever; French law—especially legislation enacted by France for its colonies and *territoires d'outre-mer*—may play a role not in itself (as if there were a sort of *continuum juris*, a legal link between such law and international law), but only as one factual element among others, or as evidence indicative of what has been called the 'colonial heritage', i.e., the 'photograph of the territory' at the critical date.[443]

This passage seems to have been inspired by a desire not to suggest that reference to French colonial boundaries signified any approval or legitimation of the colonial system,[444] but its scope and significance as a matter of legal argument are obscure. The idea seems to be that the moment when international law begins to govern the matter—the moment of independence—is also the moment when colonial law is spent, so that there is a breach of continuity. The *uti possidetis* principle is thus deemed to act upon the 'frozen' territorial title, which presents itself as a purely factual circumstance. This view however does not take account of the nature of a territorial boundary as a purely legal and immaterial concept: even if a boundary is constituted by a precise natural feature like a river, or defined on the ground by markers—or even a fence—its status *as a boundary* is conferred by a legal system, national or international as the case may be. If therefore colonial law ceases to operate at or before the moment international law begins to apply, there is no 'boundary' for the *uti possidetis* principle to act on.

The Chamber returned to the point later in its judgment when discussing an item of French colonial legislation—an Order of 31 August 1927, to which an erratum had been issued on 5 October 1927. The Chamber first observed that

> if the Chamber's task were to interpret and apply the Order as amended on 5 October 1927 as a regulative text, for the purpose of establishing the boundaries of Upper Volta in 1932, it would have to examine its scope and appraise the relevance of the initial text of 31 August 1927, and of any *travaux préparatoires*, in the light of the particular rules of the legal system from which the Order derives its force as a regulation, i.e., French colonial law.[445]

After emphasizing that the Order (which in fact related to the border

[443] Ibid., para. 30.
[444] As is clear from the separate opinion of Judge Abi-Saab, ibid., p. 659.
[445] Ibid., p. 590, para. 69.

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between Upper Volta and Niger) was relevant only as evidence of the intentions of the colonial power, the Chamber continued:

> from a more general perspective, the Chamber has already had occasion to emphasize . . . that if colonial law has any role to play in this case it does so not in its own right, by way of a renvoi from international law to colonial law, but solely as evidence of the situation which existed at the time when the two States Parties achieved independence. The Chamber is therefore free to examine in this light the two successive versions of the 1927 Order, while nonetheless attributing greater weight to the text as modified by the erratum as a reflection of the definitive intentions of the colonial authorities, and to take the *travaux préparatoires* into consideration if this proves to be necessary.[446]

It appears from the pleadings[447] that the significance of this passage is to discount an argument advanced by Mali, that the Order of 31 August 1927, even as amended, was null and void as a matter of French administrative law, and therefore should not be taken into account by the Chamber.[448] The general consideration advanced by the Chamber in response to this, in the passage just quoted, is open to the same objection as was suggested in respect of the earlier passage in the judgment: the 'definitive intentions of the colonial authorities' as to the course of an administrative boundary are to be expressed in an administrative act. If such an act is, by its own applicable law, a nullity, it may nevertheless cast some light on the views of the authorities as to where the boundary could or should be, but it is not evidence of where the boundary actually *was*.[449]

(4) *Municipal law as a source of analogy*

The use of analogies drawn from municipal law to illustrate, explain or expand rules of international law is a judicial practice of the utmost respectability, its bible being Lauterpacht's magisterial *Private Law Sources and Analogies of International Law* (1927). Overt use of it by the Court itself in its decision is, however, not particularly common; it is rather individual judges who have resorted to parallels in municipal law to throw light on a particular question. Judge Dillard, for example, was fond of using this technique; and the frequent reference in the opinions of Judge de Castro to Roman law afford a striking demonstration of the perennial freshness and applicability of certain basic legal conceptions.

Individual judges are often in a good position to draw analogies from the specific national systems of law with which they are most familiar. The Court as a whole tends more to refer to municipal law in general, *en bloc*, sometimes, as in the *Barcelona Traction* case, with unhappy results.[450]

[446] Ibid.

[447] Counter-Memorial of Mali, paras. 5.16–5.17.

[448] See paras. 71–2 of the judgment.

[449] A similar argument, distinguishing between 'evidence' or 'information regarding the views or intentions' of the authorities, and an act effective in colonial administrative law, is in fact employed by the Chamber in relation to a different instrument: see para. 80 of the judgment.

[450] See above, subsection (2).

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There is of course a narrow line between reference to private law in quest of illuminating analogies, and recourse to the 'general principles of law' referred to in Article 38 of the Statute. It is therefore not surprising that the Court should buttress its conclusions with reference to a widespread consistent usage in municipal systems of law, even if no specific appeal is made to 'general principles'.

An appeal to municipal law, unspecified, by way of analogy is to be found in the advisory opinion given in the case of *Certain Expenses of the United Nations*. It had been argued, in support of the view that the expenditures under discussion were not 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter, that those expenditures should have been authorized by the Security Council, not by the General Assembly. The Court observed:

> If it is agreed that the action in question is within the scope of the functions of the Organization but it is alleged that it has been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent.[451]

The Court went on to point out that

> In the legal system of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations[452]

and that accordingly each organ must determine its own jurisdiction.

It is however striking that the Court refers to 'cases in which the body corporate or politic may be bound, *as to third parties*, by an *ultra vires* act of an agent'; this is perfectly correct,[453] but what was in issue was not the effect of General Assembly resolutions 'as to third parties', but as to member States which regarded them as *ultra vires*.

2. *The Doctrine of Intertemporal Law*

(1) *The principle stated and applied*

The principle was stated in conveniently lapidary form by Fitzmaurice:

> In a considerable number of cases, the rights of States (and more particularly of

[451] *ICJ Reports*, 1962, p. 168.

[452] Ibid.

[453] In the context of English Company law, the rule in *Royal British Bank* v. *Turquand* (1855), 5 E & B 248, springs to mind, as more directly relevant than matters involving an 'agent'. This rule is however for the protection of those outside the company, not those inside (cf. *Pennington's Company Law* (5th edn., 1985), p. 140).

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parties to an international dispute) depend or derive from rights, or a legal situation, existing at some time in the past, or on a treaty concluded at some comparatively remote date . . . It can now be regarded as an established principle of international law that in such cases the situation in question must be appraised, and the treaty interpreted, in the light of the rules of international law as they existed at the time, and not as they exist today. In other words, it is not permissible to import into the legal evaluation of a previously existing situation, or of an old treaty, doctrines of modern law that did not exist or were not accepted at the time, and only resulted from the subsequent development or evolution of international law.[454]

It should however perhaps be observed that the principle in fact comprises two branches, originating in slightly different logical or legal considerations. When it is a question of interpretation of a treaty or other instrument,[455] given that the basic objective is to determine the intentions of the party or parties at the time the instrument was brought into existence, it must in the nature of things be a normally irrefragable presumption that the intention was to create rights and obligations in the context of the law as it then stood. More generally, it is appropriate to consider the evidence of the intentions of the parties against the factual and legal background contemporary with the instrument. In the *Temple of Preah Vihear* case, Judge Sir Percy Spender dissented from the majority on the basis of a different interpretation of the events of the early years of the century; he warned that: 'It is easy to fall into the error of judging the events of long ago by present-day standards'.[456] It was the applicability, and the effective application, of this principle which was at the heart of the long-fought controversy over the Mandate for South West Africa.

Where however the issue in controversy is that of rights, or a legal situation, existing at some time in the past and not deriving from a treaty or similar act of will, it is because, objectively, the only rights which could exist at the time were the rights recognized by the international law of the time that that law has to be applied to the exclusion of subsequent or present-day law. This distinction was to emerge with some clarity in the *Aegean Sea Continental Shelf* case.

A fairly obvious application of the second aspect of the rule, but one which is still worth stating, is that when a rule is created conditioning the validity of a legal act or instrument on the performance of some formality, an act performed before the rule came into effect is valid without compliance with the formality required. Thus in the *South West Africa* cases it was contended that, if the Mandate for South West Africa was a treaty, it was rendered unenforceable by Article 18 of the Covenant, which provided that no treaty or international engagement should be binding if not registered in accordance with that article. The Court rejected this contention,

[454] This *Year Book*, 30 (1953), p. 5; *Collected Edition*, I, p. 135.
[455] *ICJ Reports*, 1975, p. 38, para. 77.
[456] *ICJ Reports*, 1962, p. 128.

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inter alia because it held that the Mandate antedated the Covenant.[457] There is of course no reason why a treaty should not provide for more retrospective effect, if the parties so wish, and in the special field of declarations of acceptance of jurisdiction under the Optional Clause referring to disputes arising after a particular date, somewhat unexpected complications can arise in this respect,[458] which however do not need to be gone into here.

The question of the application of the intertemporal law principle to the interpretation of a treaty arose in the case of *Right of Passage over Indian Territory*, where Portugal relied on a treaty dating from 1779. India objected that that treaty was not validly entered into, and never became in law a treaty binding on the Maratha rulers of India; it drew attention to the existence of divergent texts, and the absence of any authentic text accepted by the parties. The Court dealt with the point as follows:

> The Court does not consider it necessary to deal with these and other objections raised by India to the form of the Treaty and the procedure by means of which agreement upon its terms was reached. It is sufficient to state that the validity of a treaty concluded as long ago as the last quarter of the eighteenth century, in the conditions then prevailing in the Indian Peninsula, should not be judged upon the basis of practice and procedures which have since developed only gradually.[459]

As this incident demonstrates, however, the intertemporal law principle is only adjective law—it is a technique for applying the appropriate law to the facts, not itself a rule of substantive law. Thus to exempt the 1779 treaty from compliance with modern requirements of form and procedure would not in itself justify a conclusion that it was valid and binding; that remained to be established, in the light of eighteenth-century practice in the Indian subcontinent. The Court therefore went on to find that

> The Marathas themselves regarded the Treaty of 1779 as valid and binding upon them, and gave effect to its provisions. The Treaty is frequently referred to as such in subsequent formal Maratha documents, including the two *sanads* of 1783 and 1785, which purport to have been issued in pursuance of the Treaty. The Marathas did not at any time cast any doubt upon the validity or binding character of the Treaty.[460]

The same case prompted observations by the Court on the wider question of the assessment of a claim under general international law in the light of the nature of that law at the relevant time. Portugal's claim to a right of passage from its territories to enclaves surrounded by Indian territory had been upheld by the Court on the basis of a local custom binding on India, but the Court found on the facts that the right did not extend to the passage of police, armed police or soldiers, or arms and ammunition. Portugal had

[457] Ibid., p. 332.

[458] See the present writer's article in *Netherlands Yearbook of International Law*, 15 (1984), p. 97 at pp. 121–8.

[459] *ICJ Reports*, 1960, p. 37.

[460] Ibid.

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based its claim not only on a special or local custom, but also on 'general international custom' and 'the general principles of law recognized by civilized nations'. So far as the general right of passage was concerned, the Court saw no need to consider these bases of claim, since the claim under special custom was sufficient to lead to the same result.

As regards armed forces, armed police and arms and ammunition, the finding of the Court that the practice established between the Parties required for passage in respect of these categories the permission of the British or Indian authorities, renders it unnecessary for the Court to determine whether or not, in the absence of the practice that actually prevailed, general international custom or the general principles of law recognized by civilized nations could have been relied upon by Portugal in support of its claim to a right of passage in respect of these categories.

The Court is here dealing with a concrete case having special features. Historically the case goes back to a period when, and relates to a region in which, the relations between neighbouring States were not regulated by precisely formulated rules but were governed largely by practice. Where therefore the Court finds a practice clearly established between two States which was accepted by the Parties as governing the relations between them, the Court must attribute decisive effect to that practice for the purpose of determining their specific rights and obligations. Such a particular practice must prevail over any general rules.[461]

The principle of application of the contemporary law to a practice of a customary nature is evidently sound. What is perhaps surprising is the emphasis on the historical background in relation to a practice which had continued, if not up to the date of the dispute (1954), at the least up to the end of British rule in India. The implication appears to be that once the practice became firmly established, its continuance had a petrifying effect not merely on the actual rights and obligations of the parties, but also on the inter-relation, so far as these rights and obligations were concerned, of special custom and general custom, special custom and general principles. The Court's *dictum* is frustratingly cryptic; did it consider that there was at the date the judgment was given a wider principle which would have given States in the position of Portugal a more extensive right of transit? Would such wider principle have prevailed over contemporary special practices? If so, why did the historical background to Portugal's right prevent this? These must remain matters for speculation.[462]

A comparatively non-controversial,[463] yet unusual, application of the principle was required in the *Western Sahara* case. The unusual feature was that the request for advisory opinion addressed to the Court asked for assessment of the legal situation in the territory later known as Western Sahara 'at the time of colonization by Spain', a time which the Court

[461] Ibid., pp. 43–4.

[462] The reference to the relationship between practice and 'precisely formulated rules' is also thought-provoking, and will be reconsidered in a later article devoted to custom and other sources of law.

[463] But see the argument of the representative of Algeria, M Bedjaoui, discussed below, pp. 138–9.

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decided was the period beginning in 1884.[464] The Court's decision to accede to the request for an opinion on this provoked, in the dissenting opinion of Judge Petrén, the trenchant observation that:

> The Court is the principal judicial organ of the United Nations; it is not an historical research institute . . . no one would think of submitting to the Court the question, for example, of the authenticity of the will of the Emperor Trajan, or whether the invasion of Britain by William the Conqueror was justified.[465]

Judge Petrén's doubts were, however, related to the proper exercise by the Court of its power to give advisory opinions (to be considered in a later article); he did not, apparently, contest that the law applicable to his hypothetical questions would be that of the Roman Empire and of eleventh-century Europe, respectively.

The first question put to the Court—whether the territory had been *terra nullius* at the relevant period—could be answered without too much difficulty by reference to the practice of States contemporary with the Spanish colonization. The Court began its examination of the question with a classic statement of the intertemporal principle:

> Turning to Question I, the Court observes that the request specifically locates the question in the context of 'the time of colonization by Spain', and it therefore seems clear that the words 'Was Western Sahara . . . a territory belonging to no one (*terra nullius*)?' have to be interpreted by reference to the law in force at that period. The expression '*terra nullius*' was a legal term of art employed in connection with 'occupation' as one of the accepted legal methods of acquiring sovereignty over territory. 'Occupation' being legally an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of a valid 'occupation' that the territory should be '*terra nullius*'—a territory belonging to no one—at the time of the act alleged to constitute the 'occupation' (cf. *Legal Status of Eastern Greenland, PCIJ*, Series A/B, No. 53, pp. 44 f. and 63 f.).[466]

The second question was 'what were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity', again at the time of colonization. As the Court noted,

> The scope of this question depends upon the meaning to be attached to the expression 'legal ties' in the context of the time of the colonization of the territory by Spain. That expression, however, unlike '*terra nullius*' in Question I, was not a term having in itself a very precise meaning.[467]

Normal application of the principle of intertemporal law would suggest that what the Court would have to determine was whether there were any (and if so, what) ties which would have been regarded by lawyers of 1884 as 'legal ties'—presumably in the sense of ties recognized as significant for

[464] *ICJ Reports*, 1975, p. 38, para. 77.
[465] Ibid., p. 108.
[466] Ibid., pp. 38–9, para. 79.
[467] Ibid., p. 40, para. 84.

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international law. It would however probably not be too hardy a supposition that no ties short of territorial sovereignty would have been considered at that time as of any legal relevance.

The passage quoted above from the Court's advisory opinion in fact continues:

> Accordingly, in the view of the Court, the meaning of the expression 'legal ties' in Question II has to be found rather in the object and purpose of General Assembly resolution 3292(XXIX), by which it was decided to request the present advisory opinion of the Court.[468]

From an examination of the context of the resolution—the question of decolonization of the territory—the Court was able to identify an underlying controversy concerning

> pretensions put forward, on the one hand, by Morocco that the territory was then a part of the Sherifian State and, on the other, by Mauritania that the territory then formed part of the Bilad Shinguitti or Mauritanian entity.[469]

The Court deduced that what the General Assembly was referring to was 'such "legal ties" as may affect the policy to be followed in the decolonization of Western Sahara'.[470] Thus the Court allowed respect for the actual intention of the requesting organ to prevail over any too rigid application of the intertemporal law principle; but in doing so it left the status of the adjective 'legal', as applied to the ties, floating uncertainly between the centuries. Apart from the question whether international or local law was contemplated, were the ties to be identified legal only in the sense of relevant to the legal process of decolonization, or had they to have had some legal status in 1884? While the Court made no specific comment on the point, the alleged 'ties' it in fact examined, other than the territorial sovereignty claimed by Morocco, did not have a specifically international-law character, but were placed firmly in the context of the late nineteenth century.

(2) *Application to future acts*

The normal use of the intertemporal principle is by reference to acts performed, and law applicable, at a particular time: but essentially it simply requires that to each legal event should be applied the law as it stands at the time.[471] Thus it may also be said of an event which is to occur in the future that the law applicable to it will be the law as it stands then, not the law as it is at the moment the observation is made (subject of course to any question of acquired rights). Since the function of a Court does not normally require

[468] Ibid.

[469] Ibid., p. 42, para. 85.

[470] Ibid.

[471] Thus a Court is tacitly applying the intertemporal principle in every ordinary case by determining the dispute by reference to the law as it stands, rather as Molière's M. Jourdain was speaking prose without being aware of it.

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it to look into the future, instances of this can be expected to be rare; but it did occur in the *Fisheries Jurisdiction* cases.

In the two *Fisheries Jurisdiction* cases, the Court was clearly preoccupied by the speed with which the law of the sea was developing and changing: it referred in particular to 'present endeavours, pursued under the auspices of the United Nations, to achieve in a third Conference on the Law of the Sea the further codification and progressive development of this branch of the Law' and observed that 'the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down'.[472]

When indicating that the parties were required by international law to negotiate in good faith to bring about an equitable apportionment of the fishing resources, the Court observed that the negotiations involved

> an obligation upon the Parties to pay reasonable regard to each other's rights and to conservation requirements pending the conclusion of the negotiations. While this statement is of course a re-affirmation of a self-evident principle, it refers to the rights of the Parties as indicated in the present Judgment. It is obvious that both in regard to merits and to jurisdiction, the Court only pronounces on the case which is before it and not on any hypothetical situation which might arise in the future. *At the same time, the Court must add that its Judgment cannot preclude the Parties from benefiting from any subsequent developments in the pertinent rules of international law.*[473]

(3) *Problems of ascertaining the applicable law*

The intertemporal law principle presupposes that, for its application, it will in fact be possible to determine what international law provided at the time in question. Normally this should present no problem; but it is not inconceivable that a Court might be asked to determine, by reference to a past age, a question which had not at that time ever arisen for settlement,—a sort of retrospective case of first impression. In the context of municipal law rather than international law, this was a problem faced by the Chamber formed to deal with the case of *Elettronica Sicula SpA (ELSI)*. The facts on which the claim was based had occurred twenty years earlier, and in order to deal with an objection based on non-exhaustion of local remedies the Chamber was asked to say that a particular remedy did exist and was not used. The Chamber resolved the difficulty as follows:

> 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

[472] *ICJ Reports*, 1974, p. 192, para. 45. See also pp. 148–50, below.

[473] Ibid., pp. 202–3, para. 70 (emphasis added), *Federal Republic of Germany* v. *Iceland*. The last sentence appears also, in a slightly different context, in the *United Kingdom* v. *Iceland* judgment.

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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, PCIJ*, 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.[474]

Should this dilemma arise in respect of a question of international law, however, the rule of the burden of proof is unlikely to be of assistance.

(4) *Intertemporal* renvoi

So long as the intertemporal principle relates to the creation of rights or obligations by the operation of the rules of law current at the relevant time, there can be no room for argument but that it was those rules, and not those of a later period, which should be applied. So soon however as a subjective element is introduced, so soon as it is required to interpret the intentions of the parties to an instrument effected by an act of will—an *acte juridique* as opposed to a *fait juridique*—, the possibility exists of an intention to subject the legal relations created to such law as might from time to time thereafter become effective.

This process was identified for the first time in a decision of the Court in the advisory opinion given in the *Namibia* case;[475] but the simplest and most convincing example of its operation was in fact exemplified in the later case of the *Aegean Sea Continental Shelf*. The jurisdictional title invoked in that case was the 1928 General Act for the Peaceful Settlement of International Disputes, to which the applicant, Greece, had acceded in 1931, subject to a reservation referring to the 'territorial status' of Greece. In order to resist the assertion of this reservation against it by Turkey, by way of reciprocity, Greece argued, *inter alia*, that the concept of the continental shelf was unknown in 1931.

The Court observed as follows in relation to this argument:

> 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

[474] *ICJ Reports*, 1989, p. 47, para. 62.

[475] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*.

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accordance with 'the development of international relations' (*PCIJ*, Series B, No. 4, p. 24).[476]

It would of course be absurd to interpret the General Act as only creative of jurisdiction in respect of disputes over rights which existed in 1928; and the analysis of the Court is clearly correct in attributing to the authors of that instrument the intention that the term 'rights' should cover all rights existing, or asserted to exist, at the time the dispute was submitted for settlement. But, as the *Namibia* case had already shown, the same technique of interpretation could produce results which were more controversial. Before studying the *Aegean Sea* case further, we will resume the chronological order of decisions in this field, and examine the *Namibia* advisory opinion.

The Court in that case had to consider the (by then) familiar argument that, among the mandates conferred by the League of Nations, 'C' mandates were in a qualitatively different category from 'A' and 'B' mandates, as being, according to the contemporary intention of the members of the League, 'in their practical effect not far removed from annexation'.[477] The evidence that 'C' mandates were so regarded was implicitly accepted by the Court. The Court began its consideration of the point with a deferential gesture in favour of the intertemporal principle, but continued with a bold application of the interpretation technique just explained:

> Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant—'the strenuous conditions of the modern world' and 'the well-being and development' of the peoples concerned—were not static, but were by definition evolutionary, as also, therefore, was the concept of the 'sacred trust'. The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law.[478]

The conclusion to which this line of argument led was that 'the Court is unable to accept any construction which would attach to "C" mandates an object and purpose different from those of "A" and "B" mandates'.[479]

The doubts prompted by this line of argument do not relate to the legal logic, but to the basic finding, as to the intentions of the States concerned in 1919, upon which it is built. There must be a danger, when applying this line of approach, of confusing what, on the basis of the available evidence, may be found to have been the actual intention of the parties concerned,

[476] *ICJ Reports*, 1978, p. 33, para. 78.
[477] *ICJ Reports*, 1971, p. 28, para. 45.
[478] Ibid., p. 31, para. 53.
[479] Ibid., p. 32, para. 54.

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and what is judged, with the benefit of hindsight, to be what *ought* to have been their intention. In the particular case of the *Namibia* advisory opinion there is reason to wonder whether this may not have happened. In the passage quoted above, it is to be observed that the Court did not find as a fact that the parties to the Covenant contemplated that the concepts in Article 22 should acquire a different content with the development of international law, but that, because the concepts were, in the Court's view, 'by definition evolutionary', they 'must consequently be deemed to have accepted them as such'. Not only is no evidence referred to that the parties had such an intention; none is offered to show that the concepts were *at the time* regarded as evolutionary.

Doubts as to whether the distinction between contemporary intention and subsequent benevolent hindsight was observed are reinforced by the immediately following passage in the opinion:

> Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.[480]

It may be objected that the 'entire legal system prevailing' at the time of the *Namibia* opinion includes the principle of intertemporal law, so that the first sentence quoted rather evades than meets the difficulty. Furthermore, the ultimate objective of the sacred trust was what it was in 1919; subsequent developments might make clearer what it had been, but could not retrospectively make it something other than what it was.

In his dissenting opinion, Fitzmaurice did not question the intellectual construction whereby recourse to the intertemporal principle may lead to the application of modern law, through the 'evolutionary' intention of the States concerned. He did however actively combat the finding that, in the case of the 'C' mandates, there could have been such an intention. Referring to the assurances given that the 'C' mandates would give 'ownership in all but name', he observed:

> Whether this attitude was unethical according to present-day standards (it certainly was not so then) is juridically beside the point. It clearly indicates what the *intentions* of the parties were, and upon what basis the 'C' mandates were accepted. This does not of course mean that the mandatories obtained sovereignty. But it does mean that they could never, in the case of these territories contiguous to or very near their own, have been willing to accept a system according to which at the will of the Council of the League, they might at some future date find themselves

[480] Ibid., pp. 31–2, para. 53.

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displaced in favour of another entity—possibly a hostile or unfriendly one—(as is indeed precisely the intention now). No sovereign State at that time—or indeed at any other time—would have accepted the administration of a territory on such terms.[481]

The same passage quoted above from paragraph 53 of the advisory opinion, referring to interpretation and application 'within the framework of the entire legal system prevailing' at the time of the interpretation, was taken up by the *Institut de droit international* in its Resolution of 'The Intertemporal Problem in Public International Law', adopted at Wiesbaden in 1975. Paragraph 4 of the Resolution provided:

> Wherever a provision of a treaty refers to a legal or other concept without defining it, it is appropriate to have recourse to the usual methods of interpretation in order to determine whether the concept concerned is to be interpreted as understood at the time when the provision was drawn up or as understood at the time of its application. Any interpretation of a treaty must take into account all relevant rules of international law which apply between the parties at the time of application.[482]

During the discussion of the text, Sir Gerald Fitzmaurice proposed the deletion of the second sentence, but while his proposal obtained some support, it was defeated on a vote.[483]

In the *Western Sahara* case, an ingenious argument was put forward by the representative of Algeria, M Bedjaoui, whereby the term '*terra nullius*' in the question put to the Court would not be interpreted according to the accepted meaning given to it by European States in 1884, but otherwise, by application of the technique of 'intertemporal *renvoi*' used in the *Namibia* case. After quoting the passage from the advisory opinion in that case which has been set out (in two halves) above, he continued:

> Mais dans le cas présent, il s'agit moins d'une adaptation que de la substitution d'une norme exactement inverse. Cette substitution est plus que légitime; elle est impérative dès lors que le droit des peuples à disposer d'eux-mêmes relève du *jus cogens* et se situe par conséquent au-dessus de toute autre norme juridique d'une part et traduit d'autre part une irréductibilité de principe au système d'occupation de territoires peuplés, c'est-à-dire exprime une incompatibilité radicale avec la théorie de la *terra nullius*.[484]

The idea of substituting, on an intertemporal law basis, the norm of self-determination of peoples for the concept of *terra nullius* appears somewhat startling; however the brief quotation above does not, of course, do full justice to M Bedjaoui's subtle and learned argument. Since the Court, as we have seen, did not adopt it, it falls outside the strict scope of the present

[481] Ibid., p. 277, para. 85.
[482] *Annuaire de l'Institut*, 1975, p. 339.
[483] Ibid., pp. 367–70.
[484] *Pleadings*, p. 493.

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survey, in which space does not permit of so lengthy a digression as would be needed to examine it in full.[485]

The question of intertemporal law which arose in the *Aegean Sea Continental Shelf* case concerned, as noted above, the interpretation of the reservations attached by Greece to its accession to the 1928 General Act for the Pacific Settlement of International Disputes, the basis of jurisdiction which Greece relied on in the proceedings which it brought against Turkey. One of these reservations excluded from judicial settlement under the General Act

> 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.[486]

The question was whether a dispute with Turkey over the delimitation of the continental shelf fell within the category of 'disputes relating to the territorial status of Greece'.

Greece advanced two arguments on this point which partook of the nature of arguments of intertemporal law. First, it maintained

> 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.[487]

For reasons which it is not necessary to go into here, the essential contention of Greece was that such an expression as 'territorial status' in the 1920s was 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'.[488]

The Court rejected this contention, but it did so essentially on the ground that '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'.[489]

What is however material to the present discussion is that the Court did not disagree with Greece's contention in principle that the historical context should govern the interpretation of the reservation. Referring to the

[485] It may be observed, however, that the main weakness of the appeal to intertemporal *renvoi* was that, while reference was made in the General Assembly resolution to the 'time of colonization', the resolution itself was contemporary, so that the idea of an intention, at some moment in the past, that the meaning of a concept employed shall follow the development of the law, was wholly inapplicable. M Bedjaoui also did not, unfortunately, spell out what answer should, on the basis of his contentions, be given to Question I.

[486] *ICJ Reports*, 1978, p. 21, para. 48.

[487] Ibid., p. 28, para. 69.

[488] Ibid., p. 30, para. 72.

[489] Ibid., p. 31, para. 74.

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decisions of the Court and of the Permanent Court of International Justice relied on by Greece[490] the Court stated:

> 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 . . .[491]

The second argument put forward by Greece in this connection was more radical. It contended that there could be no question of the applicability of reservation (*b*) to a dispute over the continental shelf, because

> 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.[492]

Essentially, this contention was advanced as a matter of the intention of Greece at the time of its accession; it was stated in the Memorial in the following terms:

> . . . la notion même de plateau continental étant inconnue en 1931, il serait inconcevable que la Grèce ait pu avoir l'intention à cette date d'exclure les différends relatifs au plateau continental.[493]

It is however suggested that the point is not only one of actual or presumed intention; if the law of 1931 is to be applied, it is apparent that a dispute over the delimitation of the continental shelf was a legally meaningless concept, since the doctrine of the continental shelf had not yet been stated.[494]

The Court, however, rejected this contention of Greece also. It repudiated the parallel which Greece had sought to draw with the well-known *dictum* in the arbitral award in the case of *Petroleum Development Ltd.* v. *Sheikh of Abu Dhabi*,[495] on the following ground:

> 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,

[490] *Anglo-Iranian Oil Co., ICJ Reports*, 1951, p. 104; *Rights of Minorities in Upper Silesia, PCIJ*, Series A, No. 15, p. 22; *Phosphates in Morocco, PCIJ*, Series A/B, No. 74, pp. 22–4.

[491] *ICJ Reports*, 1978, p. 29, para. 69.

[492] Ibid., p. 32, para. 77.

[493] *Pleadings*, p. 258.

[494] Whether, with the benefit of hindsight, one can say that States in 1931 did in fact have rights over the continental shelf without knowing it (cf. the Court's statement in 1969 that such rights 'exist *ab initio*' – *ICJ Reports*, 1969, p. 22, para. 19), or whether such rights only came into existence in the late 1940s is probably a sterile debate, but not without philosophical interest.

[495] 18 ILR 144, 152.

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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.[496]

The Court therefore pursued its argument:

It follows that in interpreting and applying reservation (*b*) with respect to the present dispute the Court has to take account of the evolution which has occurred in the rules of international law concerning a coastal State's rights of exploration and exploitation over the continental shelf. The Court is, therefore, now called upon to examine whether, taking into account the developments in international law regarding the continental shelf, the expression 'disputes relating to the territorial status of Greece' should or should not be understood as comprising within it disputes relating to the geographical—the spatial—extent of Greece's rights over the continental shelf in the Aegean Sea.[497]

Its conclusion on this point was that, taking into account the particular circumstances of the dispute, that dispute was one which related to the territorial status of Greece within the meaning of reservation (*b*), and the Court declined jurisdiction on that ground.

One of the arguments advanced by the Court in support of its position has already been quoted: the interpretation of the 'rights' in Article 17 of the 1928 General Act. What is it about the term 'rights' which enables the Court's conclusion—wholly convincing as regards this specific term—to be drawn? A possible answer is that the 'evolution of the law' has no influence on the impact of a provision referring to a future conflict as to the respective 'rights' of the parties, because the term 'rights' in this context is one which necessarily extends to the whole of the 'rights' of the party at a given time. Like the term '*patrimoine*', its content is *ex definitione* both fluctuating and universal.[498] It is for this reason that its peculiar operation with regard to intertemporal law has not attracted attention; it is too obvious to be stated. It is however more than questionable whether a term like 'territorial status', particularly in the context of a reservation—by definition, a text intended to have a limiting effect—can properly be attributed this chameleon-like character.

The Court went on to point out that some of the islands to which the claim of Greece related had only been acquired by it by cession in 1947, and were thus not in its possession in 1931. The Court commented:

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

[496] *ICJ Reports*, 1978, p. 32, para. 77.

[497] Ibid., p. 34, para. 80.

[498] The same may probably be said of the expression 'the strenuous conditions of the modern world', given an 'evolutionary' interpretation by the Court in the *Namibia* case: see above, p. 136.

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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'.[499]

This is however no more than a restatement of the same argument: the category of 'rights' contemplated in Article 17 of the General Act, because of its necessarily fluid yet universal character, could as well assimilate rights over a later-acquired territory as it could rights which were legally non-existent (or undiscovered) at the time the term was used. The fact that the variation in extent of rights is, in this instance, geographical is a purely incidental aspect, so that to argue that 'territorial status' must have been intended to undergo similar variation is, with all respect, no more than a debating point.

The basic weakness in the Court's argument in both the *Namibia* and the *Aegean Sea* cases however lies, it is suggested, in a shift between the two types of intertemporal law rule to which attention was drawn at the beginning of the present section. The Court's discussion proceeds on the basis that a term used in a legal text *can*, the intertemporal principle notwithstanding—or more precisely, by a more sophisticated application of intertemporality—, have a content which is referable to the law as it stands at the time when the term comes to be interpreted, because that was the parties' intention. From this, the conclusion is drawn that a term which *can* operate in this way *does* do so, as a matter of intertemporal law, as though it were an application of the other—non voluntarist—intertemporal rule. But the question is one of the interpretation of a text emanating from a State or States, i.e., of ascertaining the intentions of that State, or those States.[500]

In the case of the Mandate for South West Africa, the intention of the League and its members was the subject of fierce controversy. In the *Aegean Sea* case, there is nothing in the Court's discussion of the point which wholly convinces the reader that Greece *intended* the meaning of the expression 'territorial status' to be referable to the current state of the law. The material produced by Greece to throw light on the background to the text of its reservation—though it did not convince the Court that 'territorial status' was intended to have a more limited meaning than that generally accepted at the time—does not suggest that it was the intention of Greece that it should have, at least potentially, a wider meaning.

The third argument used by the Court at this stage in its reasoning was:

> 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

[499] *ICJ Reports*, 1978, p. 33, para. 78.

[500] It does not appear that the Court intended to scramble the two rules to the extent advocated by McWhinney ('The Time Dimension in International Law: Historical Relativism and Intertemporal Law', *Essays in International Law in honour of Judge Manfred Lachs* (1984), p. 179).

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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' . . . 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.[501]

It is unfortunate that the Court here did not quote the 'domestic jurisdiction' reservation more fully, since it in fact refers to 'disputes concerning questions which *by international law* are solely within the domestic jurisdiction of States'. The reference to international law is surely more than sufficient to show an intention that the interpretation of 'domestic jurisdiction' should follow the evolution of the law. It is therefore hardly appropriate to require that Greece should have 'made plain . . . at the time' an opposite intention as regards the 'territorial status' reservation.

To sum up, the concept of terminology capable of giving rise to an 'intertemporal *renvoi*' used by the Court in the *Namibia* and *Aegean Sea* cases, though undoubtedly a valid one, is to be used with caution; it must be referred to the actual or legitimately deduced intention of the author or authors of the relevant text, and it is essential to avoid reading back into the intentions of the States concerned at the time they adopted this text considerations which, however firmly established they may be in present-day law, and however desirable it might have been had they been foreseen at the outset, were not in fact present to the minds of those concerned. To stretch the intertemporal principle in this way would be to falsify its whole nature.

3. *The Relationship between Sources of Law*

(1) *The nature of the rules governing the relationship between sources*

In broad terms, the relationship between the various sources of international law may be regarded as fairly well defined. At least for purposes of its application by the Court, the enumeration of its sources to be found in Article 38, paragraph 1, of the Statute of the Court can in practice be treated as an indication of a hierarchy, or order of priority of sources. International conventions in force between the parties, as *lex specialis*, exclude the application of rules of customary law covering the same ground as the treaties.[501a] An exception to this which has become recognized in more recent years is the concept of *jus cogens*: precepts of general (and presumably customary) international law which are regarded as so fundamental or so essential that attempts to derogate from them by treaty are ineffective. The 'general principles of law' constitute a concept the definition of which

[501] *ICJ Reports*, 1978, p. 33, para. 79.

[501a] Cf. *Military and Paramilitary Activities in and against Nicaragua, ICJ Reports*, 1986, p. 137, para. 274.

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remains controversial, but it is generally understood to be one to which recourse is necessary only if neither treaties in force nor custom afford rules for the settlement of the dispute. Finally, the Statute itself provides, in subparagraph (*d*) of paragraph 1 of Article 38, that judicial decisions and legal teaching are no more than 'subsidiary means for the determination of rules of law'.

It was obviously contemplated, when the Statute was drawn up, that the Court would be able, in all cases before it, to have recourse to all the recognized sources in its quest for the rules applicable to the dispute. That this has not always been the case has been the result of the need to respect the limitations of the jurisdictional title by which the Court has been seised in a particular case, and the unforeseen restrictiveness of many such titles. It may occur, and it has occurred, that the Court is limited to the application of treaty law, to the exclusion of customary law in the same field, or—though the hypothesis might seem less probable—to the application of customary law to the exclusion of the provisions of a treaty currently in force between the parties, and containing relevant provisions.

The first situation arises when the Court is seised under the compromissory clause of a treaty in the common form whereby it is expressed to confer jurisdiction over disputes concerning the interpretation or application of the treaty. The disputed articles of the treaty may, to a greater or lesser extent, overlap with the customary law; but the Court is not empowered under a clause of this type to determine the rights and obligations of the parties under customary law, but only the rights and obligations (which may prove to be identical) under the treaty. This was the position in the case of *United States Diplomatic and Consular Staff in Tehran*, where the jurisdictional title invoked was purely conventional, primarily the Optional Protocols to the Vienna Conventions on Diplomatic and Consular Relations. As we shall see (subsection (2)(*c*) below), the Court in that case went somewhat beyond the strictly treaty-law scope of the jurisdiction. The second situation has so far arisen only in the case of *Military and Paramilitary Activities in and against Nicaragua* (discussed in subsection (2)(*d*) below), as a result of the application of the so-called 'multilateral treaty reservation' attached to the United States declaration of acceptance of jurisdiction under Article 36, paragraph 2, of the Statute.

A preliminary question which suggests itself at the outset of any examination of the Court's case law in this field is: what is the nature of the rules which determine the relationship *inter se* of the various sources or types of international law rules? Even setting aside the provisions of Article 38 of the Statute, it is universally accepted that, for example, as between the parties to a treaty the rules of the treaty displace any rules of customary law on the same subject. If it were not so, if treaty rules were powerless to modify the relationship resulting from customary law, there would indeed be no point in entering into treaties at all. But is this rule itself a rule of customary law?—it is obviously not a rule of treaty origin. Or is it a general principle

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of law, of the kind contemplated by Article 38, paragraph 1 (*c*), of the Statute? Or is it some kind of basic constitutional rule of the whole international legal order, lying outside the hierarchy of sources or norms stated in Article 38?

An example of the sort of question of the relationship between sources of law which may arise in practice is afforded by the *North Sea Continental Shelf* judgment. Discussing the possibility that the equidistance rule in Article 6 of the 1958 Geneva Convention on the Continental Shelf might represent or have become a rule of customary international law, the Court suggested that since

> general or customary law rules and obligations . . . by their very nature, must have equal force for all members of the international community,

such rules will, when embodied in a convention

> figure amongst those in respect of which a right of unilateral reservation is not conferred, or is excluded.[502]

Now it may be said that this is a rule of treaty interpretation, a field governed, except where the Vienna Convention on the Law of Treaties finds application, by customary law.[503] It would certainly be very difficult to trace a pedigree in State practice for a rule of interpretation on the lines of the above *dictum*.[504] In fact, however, it is not a rule of treaty interpretation: it is a rule destined to guide the judge in determining whether an asserted rule of law is or is not an accepted rule of customary international law. In order to ascertain whether States regarded it as such—the *opinio juris*—it is relevant to see how they treated it in a multilateral convention in which it was embodied or restated. The purpose is not to interpret the treaty to determine what were the rights and obligations of the parties to it, but to use the treaty as evidence of a particular view of customary law. The rule or technique proposed by the Court might therefore be treated as no more than a 'meta-principle';[505] but the point of interest here is whether it forms part of customary international law. It is perhaps not inconceivable that a practice might become established governing the relationship between treaty obligations and obligations themselves established by practice in the routine of custom; but it is doubtful if this can in fact be demonstrated. As O'Connell puts it, canons of treaty interpretation in general are 'no more than logical devices for ascertaining the real area of treaty interpretation', so that the effect of the provisions of the Vienna Convention on

[502] *ICJ Reports*, 1969, pp. 38–9, para. 63.

[503] Cf. the *dictum* of the Court in the *Military and Paramilitary Activities in and against Nicaragua* case discussed below, p. 147.

[504] The more so since, as we observed in Chapter II, section 3(1) above, it may in any event perhaps be based on a confusion of universality and force as *jus cogens*.

[505] Cf. Koskenniemi, 'General Principles: Reflections on Constructionist Thinking in International Law', *Oikevstiede–Jurisprudentia*, 18 (1985), p. 133.

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the Law of Treaties concerning interpretation is that 'of transforming logical positions into rules of law'.[506]

The fact of the matter is that 'general international law' and 'customary international law' are not synonymous categorizations; there must be a place for (*inter alia*) rules which govern the relations between categories of international legal norms, and such rules must themselves form part of international law. The question was examined by Fitzmaurice in 1958, and his conclusion was that

> the sources of international law cannot be stated, or cannot fully and certainly be stated, in terms of international law itself, and that there are and must be rules of law that have an inherent and necessary validity, in whose absence no system of law at all can exist or be originated. Such a rule, for instance, is the rule *pacta sunt servanda*.[507]

The question whether such rules are 'within' or 'without' the body of international law itself is a philosophical conundrum not without interest;[508] but all that needs to be noted here is that there must be 'legal' rules (whatever that means) determining the relations between different sources of law—or, of more practical impact, the relations between the products of different sources of law.

Another example of the sort of *dictum* of the Court which falls into this class is to be found in the judgment on the merits in the case of *Military and Paramilitary Activities in and against Nicaragua*. Again the Court was engaged, for reasons to be examined in a moment, in considering the relations between rules embodied in a multilateral treaty and rules, covering the same subject-matter, of customary international law. The Court there stated, as a general principle,

> 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.[509]

It is significant that when the Court goes on to give a number of reasons for this ruling, these are of an intellectual or hypothetical nature and do not purport to be a statement of practice supporting a customary rule.[510]

Turning now from the nature of the rules governing the relationship between treaty law and customary law to the content of the rules themselves as declared by the Court, we may first consider the significance in this context of provision for reservations in a multilateral treaty. While, as observed above, the mere generality of a rule of customary law does not militate

[506] *International Law*, vol. 1, pp. 252–3.

[507] 'Some Problems regarding the Formal Sources of International Law', *Symbolae Verzijl* (1958), p. 164.

[508] See the observations of the present writer in *International Customary Law and Codification* (1972), pp. 37–9, and the important article of Maarten Bos, 'The Recognized Manifestations of International Law', *German Yearbook of International Law*, 20 (1977), p. 9, particularly pp. 72–3.

[509] *ICJ Reports*, 1986, p. 95, para. 177.

[510] Ibid., para. 96.

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against the possibility of States agreeing by treaty to derogate from it or apply a different rule, it is certainly the case that if a rule is not only a general rule of customary law, but also a matter of *jus cogens*, it would be to be expected that a provision in a multilateral treaty stating the rule should not be one to which reservations under the treaty would be permitted.

The reverse relationship has in fact been considered by the Court in its judgment on the merits in the case of the *Military and Paramilitary Activities in and against Nicaragua*. When considering whether the prohibition of the use of force expressed in Article 2, paragraph 4, of the UN Charter is a principle of customary international law, the Court found confirmation that this was so

> 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,

and the Court quoted allusions to the principle as being one of *jus cogens*.[511] The principle operating here may seem to be one which is conceptually self-evident: if a rule is one of *jus cogens*, it cannot be other than a general rule without self-contradiction. (An interesting theoretical question is whether a rule of *jus cogens* is necessarily customary in origin or authority, or whether a 'general principle', unsupported by practice, could have this status.[512])

(2) *Rights and obligations with a double foundation: overlap of treaty and customary law*[513]

It is universally accepted that—consideration of *jus cogens* apart—a treaty as *lex specialis* is law between the parties to it in derogation of the general customary law which would otherwise have governed their relations. Thus if a treaty provides that the parties, in their mutual relations, shall not be obliged to do something which customary law would otherwise have required of them, it is trite law that the obligation so set aside does not form part of the law between the parties. On the other hand, where the treaty is silent, general international law continues to apply. There is however the intermediate possibility, that some or all of the rights and obligations provided for in the treaty correspond exactly to those existing under customary law. If so, with which legal prescriptions are the parties complying when they give effect to those rights and obligations; and if it is the treaty they are complying with, what has become of the customary law

[511] Ibid., pp. 100–1, para. 190.

[512] The acceptance by the international community contemplated by Article 53 of the Vienna Convention on the Law of Treaties does not seem to require practice in support, and, according to some authors, need not be unanimous. On the influence in this field of codifying conventions, see Fois, 'La funzione degl accordi di codificazione nella formazione dello *jus cogens*', in *International Law at the Time of its Codification*, pp. 287 ff.

[513] Cf. Fitzmaurice, this *Year Book*, 30 (1953), pp. 57 ff.; *Collected Edition*, I, pp. 188 ff.

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requirements? Are they ousted, along with the provisions of customary law which conflict with the treaty; or are they suspended; or do they continue to be present on the scene, invisibly as it were?

(a) *The* Fisheries Jurisdiction *case*

The question of the co-existence, between the same two States, of treaty law and customary international law governing the same questions arose in two different forms in the *Fisheries Jurisdiction (United Kingdom* v. *Iceland)* case in 1973.

The United Kingdom contended that the 1972 Icelandic Fishing Regulations, asserting exclusive fishing rights of Iceland over an area extending 50 miles from baselines round its coasts, were contrary to general international law. During the currency of the proceedings before the Court, the two parties had entered into an interim agreement regulating fishing by British vessels in the disputed area for a period of two years from 13 November 1973.

Counsel for the United Kingdom was asked whether that agreement definitively regulated, for the period indicated, the relations of the two Parties, so far as the fisheries in question were concerned, or whether it would be possible for the Court to replace that regulation with another. The reply was that the judgment would state the rules of customary international law between the Parties, defining their respective rights and obligations. However, that would not mean that the judgment would completely replace the interim agreement with immediate effect in the relations between the Parties, for, as the British Government saw the matter, the agreement would remain as a treaty in force. In any event, the Parties would be under a duty fully to regulate their relations in accordance with the terms of the judgment as soon as the interim agreement ceased to be in force, i.e., on 13 November 1975, or at such earlier date as the Parties might agree. On the other hand, the judgment would have immediate effect in so far as it dealt with matters not covered in the agreement.[514]

The difficulty which resulted, in the view of Judge Petrén, who had raised the question, was the following:

What the United Kingdom is requesting of the Court is to state the law which would have been applicable to the relations between the Parties in the event that they had not concluded that agreement. Yet the essence of the judicial function is to declare the law between the Parties as it exists, and not to declare what the law would have been if the existing law had not existed. The conclusion of the interim agreement has therefore had the effect of rendering the Application of the United Kingdom without object so far as the period covered by the agreement is concerned.[515]

Judge Petrén did not consider that there were any 'matters not covered in

[514] Dissenting opinion of Judge Petrén, *ICJ Reports*, 1974, p. 156.
[515] Ibid., pp. 156–7.

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the agreement' to which the judgment could be of immediate application. Nor did he consider that the Court could or should endeavour to declare what the state of customary law was going to be on the date of expiration of the interim agreement, in view of the imminence of a further Law of the Sea Conference and the general state of flux in this domain.[516] For Judge Petrén,

> if the dispute concerned the interpretation of a treaty, an interim agreement concerning its application over a given period would not hinder the Court from ruling before the end of that period on the interpretation and future application of the treaty,[517]

presumably because the treaty-law régime established by that treaty would remain unchanged during the currency of the interim agreement.

Judge Petrén's argument is based upon the implied premiss that the existing law between two States is solely that which is directly applicable, and that if general law is displaced (in matters of *jus dispositivum*) by the conclusion of a treaty, then that law ceases to exist as law between the parties. It was true, as Judge Petrén stated, that 'it is only on 13 November 1975 that customary international law will again govern the conditions under which fishing is carried out in the disputed area';[518] but does it follow that the customary international law applicable to fishing rights and the law of the sea ceased to exist between the parties in November 1973, to revive again in November 1975?

The judgment of the Court treated the point rather as one of the powers of the Court than as a matter of principle as to the relationship between treaty law and customary law. It emphasized the danger, if Judge Petrén's argument were adopted, of discouraging States from interim arrangements, and thus running contrary to the purpose of the Charter as to peaceful settlement of disputes.[519] The essential point of its ruling was as follows:

> The Court is of the view that there is no incompatibility with its judicial function in making a pronouncement on the rights and duties of the Parties under existing international law which would clearly be capable of having a forward reach; this does not mean that the Court should declare the law between the Parties as it might be at the date of the expiration of the interim agreement, a task beyond the powers of any tribunal. The possibility of the law changing is ever present: but that cannot relieve the Court from its obligation to render a judgment 'on the basis of the law as it exists at the time of its decision'. In any event it cannot be said that the issues now before the Court have become without object; for there is no doubt that the case is one in which 'there exists at the time of the adjudication an actual controversy

[516] Judge Petrén observed that no difficulty would have arisen if the interim agreement had been drawn to expire on the date of the judgment; unfortunately, this possibility had been excluded by Iceland's boycotting of the proceedings before the Court.

[517] Ibid., p. 159.

[518] Ibid.

[519] Ibid., p. 20, para. 41.

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involving a conflict of legal interests between the Parties' (*Northern Cameroons Judgment, ICJ Reports 1963*, pp. 33–34).[520]

As a matter of practical administration of justice, the Court's approach is undoubtedly sound; but the teasing point remains: Can the Court be said to be giving judgment 'on the basis of the law as it exists at the time of its decision', when the parties have mutually released each other from compliance with that law until the expiration of their agreement?[521] Certainly customary international law continues to exist and to develop 'behind', as it were, the treaty, but is it 'law' for the parties to the treaty so long as the treaty endures?

An aspect of the case which was closely examined by Judge Sir Humphrey Waldock, but to which the same significance was not attached in the judgment, was the continuing effect of an Exchange of Notes between the parties in 1961. This was, as Judge Waldock found, that

> Iceland and the United Kingdom agreed in 1961 that the 12-mile limit, which was the only fishery limit that had come near to general acceptance at the 1960 Conference, should thereafter constitute the limit of Iceland's fishery jurisdiction as between themselves. They further agreed that this 12-mile limit should remain in force between them unless and until an extension of Iceland's fishery jurisdiction should become opposable to the United Kingdom in accordance with the final clause in the Exchange of Notes. . . .[522]

In the view of Judge Waldock, Iceland by totally disregarding the provision of that final clause (whereby the lawfulness of any extension was to be determined by the Court) violated the terms of the Exchange of Notes.

> Iceland in effect tore up the assurance which she had given in 1961 and sought unilaterally to impose the new extension upon the United Kingdom. It follows that Iceland's extension of her fishery jurisdiction promulgated in 1972 does not comply with the conditions laid down in the compromissory clause of the 1961 Exchange of Notes. It further follows, in my opinion, that the extension is not opposable to the United Kingdom in the present proceedings.[523]

Thus if there was at the time of the judgment a rule of customary law which invalidated any purported extension of fisheries jurisdiction beyond 12 miles,[524] as the United Kingdom claimed, Iceland would be simultaneously in breach both of a customary-law obligation and a conventional obligation. More interesting, and more dubious, is the position if, on the contrary, general customary law had developed to the point at which a 50-mile limit was valid *erga omnes*; was Iceland to be permanently excluded,

[520] Ibid., pp. 19–20, para. 40.

[521] This aspect was emphasized, as Judge Petrén pointed out, by the fact that the Court in effect found that the parties were under a duty to negotiate, whereas the facts surrounding the conclusion of the interim accord, in Judge Petrén's view, showed that there was agreement not to negotiate again until the expiration of the interim accord.

[522] Ibid., p. 114, para. 22.

[523] Ibid., p. 117, para. 28.

[524] On the difficulties of interpreting customary rules in this domain, see Chapter II, section 1 above.

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at least *vis-à-vis* the United Kingdom, from the happy throng of coastal States enjoying such an extension, as a result of its non-compliance with the procedures of the 1961 Exchange of Notes?[525]

(b) *The* Nuclear Tests *cases*

The claim of Australia and New Zealand in these cases was that 'the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law', and the Court was asked to order that France 'shall not carry out any further such tests'.[526] In short, the contention was that, as a matter of general customary international law, France was obliged to stop the tests. The Court made no finding on the validity of this claim; but it found that France had entered into a binding unilateral obligation to stop the tests, so that the proceedings had become without object.

The unilateral obligation was, while not being a *pactum*, certainly a *servandum*;[527] and whether or not it partook of the nature of quasi-treaty law, it was certainly peculiar to France, and, though apparently an obligation *erga omnes*,[528] not a matter of general customary law. On the assumption therefore that the applicants' contentions were correct—and the Court was careful to leave the point entirely open—France would have been under two distinct obligations requiring identical conduct. The unilateral obligation, being *lex specialis*, presumably prevailed; what then was the position in general customary law? The question is of course something of a *hypothèse d'école*, but not without interest for all that.

In particular, the following point may be noted here, though to do so trespasses to some extent on later developments on the powers of the Court to declare a case without object.

The Court had not yet determined its jurisdiction to entertain the claim of Australia and New Zealand on the merits; as it expressly stated it had therefore to refrain from entering into the merits of the claim.[529] For purposes of its decision, therefore, the question remained entirely open whether France was under an obligation, under general international customary law, to put an end to atmospheric nuclear tests. The basis of the Court's decision was that the object of the claim had disappeared, so that there was nothing on which to give judgment.[530] The basic postulate was that, as a result of the French unilateral statements, the situation had changed.

[525] See also the present writer's *Non-Appearance before the International Court of Justice*, pp. 72–5.

[526] Submissions of Australia, *ICJ Reports*, 1974, p. 253; the New Zealand submissions were that the conduct of the tests 'constitutes a violation of New Zealand's rights under international law' (ibid., p. 460).

[527] See the discussion above, Chapter I, section 1(1).

[528] See above, pp. 11–12.

[529] *ICJ Reports*, 1974, p. 259, para. 22.

[530] Ibid., p. 272, para. 59.

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But what was that change? The Court emphasized that the unilateral statements constituted 'an undertaking possessing legal effect', so that the French Government had 'undertaken an obligation'.[531] That obligation was an obligation to do what it had said it would do: stop the atmospheric tests. But if it was already bound by general international law to stop the tests, the new obligation merely paralleled the existing obligation, and there was no change in the situation justifying the conclusion that the case had become moot. The situation had only changed if the French Government was not previously under an obligation of general international law; but the Court had refrained from ruling on this, because it constituted the merits.

The situation would have been otherwise if the French statements had been, or could have been interpreted to be, an admission of the existence of an obligation of general law, and an undertaking to comply with it in future. This element would have constituted the change in the situation justifying a finding that the claim was without object. It was, however, impossible to interpret the French statements in that way.

Now it might be argued that the change in the situation which justified the Court's decision was that, whether or not there was an obligation to cease testing before the French declarations, after them there was an *admitted* obligation to do so. However, it was not the admission which was the object of the claim; it was the legal assurance that further tests would constitute the breach of an obligation.

It does not appear that the Court was conscious that the implied basis of its judgment was a finding on the merits which it recognized that it was not entitled to make at that stage (and with which some of its members might well not have agreed). The obligation created by the unilateral declarations seems to have been seen as somehow qualitatively different from the obligation of general law which Australia and New Zealand claimed to exist, and which could not be excluded as possibly existing.

(c) *The case of* United States Diplomatic and Consular Staff in Tehran

A further case before the Court in which questions of the relationship between customary law and treaty law were germane to the decision was that of the *United States Diplomatic and Consular Staff in Tehran*. The Court was there seised primarily on the basis of the Optional Protocols to the Vienna Conventions on Diplomatic and Consular Relations, whereby it had jurisdiction over 'disputes arising out of the interpretation or application of' the relevant convention. At first sight, therefore, the Court was limited to determining the dispute between the parties so far as it involved interpretation or application of the two Conventions, and was not called upon to rule on their relations under customary international law.

However, when finding that the Iranian Government had failed to

[531] Ibid., pp. 269–70, para. 51.

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comply with a number of obligations imposed by the two Conventions, the Court went on to say:

> In the view of the Court, the obligations of the Iranian Government here in question are not merely contractual obligations established by the Vienna Conventions of 1961 and 1963, but also obligations under general international law.[532]

The Court was thus ruling on a question which was to assume particular importance in the case of *Military and Paramilitary Activities in and against Nicaragua*: whether, between two parties to a multilateral convention, obligations of customary law which have been incorporated into the convention regime may be said still to exist as customary-law obligations.

The Court found, later in its judgment, that

> . . . Iran, by committing successive and continuing breaches of the obligations laid upon it by the Vienna Conventions . . . and the applicable rules of general international law, has incurred responsibility towards the United States.[533]

This lays to rest one doubt which one might otherwise feel at the co-existence of a customary obligation and a treaty obligation: if the two require identical conduct, breach of the two obligations is only a single internationally wrongful act, and involves only a single duty of reparation.

This being so, the question remains why the Court thought it appropriate to mention the existence of the obligation of customary law. One reason may be the emphasis which the Court wished to lay on 'the extreme importance of the principles of law which it is called upon to apply in the present case';[534] the Court thought it desirable to make it clear that the Iranian Government had not merely breached a treaty (an act which in itself may range in gravity from the tremendous to the trivial) but had acted in a way likely

> to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital to the necessity and well-being of the complex international community of the present day.[535]

Another reason (though this is speculation) may be hinted at by the reference to 'continuing breaches' of Iran's obligations. If, before the situation of the hostages was regularized, Iran were to denounce the Vienna Conventions and the Optional Protocols, it might claim that (at least) it was no longer in breach of a treaty obligation which no longer bound it. By emphasizing the customary-law backing of the obligation, the Court would do all it could to demolish this excuse in advance.

Whether the Court was entitled, on the basis of a title of jurisdiction referring to 'disputes arising out of the interpretation or application of' a

[532] *ICJ Reports*, 1980, p. 31, para. 62.
[533] Ibid., p. 41, para. 90.
[534] Ibid., pp. 42–3, para. 92.
[535] Ibid., p. 43.

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treaty, to go into questions of customary law at all is a question to be examined in a later article in this series.

(d) Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America)

The complications arising from a reservation attached to the United States acceptance of jurisdiction under the Optional Clause placed the Court in the very curious position, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, of having to decide the case in disregard of treaty rights and obligations known to exist between the parties to the case, and known to be relevant to the solution of the affair.

The so-called 'multilateral treaty reservation' attached to the United States declaration—one of the most impenetrably obscure pieces of drafting which the Court has had to tackle—had the effect, as the Court found, that the jurisdiction conferred upon it by the declaration did not permit the Court to entertain claims of Nicaragua that the United States had breached certain articles of the United Nations Charter and the Charter of the Organization of American States, since other States parties to those instruments which might be affected by the decision were not parties to the proceedings;[536] this finding was however 'without prejudice either to other treaties or to the other sources of law enumerated in Article 38 of the Statute'.[537] The United States contended that the claim of Nicaragua based on 'customary and general international law' could also not be heard, because they

> cannot be determined without recourse to the United Nations Charter as the principal source of that law, [and] they also cannot be determined without reference to the 'particular international law' established by multilateral conventions in force among the parties.[538]

As the Court explained further:

> 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

[536] *ICJ Reports*, 1986, p. 38, para. 56.
[537] Ibid., p. 92, para. 172.
[538] Ibid., p. 92, para. 173.

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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.[539]

The objection of the United States raised a number of distinct problems. The first was whether there could be said to be a set of rights and obligations, deriving from customary law, in force between the United States and Nicaragua, in the areas of law governed by the articles of the Charter invoked by Nicaragua. If the existence of the conventional relationship deriving from the Charter had the effect of superseding or excluding the customary-law rules in the same field, or putting them into abeyance between the parties, then the Court could not find the United States in breach of customary-law obligations, however flagrant its violation of the Charter.

Even assuming that such customary-law obligations did exist, the Court was placed by the multilateral treaty reservation in something of a dilemma. If the rules of customary law relating to non-intervention, the use of force, etc., were identical to the norms in the United Nations Charter, it was difficult to refute the contention that, by deciding on issues according to customary law, it would in effect be deciding at the same time what was the law of the Charter on them, in contravention of the multilateral treaty reservation. If however the customary-law rules and the treaty-law rules diverged markedly from each other, then the same difficulty would arise as in the *Fisheries Jurisdiction (United Kingdom* v. *Iceland)* case, that the Court would be purporting to determine the dispute by reference to rules of law which were not those applicable between, and binding upon, the parties.

The Court's solution to the problem was as follows:

> 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.[540]

In the following paragraph of its judgment, the Court gave some examples to show that the areas governed by treaty law and by the Charter 'do not overlap exactly'. (In passing, it may be questioned whether these findings themselves might not be regarded as a trespass into the forbidden ground of 'disputes arising under a multilateral treaty'.) However, the Court did not evade the issue; it continued:

> 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

[539] Ibid., pp. 92–3, para. 173.
[540] Ibid., pp. 93–4, para. 175.

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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.[541]

The Court addressed much of its argument in the judgment on this point to demonstrating that

customary international law continues to exist and apply, separately from international treaty-law, even when the two categories of law have an identical content.[542]

This however would hardly have required demonstration—as the Court itself observed, it was already implicit in much of the *North Sea Continental Shelf* judgment[543]—had it not been for the near-universality of membership of the United Nations, which renders the idea of separate customary law identical with Charter law virtually meaningless in practical terms.

The question is not whether customary law and treaty law to the same extent exist side by side *in general*, but whether they can continue to exist side by side *as between the same parties*. If the United Nations Charter had been acceded to by every State of the world, the question whether customary law continued to exist on matters dealt with in the Charter would have become academic. So long as that is not the case, however, the question is whether two States bound *vis-à-vis* each other by a treaty obligation identical to a precept of customary law are also bound by that precept.

The question of the co-existence of customary and treaty rights had arisen previously in the case concerning *Rights of Nationals of the United States of America in Morocco* in 1952.[544] It was claimed by the United States in that case that rights of consular jurisdiction enjoyed by it by treaty, and through the operation of a most-favoured-nation clause, had also come to have an independent foundation in custom, so that when the treaty rights were terminated, the customary rights continued to subsist. The custom had, it was asserted, come into existence after the relevant treaties had been in operation for some time.

The Court rejected the contention for two reasons; one was that the custom relied on was a local custom which, under the rule laid down in the *Asylum* case,[545] had to be proved, and there had not been sufficient evidence to convince the Court of the existence of the custom. The other reason was stated as follows:

This was the case not merely of the United States but of most of the countries whose nationals were trading in Morocco. It is true that there were Powers represented at the Conference of Madrid in 1880 and at Algeciras in 1906 which had no

[541] Ibid., p. 94, para. 175.
[542] Ibid., p. 96, para. 79.
[543] *ICJ Reports*, 1969, p. 39, para. 63, quoted in *ICJ Reports*, 1986, p. 95, para. 177.
[544] *ICJ Reports*, 1952, p. 176; discussed by Fitzmaurice, this *Year Book*, 30 (1953), pp. 58–69; *Collected Edition*, I, pp. 188–99.
[545] *ICJ Reports*, 1950, p. 276.

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treaty rights but were exercising consular jurisdiction with the consent or acquiescence of Morocco. It is also true that France, after the institution of the Protectorate, obtained declarations of renunciation from a large number of other States which were in a similar position. This is not enough to establish that the States exercising consular jurisdiction in pursuance of treaty rights enjoyed in addition an independent title thereto based on custom or usage.[546]

Fitzmaurice interprets this passage as not amounting to a denial by the Court of 'the principle that, apart from treaty, an independent basis of right, founded on custom and usage, might exist', but as a holding of fact 'that United States rights in Morocco were based solely on treaty and not all on custom or usage'.[547]

[546] *ICJ Reports*, 1952, pp. 199–200.
[547] This *Year Book*, 30 (1953), p. 65; *Collected Edition*, I, p. 195.

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Annex 17

5.124 Finally, a remark regarding the requirements of the "chapeau" of Article XX of the GATT 1994. There is nothing in facts of this case that indicate that the national measures in this dispute are applied in a discriminatory way, nor that they represent a disguised restriction on international trade. These bans on certain GMOs are based on legitimate concerns, and are applied equally to all Members of the WTO.

VI. [illegible]

6.1 Pursuant to Article 15.3 of the DSU, the findings of the final panel report shall include a discussion of the arguments made by the parties at the interim review stage. This Section of the Panel reports provides such a discussion. As is clear from Article 15.3, this Section is part of the Panel's findings.

A. BACKGROUND

6.2 The United States, Canada, Argentina and the European Communities separately requested an interim review by the Panel of certain aspects of the interim reports issued to the Parties on 7 February 2006.[166] None of the Parties requested an interim review meeting.[167] However, in accordance with the Panel's Working Procedures, all Parties had, and used, the opportunity to submit further written comments on each others' requests.[168]

6.3 On 8 May 2006, the Panel sent a letter drawing attention to the fact that certain aspects of its interim reports had been misconstrued by groups or members of civil society following the unauthorized public disclosure of the Panel's confidential interim reports.[169] For this reason, the Panel in its letter made a number of statements relating to its findings in this case.[170]

6.4 On 10 May 2006, the Panel issued its final reports to the Parties on a confidential basis.

B. STRUCTURE

6.5 The Panel first addresses the Parties' requests for changes to the interim reports (Section VI.C). The Panel notes in this regard that it did not receive comments on each of the Sections of the interim reports from each of the four Parties. The Panel has structured its treatment of the Parties' requests below in the following manner:

(a) Section VI.C.1 concerns Section VII.A of the interim reports (Procedural and Other General Matters).

(b) Section VI.C.2 concerns Section VII.C of the interim reports (Relevant EC Approval Procedures).

(c) Section VI.C.3 concerns Section VII.D of the interim reports (General EC Moratorium).

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[166] Letters of the Parties of 17 March 2006.
[167] Letters of the Parties of 7 March 2006.
[168] Letters of the Parties of 19 April 2006.
[169] *See infra*, Section VI.F.
[170] Letter of the Panel of 8 May 2006. In the interests of transparency, the text of the letter is attached to these reports as Annex K (available on-line only). The text of the letter is reproduced in Annex K is not part of the Panel's findings and is not intended to modify them in any way.

(d) Section VI.C.4 concerns Section VII.E of the interim reports (Product-Specific Measures).

(e) Section VI.C.5 concerns Section VII.F of the interim reports (EC Member State Safeguard Measures).

(f) Section VI.C.6 concerns Section VIII of the interim reports (Conclusions and Recommendations).

6.6 In addition, this Section also notes certain other changes (editing, etc.) that were not specifically requested by the Parties (Section VI.D).

6.7 Next, this Section deals with the European Communities' request for redaction from the public version of the Panel reports of portions disclosing "strictly confidential information" (Section VI.E).

6.8 Finally, the present Section addresses the public disclosure of the Panel's confidential interim reports (Section VI.F).

C. PARTIES' REQUESTS FOR CHANGES TO THE INTERIM REPORTS

1 Correction and other changes

6.9 The European Communities identified an incorrect reference to the year 2005 at paragraph 7.47.

2 Deletion of confidential information

(a) Comments common to Canada and Argentina

6.10 Canada and Argentina request that the hypothetical example used by the Panel at paragraphs 7.162-7.163, and footnote 132 (Canada) be qualified to avoid the possibility that its use may be misconstrued. In these paragraphs, the Panel relies on a hypothetical example (concerning food labelling) to explain its interpretive approach to the issue of mixed measures. Canada is concerned that use of the hypothetical example could be misconstrued as the Panel expressing a view on the purpose of Regulations 1829/2003 and 1830/2003, measures that were not within the Panel's terms of reference. Argentina considers that the example is not an essential part of the Panel's reasoning and could be removed without affecting the Panel's conclusions. Moreover, in Argentina's view, the Panel's reasoning finds practical application when the Panel addresses whether the EC approval procedures are SPS measures in terms of their purpose.

6.11 The European Communities responds that it fails to see how this example could be understood to refer to any "real life" measure such as Regulation 1829/2003 or to generally express any views on the WTO-compatibility of such a measure. Indeed, the Panel elsewhere in the report explicitly states that it does not take any view on the WTO-consistency of labelling requirements. Accordingly, the Panel need make no change to its report.

6.12 The Panel has removed the relevant example at paragraph 7.162 and deleted the old footnote 132.

(b) Comments by Canada

6.13 □□n□d□ requests that the Panel reconsider its representation, at paragraph 7.164, of Canada's position in relation to the issue of whether a requirement can constitute both an SPS measure and a non-SPS measure. Canada is concerned that the Panel's comments in footnote 127 suggest that the Panel has misapprehended Canada's position in this regard.

6.14 The □□r□□e□n □□□ □ □n□□e□ argues that Canada fails to state clearly what it is that it requests the Panel to do. Presumably, Canada's concerns could be met if footnote 127 would be re-phrased as follows:

> "Canada had a more complex position and characterised the issue of whether a measure that addresses both SPS risks and other types of risks or policy objectives should be considered a single measure or a series of measures, as 'semantic'."

6.15 In response to Canada's comment, the □□ne□has expanded its representation of Canada's position in footnote 339.

6.16 □□n□d□ identified an editorial oversight at paragraph 7.337.

6.17 □□n□d□ also notes that at paragraph 7.411 the Panel states that "it is reasonable to assume that the requirement that the consumer be informed of the presence of a GMO irrespective of whether there is an associated health risk is at least in part imposed to prevent consumers from being misled. In other words, we consider that, at least in part, Regulation 258/97 requires the identification of the presence of a GMO in a food product in order to ensure that those consumers who have a preference for food not containing or consisting of GMOs are not misled into purchasing food containing or consisting of GMOs". Canada respectfully requests that this passage be revised to make it clear that the Panel is not making a finding that the absence of a GMO label necessarily leads to consumers being "misled". According to Canada, the presence of a GMO label may have the opposite effect and actually mislead consumers. In any event, Canada submits that whether consumers are actually being misled is a factual matter that was not addressed by any of the parties in their submissions.

6.18 The □□r□□e□n □□□ □ □n□□e□ considers that Canada's comment on the use of the word "misled" must be dismissed. It is obvious that the Panel is merely referring to the wording used in Regulation 258/97, which in its Article 3 explicitly refers to the objective of not misleading consumers.

6.19 The □□ne□has added a footnote to paragraph 7.411 in response to Canada's comment.

(c) Comments by the European Communities

6.20 The □□r□□e□n □□□ □ □n□□e□ argues that at paragraph 7.117 the third sentence should be deleted as it is not correct that the Council can adopt a "different" measure. The Council may adopt a modified measure, but not by qualified majority. In fact, the same rules as for legislative proposals apply here, *i.e.*, the Council can modify a Commission proposal only by unanimous vote (Article 250(1) of the *Treaty Establishing the European Community as Amended by Subsequent* Treaties (hereafter the "EC Treaty"). Furthermore, for the sake of completeness, it seems appropriate to describe what happens if the Council rejects the proposal.

6.21 The □n□□ed □□□□e□does not agree with the European Communities' suggested modifications concerning paragraphs 7.117, 7.123 and 7.136. First, the record in this dispute does not contain an

instance where the Council rejected a Commission proposal. (Instead, the Council failed to reach qualified majorities for acceptance or rejection). Thus, the Panel has no need for "sake of completeness" to address this possibility. Second, the EC comments do not cite to any prior EC submission that describes the procedures that apply when the Council rejects a Commission proposal.[171] Thus, the procedures to be followed by the Commission following a Council rejection by qualified majority would appear to be a new factual matter not previously considered by the Parties or the Panel. For these reasons, the United States submits that it is neither necessary nor appropriate to address such procedures for the first time at the interim review stage.

6.22 The □□ne□has made appropriate changes to paragraph 7.117 and its accompanying footnotes in response to this EC comment. However, the Panel agrees with the United States that it is not necessary, in the context of these proceedings, to address the procedures to be followed in the event that the Council rejects a draft measure of the Commission. The Panel has therefore refrained from adding relevant explanatory text at paragraphs 7.117, 7.123 and 7.136.

6.23 The □□r□□e□n □□□ □ □n□□e□submits that, for the sake of completeness in footnote 95 to paragraph 7.123 it should be explained what happens if the Council rejects the proposal.

6.24 For the reason explained in connection with the EC comment on paragraph 7.117, the □□ne□ has refrained from making the requested addition to footnote 309.

6.25 The □□r□□e□n □□□ □ □n□□e□argues that at paragraph 7.129 the word "consent" should be replaced by the word "authorizations", since "consent" is a term which is not used in Regulation 258/97 but only in Directives 90/220 and 2001/18.

6.26 The □□ne□has made an appropriate change to paragraph 7.129 in response to this comment.

6.27 The □□r□□e□n □□□ □ □n□□e□submits that, at paragraph 7.136 the third sentence should be deleted as it is not correct that the Council can adopt a "different" measure. The Council may adopt a modified measure, but not by qualified majority. The same rules as for legislative proposals apply here, *i.e.*, the Council can modify a Commission proposal only by unanimous vote (Article 250(1) of the EC Treaty). Furthermore, for the sake of completeness, it seems appropriate to describe what happens if the Council rejects the proposal.

6.28 The □□ne□has made appropriate changes to paragraph 7.136 and its accompanying footnotes in response to this comment. However, for the reason explained in connection with the EC comment on paragraph 7.117, the Panel has refrained from addressing the procedures to be followed in the event that the Council rejects a draft measure of the Commission.

6.29 The □□r□□e□n □□□ □ □n□□e□identified a missing indefinite article in paragraph 7.152.

6.30 The □□r□□e□n □□□ □ □n□□e□requests that the Panel reflect, in a footnote to paragraph 7.199, the fact that in its response to Panel question No. 120 the European Communities also referred to the cover note accompanying the circulation of the so called "Dunkel Text" of 20 December 1990.

6.31 The □n□□ed □□□□e□argues that paragraph 7.199 addresses the EC arguments (properly rejected by the Panel) that the *SPS Agreement* does not cover measures meant to protect the environment. The

[171] In fact, the European Communities' comprehensive descriptions of its approval procedures set out in its prior submissions do not address this matter. *See, e.g.*, EC first written submission, pages 51-63; *see also* Exhibits EC-119 and 120 (presenting a flowchart of approval procedures under 258/97 and 90/220).

United States does not agree that the Panel should include the new footnote suggested by the EC summarizing an additional EC argument involving a cover note to the "Dunkel Text." The EC arguments regarding this matter are set forth in the EC answer to the Panel's questions (in particular, Question 120), and those answers are already appended in full to the interim report. Moreover, the EC comment does not acknowledge that the United States, in its response to the EC answer to Panel question No. 120, fully responded to the EC argument regarding the purported significance of this cover note to the "Dunkel Text". If a footnote were added that recited the EC argument, then – to maintain balance – a new footnote would be required to reference the US rebuttal of the EC argument. However, since all of this material is already appended to the report, and since (the United States submits) the EC argument is without merit, the interim report would not be improved by the addition of the footnote suggested by the European Communities.

6.32 The □□ne□has made appropriate changes to paragraph 7.199 in response to this EC comment, preferring to include the reference to the cover note in the text rather than in the footnote. For balance, the Panel also added a summary of the United States' and Canada's responses to the EC argument based on the negotiating history. Furthermore, in view of the European Communities' request for inclusion of a reference to the above-mentioned cover note and in view of the EC argument based on this note – that environmental damage is not covered by the *SPS Agreement* – the Panel found it appropriate (i) to address explicitly the cover note, which has also resulted in some restructuring (paragraphs 7.209-7.211), (ii) to clarify the example used at paragraph 7.210, and (iii) to add footnote 503 for further clarification of paragraph 7.209. In addition, the Panel has deleted the old footnote 158 which contained no text. The Panel furthermore corrected a typographical error at paragraph 7.209.

6.33 The □□r□□e□n □□□ □ □n□□e□argues that the first sentence of paragraph 7.236 should be deleted as it does not seem to accurately reflect the arguments made by the European Communities and suggests that the second sentence be rephrased based on the EC reply to Panel question No. 119.

6.34 The □n□□ed □□□□e□does not agree with the EC suggestion. To the contrary, the United States submits that this statement in the interim report is indeed a fair characterization of the EC's arguments regarding the term "pest."[172] The United States would not object, however, if the interim report were to include a statement, as the EC suggests, to the effect that the EC believes that the IPPC may be relevant context for interpreting the term "pest."

6.35 The □□ne□has made appropriate changes to paragraph 7.236 in response to the EC comment.

6.36 The □□r□□e□n □□□ □ □n□□e□requests that a statement by Dr. Squire (Annex H, paragraph 468) be added to footnote 227 to paragraph 7.281 so that the view of all experts on the relevant issue are referred to.

6.37 The □n□□ed □□□□e□does not agree with the EC suggestion that a statement from Dr. Squire should be appended to the footnote. The statement of Dr. Squire cited by the European Communities states no scientific opinion regarding the risks of ARMGs. Instead, in the context of discussing EC member State objections, Dr. Squire simply notes that there is a "perception" that ARMGs should not be used in herbicide-tolerant ("HT") crops. Moreover, Dr. Squire explains that given the vagueness of the member State objections, he is not able to evaluate their scientific merit. He accordingly summarizes his opinion by explaining "[t]his notwithstanding, and as in other instances, unless

[172] *See, e.g.*, EC second written submission, para. 51 ("Thus not any 'undesirable cross-breed', as the Panel put it in question 32, can be considered a pest. In particular a cross-breed that harms biodiversity is not a pest. Nor is cross-breed that harms micro-organisms, animals or the environment.").

criteria can be given, from both the proposer and objector as to what is a desirable or acceptable comparator, then progress with the discussion is impossible, as it became in this instance."[173]

6.38 **Canada** also disagrees with the suggested addition of Dr. Squire's comments in relation to ARMG. The EC suggestion implies that Dr. Squire was of the view that ARMG presents risks to human health or the environment, neither of which is the case. Tellingly, the European Communities quotes Dr. Squire out of context. The full quote is as follows:

> "The issue of antibiotic resistance was considered in the SCP's opinion (EC-66/At.53) and found not to pose risk, but there is now widespread perception that antibiotic resistance should not be introduced through GMHT products."

6.39 Canada submits that it is unclear whether Dr. Squire agreed with the opinion of the SCP on the risks of antibiotic resistance. If Dr. Squire disagreed with the SCP, presumably he would have stated so explicitly. Therefore, in terms of the issue discussed by the Panel in paragraph 7.274, *i.e.*, the risk of transferral of antibiotic resistance, Dr. Squire's comment is unrevealing. Dr. Squire does not discuss "scientific evidence", but only "perception". The cause of the "widespread perception" may have nothing to do with the actual risks associated with the use of ARMG and may simply reflect the unfortunate politics of agricultural biotechnology in Europe. For instance, scientists working in this field may have stopped using ARMG because of "optics", manipulated by anti-GMO advocates, and the availability of alternative means to achieve the same objective. Canada notes that although Dr. Squire initially indicated that he would do so, he did not respond to either of these two general questions on the existence of scientific evidence relating to the transfer of antibiotic resistance (Questions 1 and 2). Consequently, his views on the actual risks associated with the use of ARMG are unknown.

6.40 **Argentina** likewise does not agree with the EC proposal and requests the Panel to maintain the wording of footnote 227 as it currently stands. It is important to recall that when the Panel addressed to the experts the specific issue of "antibiotic resistance marker genes" (Annex H, General Questions 1 and 2), Dr. Squire did not provide an answer that expressed his point of view as an expert. Additionally, Argentina points out that the addition suggested by the European Communities reflects a mere "perception" (as it is literally stated by Dr. Squire) and not a statement or opinion based on scientific evidence as requested by the Panel.

6.41 The **United States** does not consider it appropriate to add the relevant statement to footnote 437. The statement that "there is now a widespread perception that antibiotic resistance should not be introduced through GMHT products" does not shed light on the risk of transferral of ARMG or the existence or magnitude of adverse effects on human health or the environment from the presence of ARMG or their products.

6.42 The **European Communities** requests that footnote 252 to paragraph 7.316 be deleted in its entirety, arguing that Canada's description of Directive 91/414 does not properly reflect the requirements set by the legislation and the way the legislation is implemented. The European Communities submits that in any event, the Panel itself takes the view that the question of whether Directives 90/220 and 2001/18 are applied, *inter alia*, to avoid diseases to humans or animals resulting from herbicide residues in food or feedstuff ultimately can be left open. The footnote, therefore, is also not necessary.

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[173] Annex H, para. 468.

6.43 [illegible] disagrees with the EC suggestion to delete footnote 252. This footnote is important context to explain the Panel's statement that "[i]t is not clear to us from reading Directives 90/220 and 2001/18 whether they are applied, *inter alia*, to avoid disease to humans or animals resulting from herbicide residues in GM plants used as food or feedstuff." In this footnote, the Panel sets out Canada's argument that the European Communities failed to acknowledge that the risks associated with the use of plant protection products, including the risks to human and animal health from herbicide residues in food and feedstuff, were addressed by other relevant EC legislation. Canada pointed out that Commission decisions and scientific committees have repeatedly confirmed that "the authorization of chemical herbicides applied to plants and the assessment of the impact of their use on human health and the environment falls within the scope of Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market…and not within the scope of Directive 90/220/EEC."[174] Moreover, Canada emphasized that the herbicides used in conjunction with herbicide tolerant crops, specifically glyphosate, had received a full evaluation under Directive 91/414/EEC, including an assessment of the use of glyphosate with glyphosate tolerant crops, as early as 2001.[175] In addition, the risks to human and animal health of residues of glyphosate had been fully assessed prior to the establishment of MRLs under Directive 98/82/EC.[176] This information is important in that it reveals that many of the purported risks associated with biotech crops advanced by the European Communities are in fact risks associated with the use of plant protection products generally, and that these risks, contrary to the European Communities' selective portrayal of its own regulatory environment, have received a full assessment under other pertinent legislation. On this basis, Canada is of the view that the footnote should be retained. That being said, however, Canada suggests that the Panel clarify that MRLs are not established pursuant to Directive 91/414/EEC, but, rather, pursuant to other relevant European Community rules.[177]

6.44 The [illegible] considers that the old footnote 252 is not essential and has therefore deleted it as requested by the European Communities.

6.45 Like Canada, the [illegible] identified an editorial oversight at paragraph 7.337.

6.46 The [illegible] requests that the Panel delete a sentence in paragraph 7.368 which it considers does not accurately reflect its position.

6.47 The [illegible] has deleted the relevant sentence in paragraph 7.368 in response to this comment.

6.48 The [illegible] submits that the wording "even in cases where" in paragraph 7.384 should be deleted as it implies that authorizations may be granted in either scenario, *i.e.*, where the product has been found to be safe and where the product has not been found to be safe. The latter is not possible, as market authorizations are only granted if there is no risk to human health and the environment.

6.49 [illegible] disagrees with the suggested alternative wording for paragraph 7.384. The wording "even in cases where" does not imply that authorizations may be granted in cases where the product has been found not to be safe. To the contrary, this wording highlights the fact that the labelling requirement in Directive 2001/18 is applicable regardless of the conclusion of the risk assessment or the actual risks associated with a particular biotech product. This emphasis is appropriate given the

[174] Canada's second written submission, para. 142 and footnote 163.
[175] *Ibid*., para. 183 and footnotes 194 and 195.
[176] *Ibid*., para. 185 and footnote 196.
[177] *See ibid*., para. 180.

Panel's inquiry in paragraph 7.377 and succeeding paragraphs regarding whether the imposition of a labelling requirement under these circumstances can be considered an SPS measure. Alternatively, the Panel may wish to consider replacing "even in cases where" with "regardless of the fact that".

6.50 **Ar□en□n□** does not consider the proposed amendments to paragraph 7.384 to be acceptable. Regarding the first proposed amendment, the European Communities is changing the scope and sense of the first two sentences. It is cutting off the first sentence by adding a full stop after the word "GMO", and thus linking the rest of it with the proposed amendment which Argentina considers not to be acceptable. As to the second proposed amendment, the European Communities is giving no reason for it (it only refers to the first one). Argentina notes that, the competent authorities have not granted a market authorization even when the scientific evidence showed that the release was safe. Since the European Communities' proposed description is not accurate, especially the word "therefore", Argentina respectfully requests the original wording to be maintained.

6.51 The □□**ne**□ has made appropriate changes to paragraph 7.384 in response to this EC comment.

6.52 The □□**r**□□**e**□**n** □□□ □ □**n**□□□**e**□ argues, with reference to the old paragraph 7.381, that it does not agree with the Panel that the labelling requirement in Directive 2001/18 only serves the purpose of protecting human health and the environment in the way the Panel has described it. This said, the European Communities does not object to the statement that this is one possible purpose of labelling and therefore bears a rational relationship. However, as, in the European Communities' view, it is not the only purpose – the other one being consumer information – the European Communities submits that the wording should be more "open" and the last sentence should be deleted as it suggests exclusivity of purpose. Finally, the European Communities suggests to use the words "even though" instead of "even in cases where".

6.53 The □**n**□□**ed** □□□□**e**□ submits that the European Communities has no basis for its suggestion that the Panel delete one of the most important sentences in that section of the interim report: namely, the concluding sentence to paragraph 7.381. That paragraph (and sentence) provide:

> "The preceding paragraph makes clear that there is a rational relationship between the labelling requirement in Directive 2001/18 and the purpose of protecting human health and the environment, even in cases where a product containing or consisting of a GMO has been found to be safe for human health and the environment. Accordingly, we see no reason to assume that the labelling requirement is intended to serve a purpose which is different from the purpose Directive 2001/18 says it seeks to achieve, *i.e.*, the protection of human health and the environment."

6.54 The United States contends that the European Communities' only basis for suggesting the deletion of the last sentence in paragraph 7.381 is the assertion that the labelling requirement also serves the purpose of "consumer information." However, the European Communities provides no basis for this assertion, and does not, for example, cite to any supporting provision of the Directive. Indeed, as the Panel correctly notes, the labelling requirement is an integral requirement of Directive 2001/18, and the very first article of that directive states that its objective is "to protect human health and the environment." Thus, the European Communities has provided no basis in the record for its suggested change to paragraph 7.381.

6.55 □□**n**□**d**□ also disagrees with the European Communities' proposed deletion of the last sentence of paragraph 7.381. The Panel's conclusion that there is "no reason to assume that the labelling requirement is intended to serve a purpose which is different from the purpose Directive 2001/18 says it seeks to achieve, *i.e.*, the protection of human health and the environment"

is a sound one given the text of Directive 2001/18 and the European Communities' own submissions in this case. The Panel rightly points out that the only stated purpose of the Directive, other than approximation of member State laws, is to protect human health and the environment. Moreover, the European Communities did not refer to "consumer information" as an objective of Directive 90/220 or 2001/18 in its description of its legislative framework set out in its first written submission, paragraphs 155 to 163, or in its explanation of the flaws in Directive 90/220 that it claims needed to be rectified by Directive 2001/18.[178] The European Communities' position has been that the new labelling requirements in Directive 2001/18 were intended to strengthen post-marketing surveillance, and not for "consumer information" purposes. Consequently, the suggested change does not reflect the position taken by the European Communities in these proceedings and should be disregarded.

6.56 **Argentina** considers that the first phrase of paragraph 7.381 should remain unchanged. First, as the European Communities indicates, the Panel does not state in paragraph 7.380 that protecting human health and environment "is the only" purpose. The Panel explicitly stated that the purposes in Article 20 of Directive 2001/18 referred *inter alia* to situations described in paragraph 7.380, and correctly describes to what extent the identification and labelling of GMOs contributes to some of the purposes of Article 20. Second, both the described purposes of Article 20 in paragraph 7.380, and the wording of Article 20 itself (especially paragraphs 2 and 3) explicitly refer to foreseen situations of risks to human health and the environment. Consequently, Argentina considers that the wording proposed by the European Communities ("can be") diminishes the real extent of these situations, foreseen in Directive 2001/18/EC, and which are provided for with a specific procedure. The wording proposed by the European Communities could be understood as envisaged for situations "merely happening" to deal with human health and environment, and would not express the clear purpose stated in Directive 2001/18 referring to the sense of labelling.

6.57 Argentina submits, in addition, that from paragraph 7.379 the Panel seeks to identify the rationale of labelling as set out in Directive 2001/18, and uses, among other provisions, Article 20. The Panel did find a rationale and found it to be related with the purpose of protecting human health and the environment. The European Communities states that there is another purpose, namely consumer information. Argentina considers, as it believes the Panel to have done, that the purpose of informing both the consumer and the authorities is not exhaustive in itself but also aimed towards a proper handling of the information on the labelled product. Argentina acknowledges that there might be a purpose for information related to what the Panel correctly recognized as "nice to know", or for avoiding confusion about the product, but Argentina considers - and believes that the European Communities would agree with this - that the purpose of informing does serve another purpose, a more important one than the answering to what is "nice to know" or avoiding confusion, directed to the better management of risks should these occur and therefore related to what one "needs to know", as the Panel said. Argentina considers that this far more important purpose than the one of mere information with no subsequent purpose of action, should not be diminished.

6.58 Finally, Argentina argues that the Panel sought to find the rationale for labelling in order to determine whether it relates to the protection against the risks established in the *SPS Agreement*. The Panel found the rationale precisely "besides" the purpose of consumer information (assuming *arguendo* the statement of the European Communities is correct in putting at the same level of importance consumer information and information provided for risk management) and "within" the same information (in order to make a further use of it -information is of no great value unless one uses it for a purpose - for risk management, as correctly established in paragraph 7.380). Therefore, Argentina considers that it is proper to say that there clearly "is" a rational relationship between the

[178] EC reply to Panel question No. 92.

labelling requirement and the purpose of protecting human health and the environment, and requests that the original wording by the Panel be maintained.

6.59 The □□**ne**□has made appropriate changes to paragraph 7.389 in response to this EC comment. The Panel also found it appropriate to make further changes, or additions, in response to the EC comment at paragraphs 7.385-7.389 and 7.391.

6.60 Regarding the EC assertion that the labelling requirement in Directive 2001/18 serves two purposes – the protection of human health and the environment, on the one hand, and consumer information, on the other hand – we note that the European Communities, in its comments on the interim reports, does not put forward a single argument to substantiate its assertion. Nor does it identify any evidence on the record which would support the conclusion that consumer information is one purpose for which the labelling requirement in Directive 2001/18 is applied.[179] We point out in this regard that in its first written submission the European Communities described the EC legislation concerning the approval of biotech products in some detail, including Directive 2001/18. The European Communities stated that Directive 2001/18 pursues the related but distinct objectives of "protecting human health and the environment". Consumer information was not mentioned as an objective of the Directive or of the labelling requirement contained therein.[180]

6.61 We further note that whereas Regulation 258/97 explicitly refers to the concept of "consumer information" in the context of labelling[181], neither the preamble nor the main text of Directive 2001/18 do. This is consistent with the fact that Directive 2001/18 is concerned with the deliberate release of GMOs into the environment and not with food containing or derived from GMOs, Indeed, Directive 2001/18 refers, not to final consumers of GMOs[182], but to "users" of GMOs (such as crop farmers, or livestock farmers using GMOs for animal feed)[183]. We also note that, unlike Regulation 1829/2003 (on genetically modified food and feed) and Regulation 1830/2003 (concerning the traceability and labelling of GMOs and the traceability of food and feed produced from GMOs), Directive 2001/18 does not refer to such concepts as "informed choice" of consumers, or users, or "freedom of choice" of consumers, or users, in connection with its labelling provisions.[184] The preamble to Directive 2001/18 merely states that labelling to indicate the presence in a product of a GMO serves to "ensure that the presence of GMOs in products containing, or consisting of, genetically modified organisms is appropriately identified".[185] This leaves unanswered the question of why appropriate identification is sought. We therefore consider that the preamble to

[179] It is worth noting that in its first written submission the European Communities described the EC legislation concerning the approval of biotech products in some detail, including Directive 2001/18. The European Communities stated that Directive 2001/18 pursues the related but distinct objectives of "protecting human health and the environment". Consumer information was not mentioned as an objective of the Directive or of the labelling requirement contained therein. EC first written submission, paras. 142-143.

[180] EC first written submission, paras. 142-143.

[181] Article 8(1) of Regulation 258/97.

[182] In contrast, Article 8(1) of Regulation 258/97 concerning novel foods and food ingredients refers to the "final consumer" of a novel food or food ingredient.

[183] Articles 19(3)(f) and 20(2) of Directive 2001/18.

[184] The preamble to Regulation 1829/2003 (on genetically modified food and feed) states that labelling of biotech products enables the "consumer", or "user", to make an "informed choice" and precludes "potential misleading of consumers" as regards methods of production (17th, 20th and 21st preambular paragraphs of the Regulation). Along similar lines, the preamble to Regulation 1830/2003 (concerning the traceability and labelling of GMOs and the traceability of food and feed produced from GMOs) states that accurate labelling of biotech products enables operators and consumers to "exercise their freedom of choice in an effective manner" (4th preambular para. of the Regulation).

[185] 40th preambular para. of Directive 2001/18.

Directive 2001/18 does not assist in determining whether the labelling requirement serves the additional purpose of consumer information.

6.62 Even if we were to accept, *arguendo*, that the relevant labelling requirement in Directive 2001/18 could help processors of raw materials (*e.g.*, rape seeds) to provide information and assurances to the final consumer about their food products (*e.g.*, highly refined rape seed oils produced from non-GM rape seeds) and in particular about their method of production[186] – for instance by reducing the likelihood of accidental and unintentional use of GM raw materials (*e.g.*, GM rape seeds) – the fact remains that neither the preamble nor the main text of Directive 2001/18 contains any reference to "consumer information" as an objective of the Directive in general or its labelling requirement in particular.[187]

6.63 We also find relevant in this connection the provisions of Article 26 of Directive 2001/18, which applies to GMOs subject to containment measures (contained use) or to GMOs to be made available for research and development activities. Like the GMOs which are for placing on the market, the GMOs covered by Article 26 are subject to a requirement whereby the presence of GMOs must be indicated on a label or in accompanying documentation using the words "This product contains genetically modified organisms". Given that the GMOs at issue in Article 26 are not released into the environment for the purpose of placing on the market, *i.e.*, for making available to third parties such as consumers we are of the view that the labelling requirement contained in Article 26 is not imposed for the purpose of "consumer information", that is to say, for the purpose of enabling consumers to make an informed choice and preventing potential misleading of consumers.

6.64 We recall that the requirement to identify the presence of a GMO is exactly the same in the case of contained use or release at the research stage (Article 26) and release for the purpose of placing on the market. This circumstance, coupled with the fact that the labelling requirement applicable in the situations envisaged in Article 26 is not, in our view, applied for "consumer information" purposes, and that there is no indication in Directive 2001/18 that the labelling requirement applicable to GMOs which are for placing on the market is imposed, at least in part, for "consumer information" purposes, raises further doubt in our minds about the validity of the unsubstantiated EC assertion that the latter labelling requirement is partly imposed for the purpose of "consumer information".

6.65 Canada and Argentina submitted the Commission's 1996 Report on the Review of Directive 90/220/EEC in the context of the Commission's Communication on Biotechnology and the White Paper.[188] This Report was not submitted by the United States or the European Communities, but the European Communities referred to its content in very general terms in a response to a question from the Panel.[189] We note that the Report contains the following two paragraphs:

> "The issue of labelling of products under Directive 90/220/EEC has been the subject of controversy. Some Member State Authorities object to the placing on the market of a product whose labelling will not indicate that it is genetically modified. The

[186] We note that some foods derived from GMOs – *e.g.*, highly refined rape seed oils in which neither DNA nor protein of GMO origin is detectable – are not subject to mandatory labelling under Regulation 258/97.

[187] It is also useful to recall in this context that Directive 2001/18 applies to various kinds of products containing, or consisting of, GMOs, including products not intended for human consumption, such as products for industrial use (*e.g.*, products for use as lubricants).

[188] Exhibits CDA-119 and ARG-53.

[189] EC response to Panel question No. 92(a). We note once more that the European Communities, in its comments on the interim reports, did not substantiate its assertion regarding the purpose of consumer information, and in particular pointed to no document in the record which would support its assertion.

> current provisions of the Directive do not allow the imposition of such labelling in the absence of any link to risk assessment. Specific provisions on labelling are, however, foreseen in product legislation.
>
> It will be essential to address this issue in order to take into account the need to inform consumers and to comply with the international obligations of the Community. The issue of labelling will be considered when preparing the amendment of Directive 90/220/EEC and the final provisions of other relevant product legislation will be taken into account."[190]

6.66 In the second of the two above-quoted paragraphs the Commission refers to the need for consumer information, although without explaining why consumers need to be informed.[191] Even if it were assumed that the Commission saw a need for "informing consumers" to ensure that consumers could make an informed choice and to preclude potential misleading of consumers as regards methods of production, it is important, in our view, to bear in mind the following elements. *First*, the Commission is not the Community legislator. Directive 2001/18 was adopted by the European Parliament and Council.[192] The views of the Commission do not necessarily reflect the views of the European Parliament and Council. Indeed, the Report of the Commission specifically mentions that controversy surrounded the issue of labelling and that member States took divergent views on the need for labelling to indicate the presence in a product of a GMO. *Secondly*, even disregarding the fact that the Commission is not the Community legislator, we note that the Commission Report is dated December 1996 and that Directive 2001/18 was not adopted until March 2001. In our view, it cannot simply be assumed that a statement made by the Commission more than four years before the date of adoption of Directive 2001/18 accurately reflects the purpose of the provision actually enacted on labelling. *Finally*, we recall that the phrase "inform consumers" did not find its way into the final text of Directive 2001/18. Given this, we think it is entirely conceivable that a deliberate choice was made by the Community legislator not to endorse this particular rationale for requiring labelling to indicate the presence in products of a GMO.[193] Certainly, the deliberate omission of the phrase "inform consumers" cannot lightly be assumed to have no substantive meaning when the same Community legislator (consisting of the European Parliament and Council) did use the phrase "inform the final consumer" in Regulation 258/97 and included very similar phrases in Regulations 1829/2003 and 1830/2003. The deliberate omission further seems significant in view of the fact that the same Community legislator in Article 26 of Directive 2001/18 imposed an identical requirement to indicate the presence of GMOs for GMOs that are not for placing on the market. As we have said, the Article 26 labelling requirement in our view is not imposed for "consumer information" purposes. For these reasons, we consider that the link between the 1996 Report of the Commission and the 2001 Directive of the European Parliament and Council is not sufficiently close and direct to allow us to conclude, without more, that the labelling requirement in Directive 2001/18 is applied, in part, for the purpose of consumer information.

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[190] Exhibits CDA-119 and ARG-53, p. 9.

[191] We recall that Regulation 258/97 and Regulations 1829/2003 and 1830/2003 explain why consumers, or users, need to be informed.

[192] The European Communities explained that Directive 2001/18 was adopted through the so-called "co-decision" procedure which involves several rounds of reading in the European Parliament and Council and, as a last resort, a reading in a conciliation committee. The European Communities told the Panel that the draft Directive 2001/18 went through all these stages before it was finally adopted on 12 March 2001. EC first written submission, para. 158.

[193] It is worth recalling once more that the Report of the Commission itself draws attention to the fact that the issue of labelling to indicate the presence in a product of a GMO had been the subject of controversy among member States.

6.67 Additionally, we note that in response to a question from the Panel, the European Communities referred to its 1998 proposal for a European Parliament and Council Directive amending Directive 90/220.[194] Consistent with what the Commission announced in its 1996 Report, the Commission proposal states that applications for approval are to contain a proposal for labelling which shall inform the consumer of GMOs in the relevant product(s) "whenever there is evidence that the product(s) contain(s) GMOs".[195] Thus, the 1998 Commission proposal proposes labelling to inform consumers about whether products contain or consist of GMOs. It does not propose labelling to help inform consumers about whether products which do *not* contain or consist of GMOs have nonetheless been produced from GMOs (*e.g.*, highly refined rape seed oils produced from GM rape seed). Regarding the link between the 1998 Commission proposal for an amended Directive and Directive 2001/18, we are of the view that the considerations we have put forward regarding the 1996 Report are valid, *mutatis mutandis*, also in the case of the 1998 proposal for an amended Directive. In particular, it must be recalled (i) that the Commission is not the Community legislator, and (ii) that the proposed phrase "inform the consumer" does not appear in the final, adopted text of Directive 2001/18. In respect of the last point, we again highlight the fact that the Community legislator did use the phrase "inform the final consumer" in Regulation 258/97 and that it used very similar phrases in Regulations 1829/2003 and 1830/2003. As we have said, the omission of the phrase "inform the consumer" further seems significant in view of the existence of Article 26 of Directive 2001/18. Accordingly, as with the 1996 Report of the Commission, we are of the view that the link between the 1996 Report of the Commission and the 2001 Directive of the European Parliament and Council is not sufficiently close and direct to allow us to conclude, without more, that the labelling requirement in Directive 2001/18 is applied, in part, for the purpose of consumer information.

6.68 In the light of the above elements and considerations, we are not convinced by, and therefore are unable to accept, the European Communities' unsubstantiated assertion in its comments on the old paragraph 7.381 of the interim reports that the relevant labelling requirement in Directive 2001/18 is applied, in part, for the purpose of consumer information.

6.69 The □□r□e□n □□□ □ □n□□e□suggests a change to the wording of paragraph 7.383 to clarify what "otherwise" refers to.

6.70 □□n□d□argues that the Panel should reject the European Communities' suggestion to change "otherwise" to "that there is no such rational relationship" in the second sentence. The suggested modification changes the meaning of the sentence, which Canada understands to be that nothing in the record suggests that the labelling requirement in Directive 2001/18 is related to any purpose other than protecting human health and the environment.

6.71 **Ar□en□n**□also does not consider this change to be appropriate. Regarding the replacement of the word "is", the suggestion by the European Communities undermines even more the findings of the Panel: for paragraph 7.381 the European Communities proposed "can be", and now it proposes "may be" for paragraph 7.383, which provides for an even lower level of certainty. Such a change would alter the Panel's reasoning to such an extent as to create confusion as to whether the objectives derived from Directive 2001/18 should be considered as "SPS-purposes" or not. The Panel has correctly found a clear and easy rationale, which links the labelling requirement in Directive 2001/18 with the purpose of protecting human health and environment. The European Communities is trying

[194] EC reply to Panel question No. 92(a). The European Communities did not submit this proposal, but in a footnote to its reply provided a reference to the Official Journal of the European Communities, where the proposal may be found.

[195] Article 11(2)(e) of the proposal.

to find an "open door" out of the *SPS Agreement*, even when the specific purpose of protecting human health and the environment was found and stated. For these reasons, Argentina considers that the word "is" should remain unchanged.

6.72 About the replacement of the word "otherwise", Argentina does not consider it acceptable either, because it also undermines the level of certainty. Should the EC proposal be accepted, the resulting text would suggest that the rational relationship of the labelling requirement with an SPS-purpose was found by the Panel simply "by exclusion". Consequently, Argentina considers that the original word "otherwise" should remain, because it clearly establishes that there is nothing which might lead the Panel to depart from its finding (and not that the Panel came to that finding because it had no other choice).

6.73 The □□**ne**□has made certain changes to paragraph 7.391 in response to the EC comment on the old paragraph 7.381. This change obviates the need for the change requested by the European Communities in relation to the old paragraph 7.383.

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(a) Comments common to the United States, Canada and Argentina

6.74 The □□□ □□□**n**□**n**□□□**r**□□**e**□individually request that the Panel issue a recommendation that the European Communities bring its general moratorium into conformity with its obligations under the *SPS Agreement*. The Complaining Parties assert that the Panel's analysis of this issue did not take account of all relevant factors and that the general moratorium which the Panel found to have existed in August 2003 did not cease to exist after August 2003. The Complaining Parties submit that the factors cited by the Panel as justifying the need for it to make findings in this case also justify the need for a recommendation. Furthermore, the Complaining Parties contend that the failure to make such a recommendation could be prejudicial to their interest as complaining parties. They argue that in the absence of a recommendation with regard to the general moratorium, the European Communities (should it fail to come into compliance) may try to argue that the Complaining Parties should be denied recourse to Article 21.5 of the DSU, and should be required to bring an entirely new case to examine a modified general moratorium. Canada notes that, in contrast, with regard to the product-specific measures and member State safeguard measures, Canada would (should the European Communities fail to come into compliance) have recourse to Article 21.5 of the DSU. According to Canada, this procedural bifurcation of the dispute would make it harder for the Parties to reach a positive resolution of the overall dispute. The Complaining Parties additionally argue that if the Panel were to add a recommendation to its finding that the general moratorium is inconsistent with the *SPS Agreement*, it would not add to the obligations, or diminish the rights, of the European Communities in any way. Canada points out in this regard that the Panel could recommend that the European Communities bring its measures into conformity with its WTO obligations "to the extent that it has not already done so".

6.75 The □□**r**□□**e**□**n** □□□ □ □**n**□□□**e**□opposes the Complaining Parties' propositions, which, in its view, are unfounded and must be dismissed. More specifically, the European Communities notes that Canada accuses the Panel of having made a selective and limited assessment of the developments that have taken place after its establishment. The European Communities submits that what Canada is attacking, in reality, is that on the basis of the Panel's characterization of the measure, one fact – namely that of approvals being adopted – mattered more than any other for the question of a continued existence of the measure. Thus, fundamentally, Canada is challenging the Panel's characterization of the measure as a general "moratorium" affecting all decisions on biotech products. If that was not the measure that Canada intended to challenge, it should have made it clear in its

request for the establishment of a Panel and its submissions to the Panel. What Canada or the other Complaining Parties cannot seriously claim is that a situation in which decisions on GMO applications are adopted under the relevant legislation would be consistent with the continued existence of a general "moratorium".

6.76 The European Communities further notes that notably Argentina alleges that the Panel lacks jurisdiction to find that the supposed measure has ceased to exist. The European Communities points out that the question of whether a panel has jurisdiction to find whether the measure before it has ceased to exist, in practice, has not, generally speaking, been an issue in past disputes, since the parties, in most cases, actually agreed that the measure had ceased to exist. This said, in the case *US – Certain EC Products* the parties did disagree on the continued existence of the March 3 measure and the panel naturally assumed jurisdiction to rule that that measure had expired (while refusing to assume jurisdiction over the legally distinct measure of April 19th). More generally, however, the European Communities submits that the Panel has jurisdiction because it is its task to secure a positive solution to the dispute according to Article 3.7 of the DSU. It follows necessarily that the Panel cannot simply ignore subsequent developments that affect the existence of the measure identified in its terms of reference. If it did otherwise, it would leave open the fundamental question underlying these disputes and, as a result, the Panel would fail to produce a report that actually helps all the Parties to come closer to a final and positive solution.

6.77 In relation to the issue of whether there is a need for a recommendation, the European Communities observes at the outset that the Appellate Body's ruling in *US – Certain EC Products* regarding measures that have ceased to exist does not leave any open question. If a measure has been found to have ceased, no recommendation is to be made.[196] The European Communities notes that in contrast, the general gist of the Complaining Parties' arguments on this issue is to move all issues relating to subsequent developments regarding a challenged measure to the implementation stage and to treat them there as a question of whether or not a Member has brought itself into full conformity with its obligations. This approach ignores a panel's duty to secure a positive solution to the dispute, which obliges it not to refuse to rule on issues it has the ability to rule on. Furthermore, in basing their arguments on due process and on the necessity of preventing "moving target" situations, the Complaining Parties overlook that these considerations also apply to the responding party. Indeed, in trying to secure a positive solution to the dispute a panel needs to take into account either side's due process rights. In the present case, the absence of a recommendation on the alleged moratorium does not deprive the Complaining Parties of the possibility to react to possible problems in the processing of pending applications as they have findings and recommendations on individual product applications. A recommendation on a "general moratorium" that may or may not have ceased to exist, on the other hand, would inadmissibly require the European Communities to defend itself against the moving target of a measure that the Complaining Parties refuse to define.

6.78 On the basis of these considerations, the European Communities is of the view that the Panel should refuse the Complaining Parties' requests to change its finding that the "general moratorium" measure has ceased to exist and should not issue a recommendation.

6.79 The □□**ne**□found it acceptable to make a number of changes to its findings set out at paragraphs 7.1302 *et seq*. in response to the requests of the Complaining Parties. In particular, the Panel's final reports refrain from expressing a view on whether the general EC moratorium on approvals has ceased to exist subsequent to the date of establishment of the Panel. Furthermore, Section VIII of the final reports now offers a qualified recommendation in relation to the general EC

[196] The European Communities argues that this has been recognised by Canada in its third written submission at para. 197.

moratorium on approvals, except for DS293 (Argentina). The exception for DS293 is necessary because in DS293 the Panel concluded that Argentina had failed to establish that the European Communities breached its WTO obligations by applying a general moratorium between June 1999 and August 2003. Given this conclusion, it would not be appropriate for the Panel to accept Argentina's request that it recommend that the European Communities bring the general moratorium into conformity with its obligations of the *SPS Agreement*. Even a qualified recommendation would be inappropriate in these circumstances.

6.80 Regarding the European Communities' argument based on Article 3.7 of the DSU, the Panel agrees that a positive solution to a dispute is one that takes into account all disputing parties' rights and interests. In the present case, the Panel considers that a qualified recommendation in DS291 and DS292 safeguards and preserves the rights and interests of all Parties concerned and hence is consistent with the aim of securing a positive solution to the dispute referred to the Panel. The Panel is not convinced by the European Communities' argument that a qualified recommendation would "require the European Communities to defend itself against the moving target of a measure that the Complaining Parties refuse to define". In fact, the European Communities itself acknowledges that the Panel has defined the measure at issue[197]. Nor does making a qualified recommendation "leave open the fundamental question underlying these disputes".[198] Indeed, the Panel's findings and conclusions resolve the matter referred to it by the Complaining Parties in their requests for the establishment of a panel, namely, whether the European Communities was applying a general *de facto* moratorium on approvals as of the date of establishment of the Panel, and if so, whether this resulted in the European Communities acting inconsistently with its WTO obligations.

6.81 The Panel also sees no force in the EC argument that the provisions of Article 3.7 "oblige[] it not to refuse to rule on issues it has the ability to rule on".[199] The European Communities provides no support for this interpretation of Article 3.7. If, as the European Communities contends, panels were under an obligation to rule on all issues they have the ability to rule on, they would not be entitled to exercise judicial economy. Yet it is a well established point of WTO jurisprudence that, subject to certain limitations, panels are entitled to exercise judicial economy.[200]

6.82 Additionally, we observe that even if we were to accept that, in the present case, the issue of whether the general EC moratorium has ceased to exist subsequent to the date of establishment of the Panel is an issue we have the ability to rule on, we consider that in view of the findings and conclusions already offered by us a ruling on this issue would not be necessary to enable the DSB to make sufficiently precise recommendations to the European Communities.

6.83 The above-mentioned changes made by the Panel obviate the need for other changes requested by the Complaining Parties in their comments (*e.g.*, the United States' request that the Panel further clarify a finding that is no longer contained in the final reports).

(b) Comments by Canada

6.84 □□**n**□**d**□ submits that, at paragraph 7.460, the Panel appears to have omitted one manner in which the Commission could prevent or delay approvals. According to Canada, a third possible manner arises from the fact that the Commission could fail to adopt, or delay the adoption of a proposed decision to approve, an application following the failure of the Council, within 90 days of its

[197] EC comments on the Complaining Parties' comments, paras. 7 and 16.
[198] *Ibid*., para. 24.
[199] *Ibid*., para. 37.
[200] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133.

referral to the Council, either to adopt, or to indicate by a qualified majority that it opposes, the proposed decision. Canada argues that while this scenario might be less likely given that the Commission would have signalled its determination to push a product application to a final approval by putting it before the Council, a severely divided Council might influence the Commission's resolve to take the further step of approving the product itself in the face of the attendant political controversy.

6.85 The □□r□e□n □□□ □□n□□e□ does not agree with Canada's comment on the alleged third manner in which the Commission could prevent or delay approvals. Apart from the fact that the approach described would be illegal under the relevant EC legislation, it is of no relevance in the present case. The Complaining Parties have not described, or put forward evidence of, any instance where it would have been employed to give effect to the alleged moratorium.

6.86 The □□ne□ does not find it appropriate to make a change to its findings in response to Canada's comment. The Panel's findings clearly state, at paragraph 7.465, that the issue the Panel considers in the relevant sub-section is whether it was possible for EC member States and the Commission to prevent or delay approvals of biotech products "in the manner alleged by the Complaining Parties". Canada points to no portion of its submissions where it alleged that the Commission prevented or delayed approvals by not adopting a draft measure following a failure of the Council to act.[201] At any rate, the information on the record does not indicate that the situation described by Canada ever arose in any of the approval procedures at issue in this dispute.

6.87 □□n□d□ submits that at the old paragraph 7.1303, the date of August 2003 is incorrect. At that time, the Commission had not yet approved NK603 maize for animal feed and industrial processing. The Commission finally adopted a decision approving this application on 19 July 2004, following the refusal by the member States, both at the Regulatory Committee and Council levels, to support its approval. As far as Canada is aware, there is no record of the lead CA (Spain) issuing the letter of consent.

6.88 The □□ne□ removed the relevant statement, but retained a modified version of paragraph 7.1303.

(c) Comments by Argentina

6.89 **Ar□en□n□** considers that the phrase "as described by Complaining Parties" at paragraph 7.448 does not reflect integrally the whole characterization set forth by the Complaining Parties when they described the measure at issue and that it would therefore be more accurate for the Panel to consider removing the aforementioned phrase. At the same time, Argentina notes that it is not objecting to the elements pointed out by the Panel.

6.90 The □□ne□ has made appropriate changes to paragraph 7.456 in response to this comment.

(d) Comments by the European Communities

6.91 The □□r□e□n □□□ □□n□□e□ argues that, the word "main" should be deleted in paragraph 7.448 as it could create confusion as it leaves open what other elements there might be. Alternatively, the Panel could state what the other elements are. Moreover, in the European Communities' view, different wording should be used in the last bullet point to reflect the fact that a final decision can also be negative in nature and does not necessarily have to lead to approval.

[201] Indeed, Canada makes no such allegation at para. 27 of its first oral statement, for instance.

6.92 **Ar□en□n□** disagrees with the first amendment proposed by the European Communities, namely, the deletion of the word "main", and recalls its comment on this paragraph. The deletion of the word "main" would imply a further move away from the description of the measure given by the Complaining Parties. Under the European Communities' proposal wording would be: "The elements which characterize the moratorium as described by the Complaining Parties are the following [...]". In other words, through this suggested wording there would be stated not only a closed set of elements which characterizes the moratorium, but also that this is a description supported by the Complaining Parties. In this sense, Argentina proposes that the Panel consider the following options: (a) the deletion of the terms "described by the Complaining Parties" as it was previously suggested; or (b) the deletion of "main" and "described by the Complaining Parties" plus the addition of a footnote to paragraph 7.448 clarifying the particular description supported by the Complaining Parties, in this case by Argentina.

6.93 The □□**ne**□has made appropriate changes to paragraph 7.456 in response to this EC comment. The Panel did not see a need to use different wording in the last bullet point.

6.94 The □□**r**□□**e**□**n** □□□ □ □**n**□□**e**□submits that, in paragraph 7.457, the first sentence, including the accompanying footnote, needs to be deleted as it does not accurately reflect the position of the European Communities. The sentence implies that the European Communities has taken a position on the issue of "ability to prevent approvals", which is not the case. The issue was never discussed as such. To the extent the European Communities took a position on the individual steps identified by the Panel, this was done not from a perspective of a so-called "ability to prevent" but to explain the different procedural steps set out in the legislation (which has not been challenged). The European Communities points out that the footnote is repeated almost verbatim in paragraph 7.462. The European Communities submits that a new footnote be added at the end of this paragraph in order to refer to the EC second submission where the argument on internal decision-making process is made.

6.95 The □**n**□**ed** □□□**e**□does not agree with the EC suggestion that the Panel should delete the first sentence of paragraph 7.457, which provides that "[t]he European Communities does not contest that it had the ability to prevent approvals of biotech products in the various ways identified by the Complaining Parties." To the contrary, this statement is important in the context of the dispute, and completely accurate. Even though the issue of whether the European Communities adopted a general moratorium on biotech approvals was central to the case, the European Communities in fact did not contest that EC member States and the Commission had the ability to block final decisions on biotech applications. Indeed, the European Communities provided no citation to any prior EC arguments where it did contest this proposition, nor is the United States aware of any such arguments in the European Communities' oral or written submissions. Instead, all the European Communities can do is to imply that it never conceded the issue. But, whether or not the European Communities affirmatively conceded the issue is beside the point: the first sentence of paragraph 7.457 is completely accurate in noting that the European Communities did not contest that the Commission and member States had the ability to block final decisions on biotech products.

6.96 □□**n**□**d**□also disagrees with the EC suggestion. As Canada understands it, the Panel's point is not that the European Communities expressly admitted that it had the ability to prevent biotech approvals in the manner identified, but that the European Communities did not deny that it was possible under the EC regulatory system for biotech approvals to be prevented in the manner identified by the Complaining Parties.

6.97 **Ar□en□n□** likewise does not agree with the deletion of something that constitutes a finding by the Panel. In Argentina's view, it does not refer to any alleged position by the European Communities, but to the fact that the European Communities did not contest this issue.

6.98 The □□**ne**□has deleted the first sentence of paragraph 7.465 and the accompanying footnote, but sees no reason to add a new footnote at the end of the paragraph.

6.99 The □□**r**□□**e**□**n** □□□ □ □**n**□□**e**□considers that the last bullet point in paragraph 7.459 requires some clarification as the step identified therein does not exist under Regulation 258/97. Moreover, the second sentence in footnote 351 should be deleted, as it seems entirely unnecessary. At the same time, it would seem necessary to point out that these very same steps may be taken for wholly legitimate (scientifically justified) reasons.

6.100 □□**n**□**d**□ has no objection to the European Communities' proposed revision of the text of paragraph 7.459. However, in relation to the footnote, given the Panel's finding that "despite a clear legal obligation to give written consent […] France withheld its consent and thus did what was within its power to prevent these products from being approved",[202] it hardly seems inappropriate for the Panel to point out that the acts and omissions of the European Communities might be inconsistent with the European Communities' own internal law. Canada submits, in addition, that the suggested addition to footnote 351 is unnecessary and should be disregarded. The question is not whether any of the identified methods employed by the EC member States to give effect to the moratorium "necessarily" reflects an intention to prevent or delay final decision, but whether in this case EC member States employed these methods to prevent final approvals.

6.101 **Ar**□**en**□**n**□believes that the addition in footnote 351 proposed by the European Communities would be misleading and should not be accepted. The Panel is referring to situations in which the member States have the ability to prevent or delay, with no further reference to the intention of the member States. Furthermore, to say in footnote 351 that there "might be no intention" of delaying or preventing, as the European Communities suggests, is certainly contradictory with the Panel's statement in paragraph 7.459, especially since point (b) refers to "objections", point (c) refers to an acting "blocking minority", and point (d) refers to a "refusal" to give consent. All these points refer to situations in which member States do act on purpose, hardly "by accident" or "with no intention". The EC observation to footnote 351 would undermine the sense of paragraph 7.459 as correctly expressed by the Panel. Consequently, Argentina requests this suggested addition not to be accepted.

6.102 The □□**ne**□has made appropriate changes to paragraph 7.467 in response to this EC comment. The Panel has also deleted the second sentence of footnote 574, but does not find it appropriate to add the sentence suggested by the European Communities.

6.103 The □□**r**□□**e**□**n** □□□ □ □**n**□□**e**□considers that paragraph 7.462 requires some clarification as the scenario identified therein does not exist under Regulation 258/97.

6.104 The □□**ne**□has made appropriate changes to paragraph 7.470 in response to this comment.

6.105 The □□**r**□□**e**□**n** □□□ □ □**n**□□**e**□contends that the date referred to in paragraph 7.500 should be 31 August 2005 and not 1 September 2005 as the application concerning RR oilseed rape (EC-70) was approved on 31 August 2005.

6.106 The □□**ne**□has made appropriate changes to paragraph 7.508 in response to this comment, noting that it was the EC letter of 1 September 2005 which suggested the 1 September 2005 approval date.

[202] Interim Reports, paras. 7.1015 and 7.2197.

6.107 The □□r□□e□n □□□ □ □n□□e□submits that the last two sentences of paragraph 7.501 should be deleted as the Panel's assertion that the European Communities never submitted information on MON863 is not correct. Exhibit EC-106 is a status report on the application for MON863, which is actually a hybrid (MON863 x MON810). In the EC first written submission, at paragraph 335, the application was identified as Monsanto Maize with the right application number (C/DE/02/9), but unfortunately contained an erroneous reference to the hybrid event in question (MON810 x NK603 instead of MON863 x MON810). The Panel itself, in paragraph 7.542 seems to have correctly identified the application. Furthermore, from paragraph 7.543 it can be inferred that the Panel was fully aware of the fact that the application concerned MON863 x MON810.

6.108 □□n□d□agrees with the European Communities that the confusion arising from the European Communities' mislabelling of the application for the maize hybrid MON863 x MON810 (C/DE/02/9) is indeed unfortunate. Canada also agrees that some information concerning MON863 maize was submitted to the Panel. Specifically, Canada submitted as evidence the scientific opinions conducted by the European Food Safety Authority (EFSA) for MON863 maize (resistance to certain coleopteran insects) and the hybrid product MON863 x MON810 (resistance to certain lepidopteran insects), dated 2 April 2004. Two opinions were issued, one under Directive 2001/18 and the other under Regulation 258/97, and were submitted as Exhibits CDA-35-O (2 April 2004) and CDA-35-P (2 April 2004), respectively. Canada also agrees with the European Communities that the Panel's discussion in paragraph 7.542 of the application for maize (Exhibit EC-106) and of the novel food application in paragraph 7.543 appears to relate to the applications submitted under Directive 2001/18 and Regulation 258/97 to the competent German authorities for MON863 maize and its hybrid MON863 x MON810. Furthermore, rather than deleting the text in paragraph 7.501 as proposed by the European Communities, Canada suggests modifying the text to reflect the Panel's conclusions in paragraphs 7.542 and 7.543 that the Panel does not consider that the information supplied by the European Communities in respect of these applications is sufficient to support the inference that no general moratorium on final approvals was in effect before or in August 2003.

6.109 The □□ne□is not convinced by the European Communities' assertion that the application concerning MON863 maize was actually an application concerning a hybrid product, namely, MON 863 x MON810 maize. The European Communities points to no evidence on the record in support of its assertion.[203] As we have noted, the European Communities itself distinguishes between the application concerning the parental line MON863 (*see* EC reply to Panel question No. 91) and the hybrid MON863 x MON810 (*see* EC first written submission, paragraph 335 and Exhibit EC-106). We note that in its submissions the European Communities mentioned the same reference C/DE/02/9 when referring to MON863 maize and MON863xMON810 maize. However, the European Communities does not argue that this constitutes conclusive proof that the products are one and the same. At any rate, it has never been suggested to us by any Party that under Directive 2001/18 it would not be possible to submit a single application covering two distinct, but related, biotech products. In the light of the foregoing considerations, the Panel declines the EC request to delete the last two sentences of paragraph 7.501. In response to Canada's comment, the Panel has added a reference to Exhibits CDA-35-O and -P in footnote 398 and made appropriate consequential changes to paragraph 7.509. The Panel does not agree with Canada, however, that paragraphs 7.550 and 7.551 relate, *inter alia*, to applications submitted under Directive 2001/18 and Regulation 258/97 concerning MON863 maize. These paragraphs relate to applications concerning the hybrid maize

[203] We note in passing that in relation to its comment on para. 7.500 regarding the correct approval date in the case of RR oilseed rape (EC-70), the European Communities indicated where in the Official Journal of the European Union the relevant Commission decision may be found. The European Communities did not give the corresponding reference to the Official Journal for the Commission decision concerning MON863 maize.

MON863 x MON810, which is consistent with the fact that both Exhibit EC-106 and paragraph 337 of the EC first written submission refer exclusively to the hybrid maize MON863 x MON810.

6.110 The □□r□e□n □□□ □□n□□e□ identified incorrect sub-paragraph numbering in paragraphs 7.516 through 7.523.

6.111 The □□r□e□n □□□ □□n□□e□ considers that the term "consistent with" in paragraph 7.544 should be qualified given that in the analysis then following the Panel identifies very diverse kinds of situations. Indeed, in some cases, such as for example in the case of the transgenic potato, the Panel discusses alternative explanations which it considers possible for a given act or omission, but then concludes anyway that the facts are consistent with the assertion that a moratorium existed. Such conclusions only make sense if "consistent with" can be read to mean "neither supports nor contradicts". The European Communities therefore suggests that the Panel add a new sentence to paragraph 7.544 to explain the meaning of the term "consistent with".

6.112 The □n□□ed □□□□e□ does not agree with the EC suggestion that the Panel should add the following underlined sentence in the middle of paragraph 7.544:

> "In the remainder of this Subsection, the Panel will examine all other relevant applications with a view to determining whether they are consistent with the Complaining Parties' contention that during the relevant time period (October 1998 to August 2003) the European Communities applied a general moratorium on final approvals. By 'consistent with' we do not necessarily mean to say that the facts support the Complaining Parties' contention, but that they do not contradict it. The structure of this examination reflects the arguments of the Complaining Parties. More specifically, the Panel's examination is structured according to the acts and omissions through which, in the Complaining Parties' view, the European Communities gave effect to the alleged general moratorium on approvals. The Panel will first address applications submitted under Directives 90/220 and/or 2001/18. Thereafter, the Panel will address applications submitted under Regulation 258/97."

6.113 In the United States' view, the European Communities' suggested gloss on the term "consistent" reflects a misunderstanding of the Panel's mode of analysis. In the remainder of the subsection, the Panel shows how delays in processing individual applications were consistent with a moratorium, even though for certain applications other explanations for delays might have been possible. All such evidence indeed supports the Complaining Parties' contentions: in particular, it is cumulative with all of the other evidence submitted by the Complaining Parties showing the existence of a general moratorium, and it further shows that the European Communities was incorrect in asserting that the application histories proved that no such moratorium ever existed. Thus, the suggested addition is incorrect, and should not be included in the final report.

6.114 □□n□d□ also disagrees with the suggested qualification for "consistent with" in paragraph 7.544. The qualification changes the Panel's findings in relation to the facts and history of relevant applications. Canada recalls that, in this section of the interim report, the Panel examines whether the approval procedures for relevant applications "confirm" that certain member States and/or the Commission did in fact prevent the final approval of applications in the manner identified by the Complaining Parties.[204] The Panel examines whether the history of relevant applications supports (or "confirms") the Complaining Parties' claim that the European Communities imposed a general moratorium on final approvals or supports (or "confirms") the European Communities' opposing

[204] Interim Reports, para. 7.533.

assertion that "[t]he processing of individual applications continued without interruption, and applications were not systematically stalled."[205] Given that the very purpose of the examination is to determine which of the competing theories is supported by the facts, it would be nonsensical to specify "consistent with" as meaning "neither supports nor contradicts".

6.115 Canada submits, in addition, that the European Communities points to one example (transgenic potatoes, paragraphs 7.664 to 7.668) where the Panel does not categorically reject the European Communities' alternative explanation for the Commission's failure to forward a draft measure to the Regulatory Committee and yet still finds that facts are "consistent with" the Complaining Parties' claim that a moratorium had been put in place. This appears to be the only application history that could be "consistent with" both competing theories. In order to avoid any potential confusion, Canada invites the Panel to clarify that "consistent with" as used in paragraph 7.544 means "supports" or "confirms" and to clarify whether the transgenic potatoes application supports the Complaining Parties' claim, the European Communities' competing theory, or is inconclusive.

6.116 Although **Ar□en□n□** could agree that the words "whether they are consistent with" might be clarified, Argentina does not believe that the addition proposed by the European Communities will reflect what the Panel did analyse and conclude, as stated in paragraphs 7.548, 7.758 and 7.997, namely, the conduct of the Commission and the member States. When analysing these conducts, the Panel found, among others issues, that there was an interaction between the Commission and some member States[206], from which the Panel derived the "consistency" of the conducts with the Complaining Parties' assertion about a "*de facto*" moratorium.

6.117 Additionally, Argentina does not believe that the addition proposed by the European Communities would be clarifying. On the contrary, the expression "but that they do not contradict it" seems to be both soft and too incomplete. The consistency of the findings regarding the conduct of the Commission and of some member States does not simply "not contradict" the Complaining Parties' assertions, since they deal with calculated and intended acts, but, on the contrary, do support Argentina's assertion and it is in this sense that the Panel has made these findings. Consequently, Argentina considers that the European Communities' proposed addition will diminish the sense of the word "consistency", as used by the Panel in its findings.

6.118 The □□**ne**□considers that the phrase "consistent with" at paragraph 7.552 is sufficiently clear and therefore does not find it necessary or appropriate to add the sentence suggested by the European Communities. Nonetheless, for greater clarity, the Panel has included additional language at paragraph 7.552. In relation to the approval procedure concerning the Transgenic potato, the Panel has deleted the old paragraph 7.1921.

6.119 The □□**r**□□**e**□**n** □□□ □ □**n**□□**e**□requests that a footnote be added at the end of paragraph 7.547 to clarify that the Complaining Parties have not challenged the fact that in accordance with Article 35 of Directive 2001/18 an updated dossier had to be submitted which would re-start the approval procedure.

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[205] *Ibid*., para. 7.535.

[206] Argentina refers to, especially, paras. 7.567, 7.584, 7.598, 7.612, 7.629, 7.648, 7.661, 7.670, 7.681, 7.695, 7.711, 7.726, 7.737, and 7.754 of the Interim Reports, referring to the Commission's knowledge of the *explicit intention* of the "Group of Five" and these countries' capability to act as a "blocking minority"; and also paras. 7.768, 7.777, 7.784, 7.798, 7.812, 7.825, 7.856, 7.876, 7.891, 7.901, 7.921, 7.955, 7.969, 7.985, and 7.1015 of the Interim Reports, referring to the member States as either being part of the "Group of Five", or knowing of the *explicit intention* of the "Group of Five" and its capability to act as a "blocking minority").

6.120 **Ar□en□n□** opposes the additional footnote proposed by the European Communities. It has already been clearly established several times during the proceedings, and stated in the interim report, that the Complaining Parties are not challenging the EC legislation as such (including Article 35 of Directive 2001/18/EC). Argentina considers this clarification not to be necessary. Besides this, the proposed expression "any aspect of the EC approval legislation" is too broad and misleading, since it could be understood to include, for instance, the "non-application" of the EC approval legislation, which Argentina is indeed challenging.

6.121 The □□**ne**□ has added an appropriate footnote at the end of the first sentence of paragraph 7.555 in response to this EC comment.

6.122 The □□**r**□□**e**□**n** □□□ □ □**n**□□**e**□ points out that while it is correct that it only stated the fact, referred to at paragraph 7.841, that the application was withdrawn (*see* EC second written submission, paragraph 149, footnote 60), without providing any document, it is also true that that fact was never contested by the Complaining Parties. That alone should be a reason for the Panel to accept the EC statement as a given fact. Furthermore the Panel never asked for further clarifications or documents. The European Communities considers that this issue can still be clarified at interim stage and that there is no point in waiting for an eventual implementation phase to start producing the document that shows that and when the withdrawal took place. The withdrawal letter is therefore attached as Exhibit EC-167. Based on the letter, the European Communities requests that the Panel include in paragraph 7.841 the date of withdrawal.

6.123 The □**n**□□**ed** □□□□**e**□ argues that the interim review stage of the proceeding is confined to a "review of precise aspects" of an interim report. It is not the place for a party to submit new factual evidence or exhibits concerning the measures at issue, nor does it permit making new findings based on such exhibits. The question of the status of new evidence introduced during the interim review stage of a dispute was discussed by the Appellate Body in its report in *European Communities – Trade Description of Sardines*. In that dispute, the European Communities had attempted to introduce new evidence (in the form of letters from European consumer associations) at the interim review stage. The panel declined to consider the new evidence, and the Appellate Body affirmed, explaining:

> "The interim review stage is not an appropriate time to introduce new evidence. We recall that Article 15 of the DSU governs the interim review. Article 15 permits parties, during that stage of the proceedings, to submit comments on the draft report issued by the panel, and to make requests 'for the panel to review precise aspects of the interim report.' At that time, the panel process is all but completed; it is only – in the words of Article 15 – 'precise aspects' of the report that must be verified during the interim review. And this, in our view, cannot properly include an assessment of new and unanswered evidence. Therefore, we are of the view that the Panel acted properly in refusing to take into account the new evidence during the interim review, and did not thereby act inconsistently with Article 11 of the DSU."[207]

6.124 In addition, the United States notes that the European Communities' submission of new evidence on BXN cotton is inconsistent with the Panel's Working Procedures. Paragraph 12 of those procedures provides:

> "Parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttals, answers to questions or comments made for the purpose of rebutting

[207] Appellate Body Report, *EC – Sardines*, para. 301.

answers provided by others. Exceptions to this procedure will be granted upon a showing of good cause. In such cases, other parties shall be accorded a period of time for comment, as appropriate."

6.125 The United States points out that the European Communities' new exhibit on BXN cotton was not submitted in rebuttal or in response to a Panel question. In addition, the European Communities has not claimed or made a showing of good cause which might warrant an exception to the rule in Paragraph 12. In particular, no showing of "good cause" is possible because the purported withdrawal of the BXN cotton application in the period after the establishment of the Panel is not dispositive with regard to any issue in this dispute. As the United States has explained, under Article 7 of the DSU (establishing the Panel's terms of reference), the measures at issue in this dispute are the measures in existence when the panel was established. Accordingly, information on the withdrawal of BXN cotton after panel establishment is not pertinent to the existence and/or WTO-consistency of the measures at issue.

6.126 The United States further submits that, remarkably, the EC comments make the assertion that "there is no point in waiting for an eventual implementation phase to start producing the document that shows that and when the withdrawal took place." The United States is pleased that apparently the European Communities is predicting that the Panel's recommendations and rulings regarding the BXN cotton application, after a possible review by the Appellate Body, will be adopted by the Dispute Settlement Body and that the European Communities intends to comply with those recommendations and rulings when adopted. Nonetheless, the United States strongly disagrees with the notion that there is "no point" in not allowing the submission of new evidence during the interim review stage on implementation of a possible DSB recommendation and ruling. To the contrary, the consideration of the implementation of possible DSB recommendations and rulings during the interim review stage would be inconsistent with the DSU. As the Appellate Body explained in *EC – Sardines*, the purpose of the interim review stage is to consider "precise aspects" of the report, not to consider new evidence. Instead, the DSU provides other, separate mechanisms to address this situation. For instance, those issues could arise as part of the DSB's surveillance of implementation of the recommendations and rulings. (*See, e.g.*, Article 21.6 of the DSU: "The DSB shall keep under surveillance the implementation of adopted recommendations or rulings.") Should the DSB ultimately adopt the Panel's recommendations and rulings on BXN cotton, the European Communities would be free to claim that it has already complied with the recommendations and rulings, and the DSB in turn would be free to exercise its surveillance authority. Moreover, if there were disagreement about the European Communities' claim, the DSB could establish a panel pursuant to Article 21.5 of the DSU.

6.127 Furthermore, the United States maintains that if the Panel were to accept new evidence at this time, and in a matter not in accordance with the Panel's working procedures, the Complaining Parties would be confronted with precisely the type of unfair "moving target" that the Appellate Body decried in *Chile – Price Band System*.[208] If the European Communities were allowed to present new evidence on its measures at each and every stage of the proceeding – and in particular at this stage – this already lengthy dispute could last indefinitely, as the European Communities could continue to extend the proceedings by continually submitting new evidence, by inviting the Complaining Parties to respond to it, and by asking the Panel continually to revise its findings.

[208] As the Appellate Body explained in that dispute, "the demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'." Appellate Body Report, *Chile – Price Band System*, para. 144.

6.128 For all of these reasons, the United States submits that the Panel should give no consideration to the new evidence the European Communities has attempted to introduce at the interim review stage in this dispute.

6.129 □□n□d□ opposes the European Communities' suggested modification for paragraph 7.841 of the Interim Report for two reasons. First, the European Communities appears to suggest that the mere assertion of a fact, apparently uncontested by a Complaining Party, should be "reason for the Panel to accept the EC statement as a given fact." Canada disagrees. It is a well settled principle that the party making an assertion has the burden to prove that assertion. The mere assertion of a fact that has not been specifically contested by an opposing party is not necessarily sufficient to discharge this burden.[209] The failure by the European Communities, in this case, to adduce evidence supporting its assertions exposes it to the risk that the Panel, in making an objective assessment of the facts, may not accept those assertions as fact. Indeed, in this dispute, the European Communities made many vague assertions unsupported by specific evidence. In the present case, the Panel is perfectly entitled, based on the evidence before it, to conclude as it did in paragraph 7.841.

6.130 Second, for the reasons stated below, Canada opposes the European Communities' attempt to supplement the factual record. Having failed to support its assertion with evidence during the course of these proceedings, the European Communities should not be permitted to adduce new evidence at the interim review stage, no matter how innocuous the evidence appears to be.

6.131 Canada objects to the European Communities' attempt at this very late stage of the process to supplement the factual record before the Panel by introducing three new exhibits, EC-167, -168 and -169.[210] The submission of additional evidence after the issuance of the interim report significantly alters the nature of the interim review stage and strains the demands of due process. The interim review stage is an opportunity for parties to "submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report" (Article 15.2 of the DSU); it is emphatically not an opportunity for a party to correct evidentiary oversights or reopen the factual record.

6.132 Canada notes that the European Communities suggests that the introduction of new evidence presents "no due process issue or prejudice" to the Complaining Parties because they have an opportunity to comment on the new evidence. However, this does not answer the broader due process problem of permitting only one party an opportunity to supplement the record. Permitting the introduction of selective evidence, without providing an opportunity for a fair hearing on all pertinent additional facts, violates due process. On this basis alone, the Panel should disregard these exhibits. The European Communities will have ample opportunity to submit this information during the implementation stage of the proceedings.

6.133 Canada argues that if the Panel is inclined to accept the additional evidence submitted by the European Communities, fairness dictates that the Complaining Parties should be accorded an equal opportunity to submit additional evidence to supplement the factual record. In this regard, the Complaining Parties should not be limited to responding to the evidence recently submitted by the European Communities, but should be free to submit additional evidence on any issue addressed in the Panel's interim report.

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[209] Canada notes that it stated in its submissions that the fact that it had not addressed explicitly any particular legal or factual assertions by the European Communities does not mean that it agrees with those assertions. Canada's second written submission, para. 11.

[210] Canada refers to paras. 53 and 68 of the EC comments.

6.134 The □□ne□notes that Exhibit EC-167 contains a letter dated 18 May 2004. The EC second written submission, in which the European Communities referred to the withdrawal of the application in question, dates from 19 July 2004. Thus, the European Communities could have provided the relevant letter already at the time it filed its second written submission, or at least shortly thereafter. We note that paragraph 12 of the Panel's Working Procedures states in pertinent part that "[p]arties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttals, answers to questions or comments made for purposes of rebutting answers provided by others. Exceptions to this procedure will be granted upon a showing of good cause." In this instance, the European Communities has not made a showing of good cause for submitting in March 2006 what it could have submitted already in May 2004. The fact that, in the European Communities' view, "there is no point in waiting for an eventual implementation phase to start producing the document" certainly does not amount to the requisite "good cause", since this argument provides no justification for submitting evidence that has been available for more than two years as late as the interim review stage. We also note that in *EC - Sardines* the Appellate Body stated in unqualified terms that "[t]he interim review stage is not an appropriate time to introduce new evidence".[211] For these reasons, the Panel declines to make the change requested by the European Communities.

6.135 The □□r□□e□n □□□ □ □n□□e□identified mistaken cross-references to Annex H in the Panel's findings, including in the old footnotes 683-684 and 688-689.

6.136 The □□r□□e□n □□□ □ □n□□e□ requests that at paragraph 7.886 the Panel modify its description of what Dr. Andow said so that it is closer to what he stated literally and therefore more accurately reflects his views.

6.137 The □□ne□has made appropriate changes to paragraph 7.894 in response to this comment.

6.138 The □□r□□e□n □□□ □ □n□□e□requests that a sentence should be added in footnote 774 to paragraph 7.1028 stating that the only application that does not seem to have been submitted both under Regulation 258/97 and Directive 90/220 is the application for Transgenic green-hearted chicory (food use only).

6.139 The □□ne□notes that the European Communities points to no evidence in the record which would support its assertion that there is no application concerning Transgenic green-hearted chicory that was submitted and evaluated under Directive 90/220. The Panel is not convinced by the EC assertion. Indeed, the documents on the record do not support the EC assertion. Exhibit EC-98/At.11 relates to the application concerning the Transgenic green-hearted chicory (food). The Exhibit contains a letter which states "[e]nclosed you find the summary of the evaluation of potential risks to human health and the environment, carried out by the Netherlands competent authority for Directive 90/220/EEC". That summary in turn states that the application submitted under Directive 90/220 concerns "green hearted chicory (*Cichorium intybus* L.) [of] line GM-2-28." Exhibit EC-110/At.7 provides further confirmation, in its general introduction, of the fact that an application concerning the Transgenic green-hearted chicory was submitted under Directive 90/220 and Regulation 258/97 and that the Netherlands was the lead CA in both cases. The Panel therefore declines the EC request that it add a sentence to footnote 999.

6.140 The □□r□□e□n □□□ □ □n□□e□submits that an addition is required in the last sentence of paragraph 7.1031 to clarify that there were also labelling requirements for GMO-derived products under Regulation 258/97, albeit only for those products which still contained DNA traces (*see* Article

[211] Appellate Body Report, *EC – Sardines*, para. 301.

8 of Regulation 258/97 and Article 1 of Regulation 49/2000 amending Article 2(2) of Regulation 1139/98). Alternatively, the entire last sentence starting with "In particular…" could be taken out, as it does not seem to be of relevance to the issues in this dispute.

6.141 **Argentina** considers that the addition suggested by the European Communities is not clear and, consequently, objects to it, but Argentina supports the suggested deletion of the last sentence.

6.142 The **Panel** has made appropriate changes to para 7.1039 in response to this EC comment.

6.143 The **European Communities** requests that the last sentence of paragraph 7.1300 be deleted as it does not correctly reflect the European Communities' position. In fact, the European Communities has explicitly contested the Panel's authority to make such findings in its reply to Panel question No. 7 as well as in paragraph 151 of its second written submission.

6.144 **Argentina** submits, with regard to the EC reply to Panel question No. 7, that the European Communities stated in its answer that there has been no moratorium at all, when it stated that "[t]he approval procedures have never been suspended or stalled as alleged by the Complainants. In any event, even if certain delays that occurred in the application of Directive 90/220 were to be seen to constitute a 'moratorium', these must have ended with the application of Directive 2001/18." (paragraph 24 of the EC response) and that "[t]herefore, the European Communities respectfully requests the Panel to find that, with regard to applications withdrawn before the panel establishment and the alleged 'moratorium', the Complainants' case is without object and, hence, inadmissible *ab initio*" (paragraph 25 of the EC response). In Argentina's view, the European Communities did not contest the Panel's authority to rule on a measure that had ceased to exist, since the European Communities stated that the measure did not exist at all. Argentina further submits that paragraph 151 of the EC second written submission refers to the European Communities' answer to question No. 7, so the same observation applies here. Therefore, Argentina believes that the original wording in paragraph 7.1296 accurately reflects the EC position on a "measure that ceased to exist", and that the clarification requested by the European Communities should not be taken into account.

6.145 The **Panel** does not agree with how the European Communities describes its position as reflected in its second written submission and Panel question No. 7. Nevertheless, the Panel has added a footnote to paragraph 7.1308, to indicate what the European Communities stated before the Panel.

6.146 The **European Communities** suggests the deletion of a point made at paragraph 7.1303 regarding whether NK603 maize (food) could be marketed regardless of whether NK603 maize (for animal feed use) had obtained the lead CA's written consent. The European Communities submits that a market authorization under Regulation 258/97 is directly applicable and does not require any further consent from the lead CA. As there is no provision to this effect in the legislation nor any such condition in the market authorization itself, the use of this market authorization does not (and cannot legally) depend on the adoption of a market authorization for feed use under Directive 2001/18. This is different from the question of whether under Article 9 of Regulation 258/97 the assessment of environmental risks can be made dependent on a parallel assessment under Directive 90/220 (or Directive 2001/18). Furthermore, as regards NK603 maize (for use such as animal feed), the European Communities says that it would like to inform the Panel that final consent was given by the lead CA on 18 October 2004 (new Exhibit EC-168). Moreover, as regards MON863 maize, final consent was given by the lead CA on 13 February 2006 (new Exhibit EC-169). The European Communities would invite the Panel to take these facts into account and re-draft paragraph 7.1303 accordingly. In inviting the Panel to take these matters into consideration, the European Communities points out that the Complaining Parties have the opportunity to comment on

these comments, and thus the possibility to state if they contest the plain facts, duly evidenced, and if so, on what basis. There is thus no due process issue or prejudice *vis-à-vis* the Complaining Parties.

6.147 The United States recalls that it explained in the above discussion of the EC comment on BXN cotton that the DSU and the Panel's own working procedures do not permit a Panel to examine new evidence on the measures at issue submitted during the interim review stage. Accordingly, the United States submits that the Panel should not make the changes to paragraph 7.1303 of the interim report that the European Communities suggests.

6.148 Canada similarly states that for the reasons stated above, Canada opposes the EC attempt to reopen the factual record at the interim review stage. The European Communities will have an opportunity to introduce this new evidence during the implementation stage of the proceeding. In addition, Canada submits that Exhibit EC-169 is problematic for another reason; it is a document that has been submitted by the European Communities in the German language only. Canada reiterates its objection, first raised in its letter to the Panel, dated 29 June 2004, to the European Communities' practice of submitting evidence in a language other than one of the official WTO languages. In accordance with long-standing GATT and WTO practice, any document submitted as evidence in dispute settlement proceedings that is in a language other than an official WTO language must be accompanied by a version translated into one of the official languages.[212] The failure to submit a translation of Exhibit EC-169 means that the Panel should disregard this document.

6.149 Argentina acknowledges that the European Communities can make several more approvals from now on, and thus expect the Panel to continuously adjust the text of the interim report.. Despite this, we recall our argument in the sense that the matter of whether the "*de facto*" moratorium ceased to exist is not to be assessed, and that the approvals at this later stage should not have any influence on the matter.

6.150 The Panel has made appropriate changes at paragraph 7.1303 in response to this EC comment. The Panel notes in this regard that it has accepted the European Communities' request that the Panel delete the latter part of the third sentence of the old paragraph 7.1303. After reviewing the remainder of the third sentence, the Panel has determined that there is no need to retain it. The Panel has therefore deleted the entire third sentence. In the light of this, it is not necessary to consider whether it would be appropriate to take into account Exhibits EC-168 and EC-169, which were submitted only at the interim review stage. In relation to Exhibit EC-169, we note that, in any event, the document is in German and that no translation into any of three official languages of the WTO was provided to the Panel and the other Parties.

6.151 The European Communities submits that, the wording of the old paragraph 7.1311 should be changed to "continuing existence of opposition to approvals amongst member States" because the phrase "continuing member State opposition" is too sweeping a statement as there is no such thing as a generalised opposition of member States to approvals. It also overlooks the reasons which explain the opposition of each individual member State in each specific procedure.

6.152 The United States considers that the two phrases have slightly different emphases – the phrase drafted by the Panel is clearer, and more accurately reflects the level of member State opposition. The European Communities wishes to soften the Panel finding, but the European Communities presents no valid basis for doing so. The Panel's findings on member State actions in support of the moratorium (*see, e.g.*, paragraph 7.1273) are more than sufficient to support the language currently used in paragraph 7.1311 of the interim report.

[212] Canada refers to Panel Report, *Korea –Dairy*, para. 7.16.

6.153 The □□**ne**□has made appropriate changes to paragraph 7.1311 in response to this EC comment.

6.154 The □□**r**□□**e**□**n** □□□ □ □**n**□□□**e**□identified a missing reference to the year 1999 in paragraph 7.1543.

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(a) Comments by Argentina

6.155 **Ar**□**en**□**n**□identified words included by oversight in paragraph 7.1873.

(b) Comments by the European Communities

6.156 The □□**r**□□**e**□**n** □□□ □ □**n**□□□**e**□contends that the date referred to in paragraph 7.1634 and the accompanying footnote should be August 2005 and not September 2005 as the application concerning RR oilseed rape (EC-70) was approved on 31 August (*see* Official Journal of the European Union N°L 228 of 3 September 2005, at page 11). The European Communities also requests a reference to the application concerning MON863 maize in the relevant footnote.

6.157 The □□**ne**□has made appropriate changes to paragraph 7.1641 in response to this comment, noting again that it was the EC letter of 1 September 2005 which suggested the 1 September 2005 approval date. The Panel sees no need for referring, in a footnote relating exclusively to RR oilseed rape (EC-70), to the application concerning MON863 maize.

6.158 The □□**r**□□**e**□**n** □□□ □ □**n**□□□**e**□ requests changes to paragraph 7.1662 and footnote 1143. Specifically, the European Communities suggests the deletion of a point made in footnote 1143 regarding whether NK603 maize (food) could be marketed regardless of whether NK603 maize (for animal feed use) had obtained the lead CA's written consent. The European Communities has addressed this point in its comment on paragraph 7.1303. Furthermore, and as also already explained in the above comment on paragraph 7.1303, regarding NK603 maize (for use such as animal feed), the European Communities contends that final consent was given by the lead CA on 18 October 2004 (new Exhibit EC-168). Moreover, as regards MON863 maize, the European Communities contends that final consent was given by the lead CA on 13 February 2006 (new Exhibit EC-169). The European Communities would invite the Panel to take these facts into account and re-draft the footnote accordingly. In inviting the Panel to take these matters into consideration, the European Communities points out that the Complaining Parties have the opportunity to comment on these comments, and thus the possibility to state if they contest the plain facts, duly evidenced, and if so, on what basis. There is thus no due process issue or prejudice *vis-à-vis* the Complaining Parties.

6.159 The □**n**□□**ed** □□□□**e**□argues that as for paragraph 7.1303 above, the European Communities invites the Panel to make new findings, based on newly submitted exhibits, with regard to two approvals purportedly made after the establishment of the terms of reference. As the United States explained above, under the DSU and the Panel's working procedures, it would not be proper for the Panel to accept new exhibits on the measures at issue during the interim review stage, nor to make new findings to reflect the information in such exhibits.

6.160 □□**n**□**d**□similarly states that for the reasons stated above, Canada opposes the EC attempt to reopen the factual record at the interim review stage. The European Communities will have an opportunity to introduce this new evidence during the implementation stage of the proceeding. In addition, Canada recalls that Exhibit EC-169 is problematic for another reason; it is a document that

has been submitted by the European Communities in the German language only. The failure to submit a translation of Exhibit EC-169 means that the Panel should disregard this document.

6.161 **Argentina** also disagrees with the suggested modifications. As Argentina stated before, the approvals in its view do not make any difference, since Argentina believes that the Panel should make no findings about the implication of these late approvals referring to any possible end of the "*de facto*" moratorium.

6.162 The **Panel** has made appropriate changes to paragraph 7.1669 and has deleted the relevant sentence in the footnote. However, the Panel declines the European Communities' invitation to take into account the information provided by the European Communities in the new Exhibits EC-168 and EC-169.

6.163 We first address Exhibit EC-168. Exhibit EC-168 contains a decision of the Spanish Ministry of the Environment dated 18 October 2004. In addressing this Exhibit, we recall the above-referenced provisions of paragraph 12 of the Panel's Working Procedures and observe that, in this instance, the European Communities has not made a showing of good cause for submitting in March 2006 what it could have submitted already in October 2004. Indeed, the European Communities provides no reason for the late filing. The European Communities merely argues that the Complaining Parties still have an opportunity to comment on the new exhibit. This argument is misconceived. Paragraph 12 of the Panel's Working Procedures states that "[p]arties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttals, answers to questions or comments made for purposes of rebutting answers provided by others", unless an exception is granted on a showing of good cause. The fact that paragraph 18 of the Panel's Working Procedures gives the Parties the opportunity within a time-period specified by the Panel to submit written comments on the other Parties' written requests for review does not excuse the European Communities from complying with the provisions of paragraph 12 of the Working Procedures. We also recall that in *EC - Sardines* the Appellate Body stated in unqualified terms that "[t]he interim review stage is not an appropriate time to introduce new evidence".[213]

6.164 Turning to Exhibit EC-169, we note that this exhibit apparently contains a decision of the German lead CA dated 13 February 2006. As an initial matter, we recall that the document is in German and that no translation into any of three official languages of the WTO was provided. Even disregarding this, the Panel considers that it would be inappropriate to refer to the application concerning MON863 maize in footnote 1365 given that that footnote concerns the product-specific measures challenged by the Complaining Parties. None of the product-specific measures challenged by the Complaining Parties concerns the application concerning MON863 maize.

6.165 The **European Communities** identified a missing reference to the year 1999 in paragraph 7.1809.

6.166 Like Argentina, the **European Communities** identified words included by oversight in paragraph 7.1873.

6.167 The **European Communities** submits that the wording of the third sentence of paragraph 7.2222 should be changed to provide further clarification as to what the issue exactly was.

6.168 The **Panel** has made appropriate changes to paragraph 7.2229 in response to this comment.

[213] Appellate Body Report, *EC – Sardines*, para. 301.

6.169 The [illegible] requests that a footnote reference be put in paragraph 7.2324 indicating where the arguments summarized in this paragraph have been made in the US submissions. The European Communities has been unable to identify the source of the arguments set out in that paragraph. If the arguments have not been made in the US submission they should of course be deleted from the summary.

6.170 The [illegible] notes that the point that before the European Communities adopted its moratorium, all approval procedures under Directive 90/220 were undertaken and completed in less than three years is made in paragraph 138 of the US first written submission. The United States further notes that additional support for this assertion is provided in Annex II to the US reply to Panel question No. 75(c).

6.171 The [illegible] sees no need for adding a footnote and notes that its argument summary is based on arguments set out at paragraph 138 of the US first written submission which refers to, and should be read together with, Exhibit US-31. As noted by the United States, the United States' reply to Panel question No. 75(c) contains further relevant information. Nonetheless, in response to the EC comment the Panel has deleted the last sentence of paragraph 7.2331, and has modified paragraph 7.2332. Furthermore, in order to ensure consistency across Section VII.E, the Panel has made corresponding changes to all US argument summaries which relate to the other product-specific measures challenged by the United States. In reviewing its findings concerning the US argument about the period of time during which the relevant applications were pending, the Panel also noticed that a small portion of the findings had been inadvertently omitted from the interim reports, and so the Panel has added the missing portion at paragraph 7.1929. In view of this addition, a similar statement included at paragraph 7.2295 became redundant and was therefore deleted.

5 [illegible]

(a) Comments common to Canada and Argentina

6.172 [illegible] and [illegible] identified mistaken references to Argentina in paragraphs 7.3170-7.3171.

(b) Comments by Canada

6.173 [illegible] identified a typographical error at paragraph 7.2963.

6.174 [illegible] also recalls that at paragraph 7.3390, the Panel indicates that, in respect of Canada's claims under Article 2.2 of the *SPS Agreement*, the EC member State safeguard measures are inconsistent with both Articles 5.1 and 5.7, and therefore, by implication, are inconsistent with Article 2.2. Canada submits that the finding of a dual inconsistency with both Articles 5.1 and 5.7 seems to contradict the Panel's earlier reasoning on the issue of whether Articles 5.1 and 5.7 can apply at the same time. Canada understands the Panel's findings and conclusions with respect to Articles 5.1 and 5.7 to be that Article 5.7 does not apply because sufficient scientific evidence existed to complete a risk assessment at the time the safeguard measures were adopted. On that basis, Article 5.1, rather than Article 5.7, applies and the measures are inconsistent with Article 5.1 because they are not based on a risk assessment. Similarly, therefore, Article 2.2, rather than Article 5.7, would apply, and the measures would be inconsistent with it because they are not based on scientific principles, and are being maintained without sufficient scientific evidence. Canada requests the Panel to clarify this issue and make the appropriate changes in the final report.

6.175 The [illegible] argues that Canada vaguely requests the Panel to "clarify this issue and make the appropriate changes in the final report." In the European Communities' view, this is hardly compatible with the requirement set out in Article 15.2 of the DSU to submit requests to review precise aspects of the interim report. Indeed, neither is it clear what the Panel is to do in order to accede to Canada's request, nor is it possible for the European Communities to make any meaningful comment in the absence of a precise suggestion. Canada's request should therefore be refused.

6.176 The [illegible] has made appropriate changes in Sections VII and VIII of the final reports to clarify the issue identified by Canada. The Panel also notes that it has used the concept of "consistency" in connection with Article 5.7 in view of the Appellate Body's use of that concept in the *Japan – Apples* and *Japan – Agricultural Products II* reports.[214]

6 [illegible]

6.177 **Ar[illegible]** identified a mistaken reference to Canada at paragraph 8.57(c).

D. OTHER CHANGES TO THE INTERIM REPORTS

6.178 The [illegible] has also made a number of other changes, throughout the reports, which were not specifically requested by the Parties. The Panel has done so in an effort to eliminate typographical errors and edit its reports.

E. REQUEST FOR REDACTION OF PORTIONS DISCLOSING STRICTLY CONFIDENTIAL INFORMATION

6.179 As noted *infra*, at footnote 233, the Panel, at the request of the European Communities, put in place a special set of procedures for the protection of strictly confidential information ("SCI"), notably to protect sensitive company information submitted by the European Communities. The interim reports submitted to the Parties contained references to information designated by the European Communities as SCI, and the Panel identified them as such.

6.180 At the invitation of the Panel, the [illegible] on 7 April 2006 submitted specific requests for bracketing/redaction of words, sentences and/or paragraphs in the interim reports which, in its view, disclose SCI. The European Communities stated that there was no information contained in the findings of the interim reports that directly constitutes SCI. In contrast, the European Communities identified certain references at paragraphs 271, 621, 622 and 623 of Annex H which it considered to disclose SCI and which it requested to be redacted from the public versions of the final reports.

6.181 The [illegible] on 18 April 2006 made use of the opportunity granted by the Panel to comment on the EC requests. They indicated that they had no objection to the removal of the SCI designation on information contained in the body of the interim reports or to the requests for redaction as set out in the EC letter of 7 April 2006.

6.182 Taking account of the views expressed by the Parties, the [illegible] made appropriate redactions at paragraphs 271, 621, 622 and 623 of Annex H. They are identified in Annex H as "[xxx]".

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[214] Appellate Body Reports, *Japan – Apples*, paras. 176 and 177; *Japan – Agricultural Products II*, para. 89.

F. PUBLIC DISCLOSURE OF THE PANEL'S CONFIDENTIAL INTERIM REPORTS

6.183 On 7 February 2006, the Panel provided paper and electronic copies of its confidential interim reports to the Parties. On 9 February 2006, the Panel sent a letter to the Parties to draw their attention to the fact that a commercial trade publication had posted on its website the conclusions and recommendations (Section VIII) of the Panel's confidential interim reports. The Panel noted that this was a matter of grave concern to it, recalling that it was critical to the functioning of the interim review process that all Parties maintained the confidentiality of the interim reports. The Panel further recalled that confidentiality at all stages of the process is an inherent part of the WTO dispute settlement system whose purpose is to secure a positive solution to a dispute. The Panel also observed that the maintenance of the confidentiality of the interim reports was particularly important in order to avoid that information contained in the reports and designated as SCI would be disclosed to unauthorized persons. The Panel requested the Parties to provide any information they had as to how the breach of confidentiality had occurred and urged all Parties to take all necessary steps to protect the confidentiality of the interim reports.

6.184 Subsequently, on 2 March 2006, the Panel sent another letter to the Parties to point out that Friends of the Earth (FOE) Europe had posted on its website the Panel's confidential interim reports in their entirety, *i.e.*, the descriptive part as well as the findings and conclusions. The Panel noted that in a statement made available on its web site, FOE claimed to have refrained from disclosing SCI in the version it had published, on the advice of its lawyers. The Panel stated that the leak in question was particularly serious, not just because it was far more comprehensive, but also because unlike the conclusions section of the interim reports which had been previously leaked, the findings section of these reports contained SCI.

6.185 The Panel recalled in this regard that FOE claimed that it did not disclose SCI in its published versions of the findings. In the Panel's view, however, even assuming that no SCI was in fact disclosed as a result of the action of FOE, FOE's action represented another serious incident which could damage the integrity of the WTO dispute settlement system as a whole. The Panel noted in this respect that it is very difficult to see why any private party would wish to provide panels, complaining parties and responding parties with strictly confidential information that is in its sole possession if it cannot have confidence that this information will not be disclosed without its permission during the interim review process.

6.186 The Panel again requested the Parties to provide any information they might have as to how the second breach of confidentiality occurred. The Parties responded to the Panel's letters as indicated below.

6.187 The □n□ed □□□e□observed that it shared the Panel's grave concerns. With regard to the first breach of confidentiality, the United States noted that pertinent information had been posted by the relevant publication that placed Section VIII on the internet. In particular, the website noted that the source for Section VIII was the "Institute for Agriculture and Trade Policy" (IATP). The United States pointed out that IATP is an NGO that, among other things, opposes the adoption of agricultural biotechnology. The United States stated that it was certain that no person provided by the United States with access to the interim reports had any contacts with IATP regarding those reports. Moreover, the United States noted that each person provided by the United States with access to the interim reports was aware of and respected the confidential nature of the interim reports. Thus, the United States contended that it had not been, nor would it be, the source of breaches of confidentiality regarding the interim reports.

6.188 Regarding the publication by "Friends of the Earth Europe" of a complete copy of the findings (Section VII) on the internet, the United States noted that the source of the leak appeared to be the same as the source of the 8 February leak of Section VIII of the interim reports. The United States submitted that the Friends of the Earth Europe website included a press release, datelined Geneva/Brussels 8 February 2006, stating that three NGOs – Institute for Agriculture and Trade Policy, Friends of the Earth Europe, and Greenpeace – jointly published Section VIII of the interim reports on the internet. Moreover, the United States asserted that in a separate briefing paper, Friends of the Earth Europe states: "Friends of the Earth has, on legal advice, deleted limited company-specific information from the interim report we are publishing in order to avoid legal action against us." According to the United States, this statement indicates that Friends of the Earth Europe has received a complete copy of Section VII, including SCI. Furthermore, the United States emphasized, the version of the report that Friends of the Earth Europe published on the internet in fact contained several pages, without any redactions, that the cover sheet of the reports indicated as containing SCI. The United States noted in this regard that it agreed with the Panel that a leak of material containing SCI was of extraordinary concern.

6.189 In respect of this second breach of confidentiality, the United States contended that it was not the source of the leak of the confidential interim reports. According to the United States, no person provided by it with access to the interim reports had any contacts with Friends of the Earth Europe regarding the interim reports. Moreover, in accordance with the Panel's strict rules governing SCI supplied by other Parties, the United States stated that it had tightly controlled distribution and use of any portion of the interim reports containing SCI. Furthermore, the United States asserted that it was apparent from the content of the "Briefing Paper" (entitled "Looking behind the US spin: WTO ruling does not prevent countries from restricting or banning GMOs") by Friends of the Earth Europe that no Complaining Party would have had reason to provide a copy of the findings to Friends of the Earth Europe.

6.190 In addition, the United States noted that the Panel's additional SCI procedures permitted at least one possible scenario under which provision of SCI to Friends of the Earth Europe would not have been a breach of those procedures. According to the United States, the Panel's SCI rules "do not apply to a party's treatment of its own SCI", and the European Communities was the only Party that had submitted SCI in this dispute.

6.191 □□n□d□ stated that as regards the "leak" of the findings and conclusions set out in the interim report it shared the Panel's concerns. Furthermore, Canada stated that it was in no way involved in these incidents, and deplored such breaches of confidentiality. Canada noted that, despite media demands for comments based on the leak, the Government of Canada had refused to make any public statement beyond acknowledging that it has received the interim report and was studying it. Finally, Canada remarked that should any information come to its knowledge as to how the breach of confidentiality occurred it would forward this information to the Panel and the Secretariat without delay.

6.192 **Ar□en□n□** stated that it was not involved in any way in the reported leaks referenced in the Panel's letters. Moreover, Argentina stated that it had no information to provide about how the breach of confidentiality had occurred. Argentina noted, finally, that should any information come to its knowledge regarding these regrettable incidents, it would forward this information to the Panel and the Secretariat without delay.

6.193 The □□r□□e□n □□□ □ □n□□e□ stated that it was concerned by the serious breach of the confidentiality of Panel proceedings. With regard to the first breach of confidentiality, involving the disclosure of the conclusions of the interim reports, the European Communities pointed out that as far

as it could establish the leak first occurred via a United States based NGO, the Institute for Agriculture and Trade Policy, as the relevant document was posted on their website.

6.194 In respect of the second breach of confidentiality, which occurred via Friends of the Earth Europe, the European Communities said it would refrain from making groundless accusations or insinuations, or from speculating about which Party might or might not have profited from the public dissemination of the document. Instead, the European Communities said, it could confirm that it had no information about the source of the leak and no indication that there had been any breach of confidentiality attributable to the European Communities. On the contrary, the European Communities maintained, it had systematically ensured that all persons having access to the interim reports were informed of its confidentiality and the need to preserve it.

6.195 The □□**ne**□ notes with satisfaction that all Parties deplored and condemned the serious breaches of the confidentiality of the interim reports which occurred in this case. The Panel further notes that each Party formally stated that it had no involvement in the leaks of the confidential interim findings and conclusions. It is plain to see that these statements cannot easily be reconciled with the fact that these leaks did occur. However, as is apparent from the above summary of the Parties' responses to the Panel's letters, the Panel was not provided sufficient reliable information to determine the origin(s) of the leaks. The Panel subsequently sent a letter to the Parties to inform them that it intended to take appropriate action to try to avoid further leaks of the reports upon issuance of the final reports (*see* the Panel's letter to the Parties contained in Annex K).

6.196 It should be noted, in addition, that the Institute for Agriculture and Trade Policy and Friends of the Earth submitted *amicus curiae* (friend-of-the-court) briefs, requesting the Panel to accept and consider their briefs.[215] The Panel acknowledged receipt of these briefs, shared them with the Parties and Third Parties, and accepted them as such.[216] In the light of this, it is surprising and disturbing that the same NGOs which claimed to act as *amici*, or friends, of the Panel when seeking to convince the Panel to accept their unsolicited briefs subsequently found it appropriate to disclose, on their own websites, interim findings and conclusions of the Panel which were clearly designated as confidential.

□□□□ □□□□□□□

7.1 The Panel observes that the United States, Canada, Argentina and the European Communities (hereafter "the Parties") have used different terms to refer to the products at issue in this dispute. The separate requests for the establishment of a panel by the United States, Canada and Argentina (hereafter collectively referred to as "the Complaining Parties") all refer to measures affecting "biotech products".[217] The European Communities' legislation identified by all of the Parties as relevant to the case in hand refers to genetically modified organisms (hereafter "GMOs").[218] All of the Parties to the dispute agree that, technically, the specific products at issue in this case are plants (and the products thereof) developed through the use of recombinant DNA techniques.

[215] *See infra*, Section VII.A.2.
[216] *Ibid*.
[217] WT/DS291/23, WT/DS292/17 and WT/DS293/17.
[218] Council Directive 90/220/EEC "on the deliberate release into the environment of genetically modified organisms"; Regulation (EC) No 258/97 "concerning novel foods and novel food ingredients"; and Directive 2001/18/EC of the European Parliament and of the Council "on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC".

7.2 In its consideration of the matter before it, the Panel uses interchangeably the terms biotech products, GMOs, GM plants, GM crops or GM products, without prejudice to the views of the Parties to the dispute.

A. PROCEDURAL AND OTHER GENERAL MATTERS

7.3 In this opening section, we address a number of procedural and other general matters. First of all, we explain how in preparing this document we have taken account of the fact that the Complaining Parties in this dispute have brought legally separate complaints. Then we set out how we have dealt with the unsolicited *amicus curiae* briefs sent to the Panel. Next we address how we have reached and implemented our decision to consult individual scientific experts and international organizations. We then go on to explain that certain annexes to this document are available only on-line, and we offer some general remarks on the challenges faced by the Panel in conducting these proceedings. After that, we reproduce in full our preliminary ruling on whether the Complaining Parties' separate requests for the establishment of a panel are inconsistent with Article 6.2 of the DSU, as claimed by the European Communities. Finally, we address the issue of the relevance of non-WTO rules of international law to the interpretation of the WTO agreements at issue in this dispute.

1 Multiple complaints

7.4 The Complaining Parties in this dispute did not bring a joint complaint against the European Communities. Instead, they filed legally separate complaints, and separately requested the establishment of a panel. Since these requests for the establishment of a panel related to the same matter, the DSB, consistent with the procedures for multiple complaining parties provided for in Article 9.1 of the DSU, established a single panel to examine the three complaints.

7.5 Article 9.2 of the DSU provides that when a single panel is established to examine multiple complaints, the panel is to submit separate reports on the dispute concerned if one of the parties to the dispute so requests. We have sought the views of the Parties to this dispute on the question of separate panel reports. None of the Parties requested that we submit separate panel reports. Instead, as we understand it, all Parties effectively agreed that the Panel could issue a single document constituting three reports; that the introductory and descriptive parts could be common to all reports; that the findings could be common to the three reports, except where the claims presented and the evidence submitted by the Complaining Parties were different; and that the conclusions and recommendations should be different for each report.

7.6 The Panel saw no reason to disagree with the approach suggested by the Parties. Accordingly, we decided to prepare and issue one single document constituting three separate panel reports. This is why the present document bears the symbols and DS numbers of all three complaints, *i.e.*, DS291 for the complaint by the United States, DS292 for the complaint by Canada and DS293 for the complaint by Argentina. The present document comprises a common introductory part and some common annexes. The descriptive part and certain annexes contain separate sections for each Party. Thus, the description of, *e.g.*, the United States' arguments is part of the report concerning the United States' complaint. The description of the European Communities' arguments is basically relevant to all three reports, as the European Communities has provided an integrated defence in this case. However, some portions of the European Communities' arguments are relevant to only one report.

7.7 Regarding the findings section of the three reports, we have particularized the findings for each of the Complaining Parties only where we found it necessary to do so. Thus, many (although not all) of the legal interpretations developed by the Panel are common to all three reports. On the other hand, we have particularized the conclusions for each claim made by a Complaining Party. To

distinguish the complaint-specific conclusions, we use the appropriate DS numbers. Hence, a conclusion which is part of the report concerning the United States' complaint is preceded by the reference "DS291 (United States)". Where we have made findings, or relied on materials submitted as evidence[219], which are specific to one of the three complaints, we have indicated this by using the relevant DS number, if it was not otherwise clear from the relevant context. Also, in summarizing the Complaining Parties' arguments, we have provided separate summaries for each Complaining Party where the arguments were different; where the Complaining Parties' arguments were identical or very similar, we have generally prepared an integrated argument summary for all Complaining Parties.

7.8 With regard to the final section of this document, entitled "Conclusions and Recommendations", we note that the conclusions we reached and the recommendations we made have been particularized for each Complaining Party. Accordingly, this document contains three independent sets of conclusions and recommendations.

7.9 In our view, the approach outlined above satisfies the requirement contained in Article 9.2 that a single panel present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. We also consider that this approach is consistent with the approach followed in a similar situation by the panel in *US – Steel Safeguards*.[220]

2 *Amicus curiae* □r□e□

7.10 In the course of these proceedings, we received three unsolicited *amicus curiae* briefs: on 6 May 2004 we received an *amicus curiae* brief from a group of university professors[221]; on 27 May 2004 we received an *amicus curiae* brief from a group of non-governmental organizations[222] represented by the Foundation for International Environmental Law and Development (FIELD); and on 1 June 2004 we received an *amicus curiae* brief from a group of non-governmental organizations[223] represented by the Center for International Environmental Law (CIEL). These briefs were submitted to us prior to the first substantive meeting of the Panel with the Parties, and the Parties and Third Parties were given an opportunity to comment on these *amicus curiae* briefs.[224]

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[219] We note that the Complaining Parties have only partly submitted the same factual evidence in support of their claims. In some cases, the Complaining Parties have explicitly relied on evidence submitted by another Complaining Party, but no Complaining Party has stated that, for the purposes of its complaint, it wished to rely also on all evidence submitted by the other Complaining Parties.

[220] Panel Reports, *US – Steel Safeguards*, para. 10.725.

[221] Lawrence Busch (Michigan State University), Robin Grove-White (Lancaster University), Sheila Jasanoff (Harvard University), David Winickoff (Harvard University) and Brian Wynne (Lancaster University).

[222] Gene Watch, Foundation for International Environmental Law and Development (FIELD), Five Year Freeze, Royal Society for the Protection of Birds (RSPB)(UK), the Center for Food Safety (USA), Council of Canadians, Polaris Institute (Canada), Grupo de Reflexión Rural Argentina, Center for Human Rights and the Environment (CEDHA) (Argentina), Gene Campaign, Forum for Biotechnology and Food Security (India), Fundación Sociedades Sustentables (Chile), Greenpeace International (The Netherlands), Californians for GE-Free Agriculture, International Forum on Globalisation.

[223] Center for International Environmental Law (CIEL), Friends of the Earth – United States (FOE-US), Defenders of Wildlife, the Institute for Agriculture and Trade Policy (IATP), and the Organic Consumers Association (OCA).

[224] Only the United States and the European Communities referred to these briefs. The United States comments extensively on the arguments in the *amicus curiae* briefs in its second written submission, but concludes that the information provided in those briefs are of no assistance to the Panel in resolving this dispute. US second written submission, attachment III. The European Communities refers to the argument in the *amicus curiae* briefs in its first oral statement. The European Communities' first oral statement, para. 15.

7.11 We note that a panel has the discretionary authority either to accept and consider or to reject any information submitted to it, whether requested by a panel or not, or to make some other appropriate disposition thereof.[225] In this case, we accepted the information submitted by the *amici curiae* into the record. However, in rendering our decision, we did not find it necessary to take the *amicus curiae* briefs into account.

3 Consultation and deference to experts and international organizations

7.12 We now address the Panel's decision to consult individual scientific experts and certain international organizations. In this regard, Article 11.2 of the *SPS Agreement* provides that:

> "In a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical experts group, or consult the relevant international organizations, at the request of either party to the dispute or on its own initiative."

7.13 Articles 14.2 and 14.3 of the *TBT Agreement* provides that:

> "14.2 At the request of a party to a dispute, or at its own initiative, a panel may establish a technical expert group to assist in questions of a technical nature, requiring detailed consideration by experts.
>
> 14.3 Technical expert groups shall be governed by the procedures of Annex 2."

7.14 Finally, Article 13.1 of the DSU provides in relevant part:

> "Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate."

7.15 In light of the claims of the Complaining Parties that the measures at issue violated, *inter alia*, the *SPS Agreement* and/or the *TBT Agreement*, at the time of the organizational meeting the Panel established a deadline for the Parties to request the Panel to seek appropriate scientific and technical advice pursuant to the provisions of these agreements.

7.16 On 27 May 2004, the European Communities formally requested the Panel to seek advice from scientific and technical experts at an appropriate stage. In particular, the European Communities suggested that the Panel seek advice from the most relevant sources reflecting a representative spectrum of views, including individual experts and perhaps competent international organizations. Shortly thereafter, the European Communities submitted a proposal for the terms of reference for scientific and technical advice. The Complaining Parties expressed the view that they did not consider it necessary for the Panel to seek any scientific and technical advice, *inter alia* because they were not challenging the opinions or assessments of the EC scientific committees.

7.17 The Panel decided to take a decision regarding the need for expert advisers only in the light of the second written submissions by the Parties, and provided the Parties with a further opportunity to comment on the need for expert advice. The European Communities repeated its request for input from experts; the Complaining Parties continued to argue that no expert advice was necessary in the circumstances of this case.

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[225] Appellate Body Report, *US – Shrimp*, paras. 104 and 108.

7.18 On 4 August 2004, the Panel informed the Parties that it considered that certain aspects of the Parties' submissions raised scientific and/or technical issues in respect of which the Panel might benefit from expert advice. Accordingly, the Panel decided to consult individual experts to obtain their opinion on certain scientific and/or technical issues raised in the Parties' submissions.[226] In particular, the Panel indicated that it would seek expert advice on three categories of issues:

(a) for each product application, the scientific or technical grounds for: the comments and/or objections raised by EC member States, the requests for additional information, and the time taken to evaluate the additional information provided;

(b) for each product for which a safeguard measure was taken by one of the relevant EC member States, how the scientific or other documentation relied upon by these member States compares with various standards for risk assessment, and whether the documentation relied upon by these member States was sufficient to support the safeguard measures taken; and

(c) for each biotech product subject to the complaint, whether there are significant differences in the risks arising to human, plant or animal health, or to the environment, from the consumption and use of: products of biotechnology approved by the European Communities prior to October 1998; comparable novel non-biotech products; and foods produced with biotech processing aids.

7.19 Also on 4 August 2004, the Panel decided that it would seek information from certain international organizations which might assist the Panel in determining the meaning of selected terms and concepts. Most of these terms and concepts appear in the WTO agreements at issue in this dispute (*e.g.*, "pest"). We note in this regard that the European Communities argued that the Panel also needed to consult scientific experts on the meaning of the relevant terms. The Complaining Parties opposed the European Communities' request, arguing that the terms in question were terms appearing in WTO agreements and that, as such, the Panel needed to determine their meaning by applying the customary rules of interpretation of public international law, as required by Article 3.2 of the DSU.

(a) Consultation of individual experts

7.20 The Panel invited the Parties to suggest specific questions on the three issues it had identified. All of the Parties suggested specific questions on these issues. In addition, the European Communities suggested that the Panel seek the advice of at least two experts competent in at the least the following fields of expertise: agrobiodiversity, agronomy, allergology, animal husbandry, animal pathology, biochemistry, biological diversity, control and inspection methods, crop husbandry, DNA amplification, ecology, epidemiology, entomology, environmental impact monitoring methods, environmental sciences, food and feed safety, gene expression, gene sequencing, genetics, genetic modification detection methods, genomic stability, handling transport and packaging methods, herbicide chemistry, histopathology, immunology, malherberology and weed sciences, medicine, medical microbiology and antibiosis, molecular biology, nutrition, ornithology, phytopathology, plant breeding, plant development, plant-microbe interactions, plant protection and residues of plant protection products, plant reproduction and plant biology, population genetics, risk assessment and

[226] The Panel decided to seek advice from individual scientific and technical experts as no party formally requested that such information be sought from an expert group. The approach of the Panel is consistent with the approach followed by previous panels considering alleged violations of the *SPS Agreement* and the *TBT Agreement*.

risk analysis processes, sampling methods, soil chemistry and soil sciences, soil microbiology therapeutics, toxicology, and veterinary medicine.

7.21 On 19 August 2004, the Panel requested the assistance of the CBD, Codex, FAO, IPPC, OIE and WHO to identify appropriate experts to address the issues identified above. Thirty individuals were identified by these organizations, and each of these experts was contacted by the Secretariat. Those experts who were available and interested in providing advice to the Panel were requested to provide a curriculum vitae (hereafter "CV"). Nineteen experts responded positively and their CVs were provided to the Parties. The Parties were given the opportunity to comment on each expert and in particular to make known to the Panel any compelling objections they might have to the Panel's consulting that individual with respect to the case at hand. The Parties submitted their compelling objections with regard to many of the experts by pointing, for example, that: they were actually involved in the procedures at issue in this dispute; they were employees of either party to this dispute; and they had been involved in activities which might cast doubts on their impartiality.

7.22 The Parties were also invited to submit suggestions for experts with respect to the issues before the Panel. These experts were also contacted by the Secretariat, and those interested and available to assist the Panel were invited to submit a CV. These CVs were also provided to the Parties, who were again given the opportunity to comment on the experts suggested and to identify any compelling objections. Seventy additional experts were identified by the Parties, and CVs were received from 29 of these.

7.23 On 13 October 2004, the Panel informed the Parties of the names of the experts it had selected. Argentina had expressed objections to one of the experts subsequently selected by the Panel. The Panel reconsidered the qualifications of the individual concerned, as well as the information provided by the expert with respect to any potential conflicts of interest, and determined that the objections raised by Argentina did not provide compelling grounds for not selecting this expert.

7.24 According to the additional working procedures for the consultation of experts adopted by the Panel in consultation with the Parties, the experts were requested to act in their individual capacities and not as representatives of any organisation. They were not informed of the identities of the other experts advising the Panel, until such time as they were provided with the written responses to the Panel's questions from all of the experts.

7.25 The experts selected by the Panel were:

> Dr. David Andow, Department of Entomology, University of Minnesota, St. Paul, Minnesota, USA;
>
> Dr. Marilia Regini Nutti, Director, National Research Center for Food Technology, Brazilian Agricultural Research Corporation (EMBRAPA), Rio de Janeiro, Brazil;
>
> Dr. Allison Snow, Department of Evolution, Ecology & Organismal Biology, Ohio State University, Columbus, Ohio, USA; and
>
> Dr. Geoff Squire, Scottish Crop Research Institute, Dundee, United Kingdom.

One expert selected by the Panel, Dr. David J. Hill of the Department of Allergy, Royal Children's Hospital, Melbourne, Australia, subsequently informed the Panel that he was unable to assist the Panel.

7.26 The Parties were consulted with regard to the questions to be submitted to the experts in writing. The experts were provided with all relevant parts of the Parties' submissions (including exhibits and Strictly Confidential Information) on a confidential basis. Each selected expert was requested immediately to inform the Panel of those questions which he/she did not intend to answer because they did not consider that they had the appropriate expertise. Following clarification of some of its written questions, the Panel identified two issues on which the selected experts were not likely to provide advice: the molecular characterization of certain oilseed rape and starch potato products, and quantitative detection methods.

7.27 On 15 November 2004, the Panel invited the Parties to submit names of individuals with expertise on these two particular issues, preferably from among individuals who had previously indicated their willingness to advise the Panel, and to provide the CV for any new expert they wished to be considered by the Panel and the other Parties. A total of 22 individuals with expertise in one or both of these issues were identified by the Parties, including 13 new experts. The Parties were given an opportunity to comment on each of these experts and to make known any compelling objections to their selection as advisers to the Panel. The European Communities expressed objections to one of the additional experts selected by the Panel. The Panel reconsidered the qualifications of the individual concerned, as well as the information provided by the expert with respect to any potential conflicts of interest, and determined that the objections raised by European Communities did not provide compelling grounds for not selecting this expert to address the two issues identified. The Panel subsequently selected the following two additional experts to respond exclusively to questions concerning the aforementioned two issues:

> Dr. Marion Healy, Chief Scientist, Food Standards Australia New Zealand (FSANZ), ACT, Australia;
>
> Dr. John W Snape, Crop Genetics, John Innes Center, Norwich, United Kingdom.

7.28 The procedures described in paragraph 7.24 above were also followed with respect to Drs. Healy and Snape.

7.29 The Panel's 114 questions, and the written responses from the experts, are compiled in Annex H. The questions were sent to the experts on 22 October 2004, and additional questions were sent on 19 November 2004. The written responses from all of the experts to the questions by the Panel were received on 5 January 2005. The Parties were given an opportunity to comment on the replies by the experts, and subsequently to comment on the comments of the other Parties. The Parties' comments were also provided to the experts. On 17-18 February 2005, the Panel met with all of the experts; the Parties were invited to participate in this meeting. The experts were given the opportunity to provide further information regarding the questions of the Panel, to respond to the comments made by the Parties, and to respond to further questions from the Panel and the Parties. A transcript of the Panel's meeting with the experts is contained in Annex J.

7.30 The Panel wishes to record its appreciation of the experts and of their contributions to the resolution of this dispute. They provided detailed and comprehensive responses to a large number of questions from the Panel and the Parties, respecting the strict time constraints which had to be established by the Panel. They provided the necessary scientific input to assist the Panel in understanding the issues raised by the Parties and to resolve the trade dispute before it. The clarity of their explanations and their professionalism was particularly appreciated by the Panel.

(b) Consultation of international organizations

7.31 Regarding the Panel's decision to seek information from international organizations, it should be noted that the Parties were consulted both on the international organizations from which information would be sought and on the list of terms on which information would be sought. Taking into account the Parties' view, the Panel decided that it would seek information from the secretariats of the CBD, Codex, FAO, IPPC, OIE, UNEP and WHO. In December 2004, the Panel contacted these organizations and invited them to identify appropriate standard references (scientific or technical dictionaries, documents adopted or circulated by the relevant international organization, etc.) that would assist the Panel in ascertaining the meaning of certain terms and concepts. The Parties were given an opportunity to comment in writing on the materials provided to the Panel by the international organizations.

7.32 The Panel appreciates the assistance provided by the secretariats of the CBD, Codex, FAO, IPPC, OIE, UNEP and WHO with respect to its requests.

4 Annexe [illegible]e [illegible]ne [illegible]

7.33 The Panel has consulted the Parties on the need of including in the panel reports: (i) the experts' replies to the Panel's questions; (ii) the Parties' comments on these replies and on each other's comments; (iii) the transcript of the expert meeting of 17-18 February 2005; and (iv) the Parties' replies to the Panel's and each others' questions. In the event the Parties saw a need for including these documents in the panel reports, the Panel also sought the views of the Parties on whether the aforementioned documents could be made available on-line only.

7.34 After consideration of the views expressed by the Parties, the Panel decided to annex the documents in question to the three reports. However, in order to limit the page number of the paper copies of the reports circulated to Members, the Panel also decided that, except for the Parties and Third Parties to this dispute, the relevant annexes would be available electronically only, that is to say, through the WTO's public web site. The annexes in question are available in the three official WTO languages and they form an integral part of the three panel reports.

7.35 For clarity, we list below the annexes which are available on-line only:

- Annex C: Replies by the Parties to Questions Posed by the Panel on 3 June 2004 (11 pages);
- Annex D: Replies by the Parties to Questions Posed by the Panel in the Context of the First Substantive Meeting (165 pages);
- Annex E: Replies by the Parties to Questions Posed by Other Parties in the Context of the First Substantive Meeting (15 pages);
- Annex F: Replies by the Parties to Questions Posed by the Panel and Comments by the Parties on the Other Parties' Replies in the Context of the Second Substantive Meeting (191 pages);
- Annex G: Replies by Third Parties to Questions Posed by the Panel and the Parties (16 pages);

– Annex H: Replies by the Scientific Experts Advising the Panel to Questions Posed by the Panel (238 pages);

– Annex I: Comments by the Parties on the Replies by the Scientific Experts to the Questions Posed by the Panel (391 pages); and

– Annex J: Transcript of the Panel's Joint Meeting with Scientific Experts of 17 and 18 February 2005 (171 pages).

– Annex K: Letter of the Panel to the Parties of 8 May 2006 (3 pages).

7.36 The above-mentioned annexes can be found on *Documents online* (http://docsonline.wto.org/) with the document symbols, WT/DS291/R, WT/DS292/R, WT/DS293/R, plus addenda.

5 Unforeseen delays in the conduct of the present proceedings

7.37 The Panel notes that completing the present proceedings and preparing the panel reports has, unfortunately, taken considerably longer than is the case for typical WTO panel proceedings. It is fair to say, however, that the present proceedings were quite different from typical panel proceedings, and not just because typical panel proceedings involve one complaint rather than three.

7.38 Four factors in particular have made the conduct of these proceedings a challenging task for the Panel and the small group of Secretariat officials assisting it, and have contributed to the delays that have occurred in the disposition of this case.[227] They are: (i) the volume of materials to be considered by the Panel, (ii) the need for additional fact-finding in the course of the panel proceedings, (iii) the procedural and substantive complexity of the case, and (iv) the limited co-ordination of the Complaining Parties' submissions to the Panel. It is useful to offer a few explanatory observations on each of these factors.

7.39 The volume of the materials to be considered by the Panel in this dispute was, quite simply, enormous.[228] A few facts and figures serve to illustrate this point. The Panel asked a total of 201 written questions of the Parties, and a total of 114 written questions of the six scientific experts advising it. The Parties posed a total of 22 written questions to each other. The Panel received an estimated 2580 pages of written submissions (including oral statements, comments relating to the expert consultation and replies to questions) from the four Parties. An estimated 292 pages were received from the scientific experts advising the Panel. The Third Parties submitted an additional 102 pages of written submissions (including oral statements and replies to questions).[229] The *amici curiae* filed briefs totalling 96 pages. Furthermore, the Parties submitted an estimated total of 3136 documents to the Panel in support of their claims and arguments.[230] While some of these documents are short, others extend over more than one hundred pages.

[227] It is well to recall in this connection that this Panel was established on 29 August 2003, but not composed until 4 March 2004. Thus, there was an initial delay of more than six months even before the beginning of the Panel's work.

[228] The scientific experts advising the Panel also expressed this sentiment.

[229] We note that Norway alone submitted a total of 53 pages of submissions to the Panel.

[230] Of the estimated 3136 documents submitted to the Panel, the Complaining Parties submitted 417 documents and the European Communities 2719 documents. We note that there is some double-counting involved in our estimate in that the Complaining Parties in part submitted the same exhibits. The 2719 documents submitted by the European Communities include the documents provided in response to the Panel's request for information.

7.40 Another characteristic of these proceedings was the fact that very substantial amounts of information were exchanged among the Parties, not before, but during the panel proceedings. What is more, most of that information was not provided to the Panel until after the first substantive meeting of the Panel with the Parties. More specifically, the European Communities indicated at the first substantive meeting that the Panel was still lacking certain important information which the European Communities alleged supported its position in this case. The European Communities stated that it was willing to provide that information, but noted that it was to a large extent in the possession of its member States. The European Communities told the Panel that a formal request for information from the Panel would assist it in obtaining the information from its member States. With the support of the Complaining Parties, the Panel then sought additional information of the European Communities pursuant to Article 13 of the DSU.

7.41 While much information was subsequently provided by the European Communities, the information submitted was in important respects incomplete, numerous documents had not been translated into an official WTO language, and the way the European Communities initially numbered its own exhibits was confusing. This led the Panel to request the missing information, translation of relevant documents and a more user-friendly system for numbering exhibits. The European Communities complied with the Panel's follow-up request. However, in view of the delayed provision of the information requested by the Panel, the Complaining Parties requested that the second substantive meeting be postponed for several months and that they be given an opportunity, prior to the second substantive meeting, to make further written submissions (hereafter "third written submissions") with regard to the new information provided by the European Communities. The Panel acceded to these two requests.[231]

7.42 The above-mentioned situation meant that the Panel and Complaining Parties did not have all the information requested of the European Communities until seven months after the Panel was composed, and that the second substantive meeting, which at the Parties' request was held back-to-back with the Panel's meeting with the experts, was not held until almost one year after the Panel was composed. It is clear that if the information provided by the European Communities in the course of the proceedings had been available to the Complaining Parties from the outset, the proceedings could have been conducted more efficiently and with a clearer focus.[232]

7.43 The third factor we have identified is the procedural and substantive complexity of the case. On the procedural side, we have already mentioned the extensive fact-finding which had to be undertaken in the course of the proceedings.[233] We have also mentioned the expert selection process

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[231] We note that the scheduling of the second substantive meeting was also linked to the Parties' request that that meeting be held immediately following the Panel's meeting with the experts. In order for the experts to be able to reply to the Panel's questions, the experts needed to be given sufficient time to familiarize themselves with the entirety of the information submitted to the Panel.

[232] As we do not have the facts to determine why more information was apparently not gathered or provided at an earlier stage in these dispute settlement proceedings, we can only re-emphasize what the Appellate Body stated in *India – Patents (US)*:

> All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly. Facts must be disclosed freely. This must be so in consultations as well as in the more formal setting of panel proceedings. In fact, the demands of due process that are implicit in the DSU make this especially necessary during consultations. (Appellate Body Report, *India – Patents (US)*, para. 94.)

[233] As an aside, we note that in connection with this fact-finding process we put in place, in consultation with the Parties, a special set of procedures for the protection of strictly confidential information (hereafter "SCI"), notably because of sensitive company information submitted by the European Communities.

and the process through which we have identified the questions to be asked of the experts. In addition to this, a very large number of letters were exchanged between the Panel and the Parties on various other procedural and organizational matters. Thus, until the second substantive meeting with the Parties most of the Panel's time was spent either attending to the aforementioned procedural matters or studying the Parties' submissions. Regarding the substantive aspects of this case, we note that the Panel's work was made difficult not just because of the often technical and/or scientific nature of the material submitted to us, but also because the Parties' submissions raised a series of fundamental legal issues (*e.g.*, concerning the scope of the *SPS Agreement*) which required careful consideration.

7.44 The last factor to be explained is the limited co-ordination of the Complaining Parties' submissions to the Panel. By this we mean that, with few exceptions, the Complaining Parties did not put forward the same arguments or adopt each others' arguments. We recognize that since the Complaining Parties' brought three legally distinct complaints, they were under no obligation to co-ordinate their submissions to the Panel. We also recognize that the measures challenged and the claims presented by the Complaining Parties were not identical. However, there is a significant overlap among the three complaints. Given the complexity of this case and the vast amount of information to be taken into account, it would have alleviated our burden – and that of the Responding Party – if the Complaining Parties had been able more consistently to provide the same, or at least substantially the same, argumentation on common elements of their complaints.[234] Indeed, in view of the differences among the Complaining Parties' submissions, even simple tasks, like summarizing the Complaining Parties' arguments on a particular issue, required much time. Needless to say, the submission of different arguments by the Complaining Parties also meant that there were more arguments which the Panel needed to consider and address in its reports.

7.45 While the four foregoing factors have contributed to the successive delays in the disposition of this case, we furthermore note another factor which contributed to, at least, the last postponement of the deadline for our interim report: the reduced availability of some of the Secretariat staff assisting the Panel, notably because of the preparations for the Ministerial Conference in Hong Kong. Due to the need for familiarity with the case file it was not possible adequately to address this problem by assigning other staff to the case.

7.46 Having outlined some of the challenges faced by the Panel, we want to acknowledge that each of the Parties to this dispute, and perhaps Argentina in particular given its status as a developing country Member, has faced considerable difficulties of its own in coping with all the information put before the Panel, in responding to the claims and arguments presented by the other Parties and in meeting the generally tight deadlines imposed by the Panel. At the end of the second substantive meeting, the Panel expressed its appreciation for the Parties' co-operation and for their contributions, which had to be made under difficult circumstances.

6 Consideration of the request for preliminary ruling under Article 6.2 of the DSU

7.47 On 8 April 2004, the Panel issued a preliminary ruling in response to a request by the European Communities that the separate requests for the establishment of a panel made by the United States, Canada and Argentina are inconsistent with the requirements of Article 6.2 of the DSU. The Panel's preliminary ruling is reproduced below as it was sent to the Parties, with original footnotes appearing as endnotes at the end of the reproduced ruling.

[234] We note in this regard that in the panel proceedings in *US – Steel Safeguards* the eight complaining parties at least in part divided among themselves the argumentation on common elements of their complaints. Panel Report, *US – Steel Safeguards*, para. 10.726.

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1. On 8 March 2004, the European Communities submitted to the Panel a request for a preliminary ruling. The European Communities requested that the Panel rule, as early as possible in the proceedings, that the separate requests for the establishment of a panel (hereafter "panel requests") made by the United States[1], Canada[2] and Argentina[3] are inconsistent with the requirements of Article 6.2 of the DSU.

2. After consultations with the parties regarding the procedural implications of the European Communities' preliminary ruling request, the Panel decided to issue a preliminary ruling before the due date of the Complaining Parties' first written submissions. The Panel gave an opportunity to the Complaining Parties to submit written comments on the European Communities' request and also invited the third parties to submit any written comments they might have in response to the views expressed by the parties.[4] The Complaining Parties filed their comments on 24 March 2004. The third parties' comments were due on 29 March 2004, but none were filed. The Panel also put a number of written questions to the parties. The parties provided written replies to these questions on 29 March 2004. The Panel issued its ruling to the parties and third parties on 8 April 2004.

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3. Article 6.2 of the DSU provides in relevant part:

> The request for the establishment of a panel shall […] identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

4. In respect of Article 6.2 the Appellate Body observed that:

> […] compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be "cured" in the subsequent submissions of the parties during the panel proceedings.[5] […] Moreover, compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances.[6]

5. In its preliminary ruling request of 8 March 2004, the □□r□□e□n □□□ □ □n□□e□ asserts that the Complaining Parties' panel requests fail to satisfy the requirements set out in Article 6.2 of the DSU, specifically, the requirement to identify the specific measures at issue, and the requirement to provide a brief summary of the legal basis of the complaints sufficient to present the problem clearly. According to the European Communities, the requirement to identify the specific measures at issue is not met because the Complaining Parties' panel requests speak of two distinct measures – one being the "suspension of consideration of applications/approvals" and the other being the "failure to grant approvals" – but fail to describe what these measures consist of. Regarding the requirement to provide a

summary of the legal basis of the complaints, the European Communities further asserts that the Complaining Parties' panel requests do not meet this requirement because they merely list a large number of provisions and fail to indicate which provisions are alleged to be violated by which measures. In the European Communities' view, the Panel's jurisdiction cannot, therefore, be clearly defined and the European Communities has been prevented from properly preparing its defence.

6. The [illegible] all consider that the European Communities' preliminary ruling request lacks merit and that it should, therefore, be rejected. In particular, the Complaining Parties consider that their panel requests clearly specify the specific measures in dispute. According to the Complaining Parties, what the European Communities is asking in this case is that the Panel require the Complaining Parties to identify the evidence supporting the existence of the measures identified. The Complaining Parties further consider that, contrary to what the European Communities suggests, their panel requests do provide a brief summary of the legal basis of the complaints sufficient to present the problem clearly. In the Complaining Parties' views, the European Communities' arguments in respect of the summary of the legal basis are based on a suggestion which has already been rejected by the Appellate Body, namely, that a complaining party must summarize its legal arguments in its panel request. Finally, the Complaining Parties argue that, in any event the European Communities has failed to establish its claim that its ability to defend itself has been prejudiced by the alleged lack of specificity in the Complaining Parties' panel requests.[7]

7. The [illegible] will first address the European Communities' assertion that the Complaining Parties' panel requests do not meet the requirement to identify the specific measures at issue. Thereafter, the Panel will examine the European Communities' assertion that the panel requests fail to satisfy the requirement to provide a brief summary of the legal basis of the complaints sufficient to present the problem clearly. Should the Panel find that any of the panel requests falls short of either of the two aforementioned requirements, the Panel will proceed to address the issue of the prejudice, if any, suffered by the European Communities as a result of the allegedly defective panel request(s).

3 [illegible]

(a) Relevant text of the panel requests at issue

(i) The United States' panel request

8. The United States' panel request describes the relevant EC measures as follows:[8]

> Since October 1998, the European Communities ("EC") has applied a moratorium on the approval of products of agricultural biotechnology ("biotech products"). Pursuant to the moratorium, the EC has suspended consideration of applications for, or granting of, approval of biotech products under the EC approval system. In particular, the EC has blocked in the approval process under EC legislation[9] all applications for placing biotech products on the market, and has not considered any application for final approval.

The approvals moratorium has restricted imports of agricultural and food products from the United States.

In addition, EC member States maintain a number of national marketing and import bans on biotech products even though those products have already been approved by the EC for import and marketing in the EC. The national marketing and import bans have restricted imports of agricultural and food products from the United States.

The measures affecting biotech products covered in this panel request are:

(1) as described above, the suspension by the EC of consideration of applications for, or granting of, approval of biotech products;

(2) as described above, the failure by the EC to consider for approval applications for the biotech products mentioned in Annexes I and II to this request; and

(3) national marketing and import bans maintained by member States, as described in Annex III to this request.

(ii) Canada's panel request

9. Canada's panel request describes the relevant EC measures as follows:[10]

Since October 1998, the European Communities ("EC") has maintained a moratorium on the approval of products of agricultural biotechnology, which are food or food ingredients that contain or consist of, or are produced from, genetically modified organisms, and genetically modified organisms intended for release into the environment ("biotech products"). The EC effectively has suspended the consideration of applications for approval of biotech products, and the granting of approvals for those products, under the relevant EC approvals processes.[11] Specific examples of such applications, and a brief description of the actions taken to block their consideration or approval, are set out in Annex I.

In addition to the moratorium, France, Greece, Austria and Italy maintain national measures prohibiting the importation, marketing or sale of biotech products that had already been approved, prior to October 1998, under the relevant EC approvals processes, for importation, marketing or sale in the EC. These national measures, and the products to which they apply, are identified in Annex II.

[…]

The measures covered in this panel request are:

1. the general suspension by the EC of its own processes for the consideration of applications for, and the granting of, approval for biotech products;

2. the failure by the EC to consider or approve, without undue delay, applications for approval of the products identified in Annex I; and

3. the national measures identified in Annex II prohibiting the importation, marketing or sale of the specified EC-approved biotech products.

(iii) Argentina's panel request

10. Argentina's panel request describes the relevant EC measures as follows:[12]

The European Communities has applied a *de facto* moratorium on the approval of agricultural biotechnology products since October 1998. This *de facto* moratorium[13] has led to the suspension of and failure to consider various applications for approval of agricultural biotechnology products as well as to undue delays in finalizing the processing of applications for the approval of such products under Community legislation.[14]

Furthermore, several EC member States have introduced bans on a number of agricultural biotechnology products which have already been approved at Community level, thereby infringing both WTO rules and Community legislation.

This action taken by the European Communities […] adversely affects agricultural biotechnology products from Argentina.

The measures at issue and in relation to which the establishment of a panel is requested are as follows:

(1) Suspension of consideration of and failure to consider various applications for endorsement or approval of agricultural biotechnology products;

(2) undue delays in finalizing consideration of various applications for approval of agricultural biotechnology products; and

(3) bans on agricultural biotechnology products introduced by EC member States[15] which infringe both WTO rules and Community legislation.

(b) Analysis

11. The □□r□□e□n □□□ □ □n□□e□ notes that all three panel requests make an explicit distinction between, on the one hand, an alleged "suspension" of the approval process and, on the other hand, an alleged "failure" to act. The European Communities asserts that it is "in the dark" on the meaning of the reference to an alleged "suspension" because none of three panel requests contains any explanation or description of what the alleged "suspension" is as opposed to the "failure" to proceed in the approval process.

12. The European Communities argues that if the Complaining Parties intended to use the term "suspension" to refer to the action of blocking the approval process, then that action is not described anywhere. The European Communities notes in this regard that there is no indication in the panel requests whether there is some kind of executive or normative act (e.g., moratorium legislation) pursuant to which the European Communities would have proceeded to suspend the approval process. If, on the other hand, the Complaining Parties intended to use the term "suspension" to refer to a situation where "nothing is happening", then it would seem impossible to distinguish "suspension" from the alleged inaction – the failure to consider or grant approvals. In the European Communities' view, if a Member is supposed to defend itself against two distinct measures, what these are and how they differ from each other should be specified in the panel request.

13. Based on the foregoing, the European Communities requests the Panel to find that by speaking of two distinct measures, one being the suspension of consideration of applications, or of approvals, and the other being the failure to grant approvals, without describing what these two measures consist of, the panel requests do not "identify the specific measures at issue".

14. The □□ne□ notes that the three panel requests use different wording to describe the measures at issue. Therefore, the Panel will consider the three panel requests separately.

15. Before proceeding to consider the three panel requests, it is useful to recall that the requirement to "identify the specific measures at issue" has recently been addressed by the panel in *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*. That panel found that "the ordinary meaning of the phrase 'identify the specific measures at issue' is 'to establish the identity of the precise measures at issue'".[16] The panel then went on to state the following:[17]

> In considering whether a panel request can be said to have identified the specific, or precise, measures at issue, we find relevant the statement by the Appellate Body that whether the actual terms used in a panel request to identify the measures at issue are sufficiently precise to meet the requirements of Article 6.2 "depends […] upon whether they satisfy the purposes of [those] requirements".[18] We also find relevant the statement by the Appellate Body that "compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances".

> […]
>
> We consider that in the absence of an explicit identification of a measure of general application by name, […] sufficient information must be provided in the request for establishment of a panel itself that effectively identifies the precise measures at issue. Whether sufficient information is provided on the face of the panel request will depend, as noted above, on whether the information provided serves the purposes of Article 6.2, and in particular its due process objective, as well as the specific circumstances of each case, including the type of measure that is at issue.

16. The Panel agrees with this analysis and, accordingly, will follow it in this case.

(i) The United States' panel request

17. The [illegible] argues that the European Communities does not and cannot explain how the United States' description of the measures at issue amounts to a failure to meet the requirement of Article 6.2 "to identify the specific measures issue". According to the United States, it is difficult to see how the concept of a "suspension" of the consideration and granting of approvals is at all ambiguous. The United States considers that in the light of statements by EC officials acknowledging the existence of a *de facto* moratorium, the European Communities' claim that the meaning of "suspension" is unclear is not credible. The United States further argues that the European Communities cannot profit from its own lack of transparency by arguing that the United States has not identified the moratorium with sufficient specificity.

18. The United States also asserts that, in the context of its panel request, the reason for using the phrases "the suspension of consideration" and "the failure to consider" is quite clear. The first phrase is used to describe the European Communities' "across-the-board moratorium affecting all biotech products". The second phrase is used to describe the European Communities' conduct as it affects the specific products identified in the annexes to the panel request. According to the United States, the two phrases are "simply two different wordings for the same concept", although the word "suspension" fits better with the European Communities' conduct as it affects all biotech applications, while the phrase "failure to consider" fits better with specific applications.

19. The [illegible] begins its analysis by recalling that the first measure referred to in the United States' panel request is described as follows:

> "(1) as described above, the suspension by the EC of consideration of applications for, or granting of, approval of biotech products".

20. The noun "suspension" is defined as "the action of suspending or the condition of being suspended".[19] In turn, the verb "to suspend" is defined as "to halt temporarily".[20] It is clear from these dictionary definitions that the measure the United States is complaining about is the "temporary halting" by the European

Communities of the consideration of applications for approval of biotech products and of the granting of approval for such products.

21. The introductory paragraph of the United States' panel request provides additional information on the first measure referred to in the panel request.[21] In particular, the introductory paragraph explains that the European Communities has suspended the consideration of applications and the granting of approvals of biotech products "pursuant to" an "approvals moratorium" which the European Communities has allegedly "applied" "[s]ince October 1998". In a footnote to the introductory paragraph, the United States also identifies relevant EC approval legislation by name and place and date of publication.

22. The European Communities has pointed out that the United States' panel request refers to an "approvals moratorium" without identifying, either by name or date of adoption, any executive decree or legislative act through which the moratorium has been implemented. In response, the United States notes that the moratorium in question is a "*de facto* measure"[22]. We recall in this connection that the panel in *Canada – Wheat Exports and Grain Imports* observed that a determination of whether a panel request contains sufficient information that effectively identifies the precise measures at issue must take into account, *inter alia*, "the specific circumstances of each case, including the type of measure that is at issue".[23] The panel in *Canada – Wheat Exports and Grain Imports* distinguished between measures of general application and particular actions taken pursuant to such measures.[24] We consider that another appropriate distinction is that between formal (*de iure*) governmental measures and informal (*de facto*) governmental measures.[25] In our view, the informal nature of a governmental measure may affect the degree of precision with which such a measure can be set out in a panel request. Notably, it will often not be possible to identify informal measures by their name, date of adoption and/or legal status.

23. In the present case, it is unclear whether the United States could have identified the alleged *de facto* moratorium with more specificity than it has. The United States alleges that the European Communities has not been sufficiently transparent with respect to the alleged moratorium. The United States notably asserts that, during the consultations prior to the establishment of the Panel, the European Communities denied that the moratorium even exists although EC officials had previously acknowledged its existence in public statements.[26] As indicated above, the European Communities mentions that the panel request does not describe whether there is "supposed to be a decision or some other kind of normative or executive act, perhaps a moratorium legislation of the kind New Zealand had".[27] However, the European Communities has adduced no evidence which would support the view that the United States could have described the alleged *de facto* moratorium with greater precision. We recall in this regard that, for the purposes of this preliminary ruling, it is the European Communities as the party claiming an inconsistency with Article 6.2 which bears the burden of proof.

24. Even assuming that the United States could have provided further details on the alleged *de facto* moratorium, we consider that the description of the first measure covered in the panel request, when read together with the introductory paragraph, adequately identifies the specific measure that is being challenged. In our view, the information provided is sufficient to meet the due process objective inherent in

Article 6.2 of the DSU. In particular, the European Communities has not persuaded us that the information contained in the description of the first measure and the introductory paragraph does not allow the European Communities to "begin preparing its defence"[28] in a meaningful way.[29]

25. Before reaching a final conclusion, however, we need to consider the European Communities' argument that the reference to "suspension of consideration" in the description of the first measure covered in the United States' panel request is so similar to the reference to "failure to consider" in the description of the second measure that it is effectively impossible, in the absence of some explanation in the panel request, to know the difference between the first and second measure set out in the United States' panel request.

26. The United States submits that the phrases "suspension of consideration" in the description of the first measure and "failure to consider" in the description of the second measure are intended to express the same general idea.[30] But this does not mean that the first and second measure set out in the United States' panel request are essentially indistinguishable. As the United States has pointed out, the first measure concerns applications for approval of "biotech products", that is to say, applications for approval of any and all biotech products. In contrast, the second measure concerns applications for approval of "the biotech products mentioned in Annexes I and II to this request". Thus, it is clear to us from the descriptions of the two measures in the United States' panel request that the first measure has a broader product scope than the second measure.

27. In the light of this important difference in the description of the two measures in question, we do not agree with the European Communities that "by speaking of two distinct measures, one being the suspension of consideration of applications/of approvals, and the other being the failure to grant approvals"[31], the United States' panel request fails to identify the specific measures at issue.

28. In conclusion, we find that the European Communities has failed to establish that the United States' panel request, and in particular the reference to an alleged "suspension" of the approval processes, does not satisfy the requirement in Article 6.2 to identify the specific measures at issue.

(ii) Canada's panel request

29. □□n□d□ argues that the phrase "the general suspension by the EC of its own processes for consideration of applications for, and the granting of, approval of biotech products" sufficiently identifies the specific measure at issue. Canada submits that the aforementioned phrase is a more detailed description of the moratorium referred to in the introductory paragraph of Canada's panel request.[32] Canada further points out that, in Annex I, its panel request sets out specific examples of applications for approval of biotech products, including a brief description of the actions taken to block their consideration or approval. According to Canada, the repeated failures by the European Communities to consider or approve these applications are examples of the moratorium. Canada also notes that the moratorium has not been formally adopted. Canada submits that if the European Communities had adopted the moratorium as a formal measure and complied with various transparency requirements of the *WTO Agreement*, Canada would have been in a

position to identify the moratorium by name, date of adoption, etc. Canada argues that the European Communities cannot use its own lack of regulatory transparency as a shield against a WTO challenge. Canada observes, finally, that it is in any event difficult to understand that the European Communities is unable to identify the measure at issue. According to Canada, the existence of the moratorium has been widely recognized and discussed by EC officials.

30. Canada further submits that the phrases "the general suspension" and "the failure to consider or approve" are used to describe different aspects of the European Communities' conduct. Canada notes in this regard that the phrase "general suspension" is used to describe the European Communities' conduct in relation to the whole class of biotech products, while the phrase "failure to consider or approve" is used to describe the European Communities' conduct as it affects the four specific products identified in Annex I to the panel request.

31. The □□**ne**□recalls that the first measure referred to in Canada's panel request is described as follows:

> "1. the general suspension by the EC of its own processes for consideration of applications for, and the granting of, approval of biotech products".

32. As noted above[33], it is clear from the dictionary meanings of the word "suspension" that the measure Canada is complaining about is the general "temporary halting" by the European Communities of its own processes for the consideration of applications for approval of biotech products and for the granting of approval for such products.

33. The introductory paragraph of Canada's panel request provides additional information on the first measure referred to in the panel request. In particular, the introductory paragraph explains that "[s]ince October 1998", the European Communities has "maintained" a "moratorium" on the approval of biotech products and that the European Communities has "effectively" suspended the consideration of applications and the granting of approvals of biotech products under the relevant EC approval processes. In a footnote to the introductory paragraph, Canada identifies by name and place and date of publication EC legislation which sets out the relevant approval processes.

34. The European Communities has pointed out that Canada's panel request refers to a "moratorium" without identifying, either by name or date of adoption, any executive decree or legislative act through which the moratorium has been implemented. Canada notes in this regard that the moratorium has not been adopted as a formal legal measure. As we have noted above[34], in our view, the informal nature of a governmental measure may affect the degree of precision with which such a measure can be set out in a panel request. In the present case, it is unclear whether Canada could have identified the alleged *de facto* moratorium with more specificity than it has. Canada argues in this respect that the European Communities should not be allowed to profit from its own lack of regulatory transparency. In addition, Canada asserts that the existence of the moratorium has been recognized by EC officials in public statements.[35] As indicated above[36], the European Communities has

adduced no evidence which would support the view that Canada could have described the alleged *de facto* moratorium with greater precision.

35. Even assuming that Canada could have provided further details on the alleged *de facto* moratorium, we consider that the description of the first measure covered in the panel request, when read together with the introductory paragraph, adequately identifies the specific measure that is being challenged. In our view, the information provided is sufficient to meet the due process objective inherent in Article 6.2 of the DSU. In particular, the European Communities has not persuaded us that the information contained in the description of the first measure and the introductory paragraph does not allow the European Communities to "begin preparing its defence"[37] in a meaningful way.[38]

36. Before reaching a final conclusion, however, we need to consider the European Communities' argument that the reference to "the general suspension" in the description of the first measure covered in Canada's panel request is so similar to the reference to "the failure to consider or approve" in the description of the second measure that it is effectively impossible, in the absence of some explanation in the panel request, to know the difference between the first and second measure set out in Canada's panel request.

37. We note Canada's explanation that the references to "the general suspension" in the description of the first measure and to "the failure to consider or approve" in the description of the second measure reflect the fact that the two measures concern different aspects of the European Communities' conduct. According to Canada, the reference to "the general suspension" is used because the first measure concerns applications for approval for "biotech products". In other words, as Canada puts it, the first measure concerns the European Communities' conduct in relation to the whole class of biotech products. Regarding the reference to "the failure to consider or approve", Canada notes that it was used because the second measure concerns the European Communities' conduct in relation to specific applications for approval of the four biotech products "identified in Annex I". In our view, Canada's explanation is consistent with a natural reading of the descriptions in question. That the first measure has a broader product scope than the second measure is further confirmed by the fact that Canada refers to the general suspension by the European Communities of "its own processes" for the consideration of applications for, and the granting of, approval of biotech products. The approval processes in question would appear to apply to all qualifying biotech products, not just the four identified in the annex to Canada's panel request.

38. In the light of this important difference in the description of the two measures in question, we do not agree with the European Communities that "by speaking of two distinct measures, one being the suspension of consideration of applications/of approvals, and the other being the failure to grant approvals"[39], Canada's panel request fails to identify the specific measures at issue.

39. In conclusion, we find that the European Communities has failed to establish that Canada's panel request, and in particular the reference to an alleged "general suspension" of the approval processes, does not satisfy the requirement in Article 6.2 to identify the specific measures at issue.

(iii) Argentina's panel request

40. **Argentina** argues that the word "suspension" can be easily understood by reading the relevant paragraph, which links the word suspension to the phrase "various applications for approval of agricultural biotechnology products". Argentina submits that it is clear that the measure at issue is the *de facto* suspension of consideration of various applications within the pipeline defined by the EC regulatory scheme. Argentina further notes that the second paragraph of its panel request makes clear that the action which led to the suspension of consideration of various applications is the *de facto* moratorium applied by the European Communities. According to Argentina, the type of measure at issue necessarily affects the extent and nature of information required to present a claim. Argentina recalls in this respect the informal nature of the EC moratorium which, Argentina says, is not contained in a particular legal act or executive order.

41. Regarding the distinction between the phrases "suspension of consideration" and "failure to consider", Argentina notes that "suspension of consideration" describes a situation where applications have been considered but where the consideration is suffering a delay, whereas "failure to consider" describes a situation where applications were submitted but there is a failure to consider them. Argentina points out that the status of various applications within the EC regulatory scheme is an issue that was discussed at length during consultations with the European Communities.

42. The **United States** recalls that the first measure referred to in Argentina's panel request is described as follows:

> (1) Suspension of consideration of and failure to consider various applications for endorsement or approval of agricultural biotechnology products.

43. As noted above[40], it is clear from the dictionary meanings of the word "suspension" that what Argentina is complaining about is the "temporary halting" by the European Communities of the consideration of various applications for endorsement or approval of biotech products.

44. The second paragraph of Argentina's panel request provides additional information on the first measure referred to in the panel request.[41] In particular, the second paragraph explains that "[s]ince October 1998", the European Communities has "applied" a "*de facto* moratorium"[42] on the approval of biotech products, which has "led to the suspension of and failure to consider various applications for approval [...] under Community legislation". In a footnote to the second paragraph, Argentina also identifies relevant EC legislation by name and place and date of publication.

45. The European Communities has pointed out that Argentina's panel request refers to a "moratorium" without identifying, either by name or date of adoption, any executive decree or legislative act through which the moratorium has been implemented. Argentina responds that the nature of the measure in question, which in this case is a *de facto* measure, necessarily affects the extent and nature of the information that needs to be provided. As we have noted above[43], in our view, the informal nature of a governmental measure may affect the degree of precision with

which such a measure can be set out in a panel request. In the present case, it is unclear whether Argentina could have identified the alleged *de facto* moratorium with more specificity than it has. Argentina suggests that the Panel should resist what it considers is an effort by the European Communities to obtain a detailed factual description of the alleged moratorium. In Argentina's view, it is not necessary to provide a detailed factual description in a panel request, since this is a matter to be dealt with in the course of the panel proceedings. As indicated above[44], the European Communities has adduced no evidence which would support the view that Argentina could have described the alleged *de facto* moratorium with greater precision.

46. Even assuming that Argentina could have provided further details on the alleged *de facto* moratorium, we consider that the description of the first measure covered in the panel request, when read together with the second paragraph, adequately identifies the specific measure that is being challenged. In our view, the information provided is sufficient to meet the due process objective inherent in Article 6.2 of the DSU. In particular, the European Communities has not persuaded us that the information contained in the description of the first measure and the second paragraph does not allow the European Communities to "begin preparing its defence"[45] in a meaningful way.[46]

47. Before reaching a final conclusion, however, we need to consider the European Communities' argument that the reference to "suspension of consideration" in Argentina's description of the first measure is so similar to the reference to "failure to consider" in the description of the same measure that it is effectively impossible, in the absence of some explanation in the panel request, to know the difference between these two aspects.

48. We note Argentina's explanation that the references to "suspension of consideration" and to "failure to consider" reflect the fact that various applications for approval have been affected by the *de facto* moratorium at different stages of the approval process. According to Argentina, some applications were considered and then the consideration was suspended, while others were submitted for consideration, but were not in fact considered. We have no difficulty accepting Argentina's explanation. We think Argentina's explanation is consistent with the ordinary meaning of the phrases "suspension of consideration" and "failure to consider"[47], and we do not, therefore, consider that it was necessary for Argentina's panel request to provide further explanation in this regard.

49. In the light of this, we do not agree with the European Communities that "by speaking of two distinct measures, one being the suspension of consideration of applications/of approvals, and the other being the failure to grant approvals"[48], Argentina's panel request does not properly identify the specific measures at issue.

50. In conclusion, we find that the European Communities has failed to establish that Argentina's panel request, and in particular the reference to an alleged "suspension" of the approval processes, does not satisfy the requirement in Article 6.2 to identify the specific measures at issue.

4 [illegible]

51. The Panel next turns to examine the European Communities' assertion that the Complaining Parties' panel requests do not provide a brief summary of the legal basis of the complaints sufficient to present the problem clearly.

(a) Relevant text of the panel requests at issue

(i) The United States' panel request

52. The United States' panel request summarizes the legal basis of the United States' complaint as follows:[49]

> These measures appear to be inconsistent with the following provisions of the *Agreement on the Application of Sanitary and Phytosanitary Measures* ("SPS Agreement"), the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), the *Agreement on Agriculture* ("Agriculture Agreement"), and the *Agreement on Technical Barriers to Trade* ("TBT Agreement"):
>
> > (1) SPS Agreement, Articles 2.2, 2.3, 5.1, 5.2, 5.5, 5.6, 7 and 8, and Annexes B(1), B(2), B(5), C(1)(a), C(1)(b), and C(1)(e);
> >
> > (2) GATT 1994, Articles I:1, III:4, X:1, and XI:1;
> >
> > (3) Agriculture Agreement, Article 4.2; and
> >
> > (4) TBT Agreement, Articles 2.1, 2.2, 2.8, 2.9, 2.11, 2.12, 5.1.1, 5.1.2, 5.2.1, 5.2.2, 5.6 and 5.8.
>
> The EC's measures also appear to nullify or impair the benefits accruing to the United States directly or indirectly under the cited agreements.

(ii) Canada's panel request

53. Canada's panel request summarizes the legal basis of Canada's complaint as follows:[50]

> These measures are inconsistent with the obligations of the EC under the SPS Agreement, the TBT Agreement, the Agreement on Agriculture and the GATT 1994. In particular, the measures violate the following provisions of these agreements:
>
> - Articles 2.2, 2.3, 5.1, 5.2, 5.5, 5.6, 7, 8, and paragraphs 1, 2 and 5 of Annex B, and paragraphs 1(a), 1(b), 1(c), and 1(e) of Annex C of the SPS Agreement;

- Articles 2.1, 2.2, 2.8, 2.9, 2.11, 2.12, 5.1, 5.2.1, 5.2.2, 5.2.3, 5.6 and 5.8 of the TBT Agreement;

- Articles I:1, III:4, X:1 and XI:1 of the GATT 1994;

- Article 4.2 of the Agreement on Agriculture.

These violations nullify or impair the benefits accruing to Canada under these agreements. In addition, the measures nullify and impair the benefits accruing to Canada in the sense of Article XXIII:1(b) of the GATT 1994.

(iii) Argentina's panel request

54. Argentina's panel request summarizes the legal basis of Argentina's complaint as follows:[51]

> The measures in question taken by the European Communities and several of its member States infringe the following provisions of the WTO Agreements:
>
> (a) Articles 2.2, 2.3, 5.1, 5.2, 5.5, 5.6, 7, 8 and 10.1 and Annexes B(1) and (5) and C(1)(a), (b), (c), (d) and (e) of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement);
>
> (b) Article 4.2 of the Agreement on Agriculture (AoA);
>
> (c) Articles I.1, III.4, X.1, X.3(a) and XI.1 of the GATT 1994;
>
> (d) Articles 2.1, 2.2, 2.8, 2.9, 2.11, 5.1, 5.2.1, 5.2.2, 5.2.3, 5.2.4, 5.6, 5.8 and 12 of the Agreement on Technical Barriers to Trade (TBT Agreement).
>
> The measures at issue nullify or impair the benefits accruing to Argentina under these Agreements.

(b) Analysis

55. The □□r□□e□n □□□ □ □n□□e□asserts that none of the Complaining Parties' panel requests provides a brief summary of the legal basis of the complaints sufficient to present the problem clearly. Specifically, the three panel requests do not make it clear (1) which obligations are alleged to be violated and (2) which measures are in violation of which obligations.

56. The □□ne□ will address the two issues identified by the European Communities separately.

57. Before going further, it is useful briefly to set out relevant Appellate Body jurisprudence. Thus, in *Thailand – H-Beams*, the Appellate Body observed that:[52]

> Article 6.2 of the DSU calls for sufficient clarity with respect to the legal basis of the complaint, that is, with respect to the "claims" that are being asserted by the complaining party.[53] A defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence.[54] Likewise, those Members of the WTO who intend to participate as third parties in panel proceedings must be informed of the legal basis of the complaint. This requirement of due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings.

58. In Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, the Appellate Body stated that:[55]

> Identification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all.[56] But it may not always be enough. There may be situations where the simple listing of the articles of the agreement or agreements involved may, in the light of attendant circumstances, suffice to meet the standard of *clarity* in the statement of the legal basis of the complaint. However, there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2.

59. Finally, in *US – Carbon Steel*, the Appellate Body clarified that:[57]

> […] whether […] a listing [of the treaty provisions allegedly violated] is *sufficient* to constitute a "brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 will depend on the circumstances of each case, and in particular on the extent to which mere reference to a treaty provision sheds light on the nature of the obligation at issue.[58]

(i) Listing of provisions

60. The □□r□□e□n □□□ □ □n□□e□asserts that the mere listing of treaty provisions is not sufficient in this case. The European Communities notes in this regard that several of the treaty provisions identified in the panel requests contain multiple obligations. Specifically, the European Communities refers to Articles 2.2, 2.3, 5.5, 7, 8, Annex B(5) and Annex C(1)(b) of the *SPS Agreement* as well as Articles 2.9, 5.2.2, 5.6 and 12 of the *TBT Agreement*. The European Communities submits that the mere listing of the aforementioned provisions makes it impossible to know the obligations that are alleged to have been violated.

61. The European Communities further notes that several of the provisions listed are either mutually exclusive (such as those contained in the *SPS Agreement* and in the *TBT Agreement*) or subordinated (such as those of the GATT 1994 in relation to the ones contained in the other WTO agreements at issue). The European Communities notes that the panel requests do not explain how the claims would be articulated. For instance, they do not explain whether all provisions apply simultaneously to different aspects of the measures, or whether some are listed only subsidiarily.

62. The United States notes that it has applied the following method in citing provisions. Where an article consisted of more than one paragraph, the paragraph has been identified. Where an article has sub-paragraphs, in most cases, sub-paragraphs have been identified. The United States notes that there are three exceptions, namely, Annex B(5) of the *SPS Agreement* and Articles 2.9 and 5.6 of the *TBT Agreement*. According to the United States, these three exceptions contain several sub-paragraphs establishing related transparency obligations. The United States did not identify specific sub-paragraphs because it considers that the EC measures at issue are inconsistent with each of the sub-paragraphs.

63. The United States also notes that it was required to cite provisions of the *SPS Agreement* and the *TBT Agreement* because the European Communities has refused to acknowledge that the alleged moratorium falls within the scope of the *SPS Agreement*. According to the United States, it is difficult to understand, therefore, how the European Communities could claim any confusion or prejudice from citing provisions of both agreements.

64. Canada argues that the it has adequately identified the obligations at issue. Canada notes that it has applied the following method in citing provisions in its panel request. Where a provision contains more than one discrete obligation, Canada listed the specific obligation that it believes has been violated by referring to the paragraph or sub-paragraph in the article pertaining to the violated obligation. Canada notes that there are two exceptions to this rule. *First*, where a provision contains more than one obligation and Canada considers that the measures at issue are inconsistent with all of them, Canada did not specify sub-paragraphs, but cited the provision as a whole. *Second*, in the case of Article 5.5 of the *SPS Agreement*, Canada argues that it is clear that Canada did not mean to challenge the European Communities with respect to its obligation to cooperate in the development of guidelines to further the implementation of Article 5.5.

65. Canada further notes that neither the DSU nor WTO jurisprudence suggest that in cases where a large number of provisions are listed more details need to be provided regarding the obligations at issue than in cases where few provisions are listed.

66. Argentina notes that its panel request is much more precise than its consultation request and argues that the panel request sufficiently details, at the paragraph or sub-paragraph level, the obligations at issue. Argentina also recalls that there are panels which have accepted the citation of general provisions only, without requiring specifications of paragraphs. Argentina further argues that not all of the provisions referred to by the European Communities set forth different obligations. According to Argentina, some of these provisions, such as Article 2.2 of the

SPS Agreement, rather set forth different conditions that must be met to fulfil one obligation.

Listing of provisions containing multiple obligations

67. The □□**ne**□notes that with one exception – Article 12 of the *TBT Agreement*, which is referred to only by Argentina – the panel requests cite the relevant provisions not just at the article level, but at the paragraph level. In some cases, the provisions are cited at the sub-paragraph level. The European Communities nevertheless considers that, in some specified instances, this falls short of the requirement in Article 6.2 to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. More specifically, the European Communities considers that the following references in the Complaining Parties' panel requests are insufficient:[59]

- Articles 2.2, 2.3, 5.5, 7, 8, Annex B(5) and Annex C(1)(b) of the *SPS Agreement*; and

- Articles 2.9, 5.2.2, 5.6 and 12 of the *TBT Agreement.*

68. We find it convenient, for analytical purposes, to place the aforementioned provisions into two categories. The *first* category encompasses Annex B(5) of the *SPS Agreement* and Articles 2.9, 5.6 and 12 of the *TBT Agreement*. The structure of these provisions would, in principle, have allowed for a more precise citation than the Complaining Parties chose to adopt. For instance, Article 2.9 of the *TBT Agreement* contains four sub-paragraphs, yet the Complaining Parties did not specify any of the sub-paragraphs in their panel requests. The *second* category encompasses Articles 2.2, 2.3, 5.5, 7, 8 and Annex C(1)(b) of the *SPS Agreement* and Article 5.2.2 of the *TBT Agreement*. These provisions contain two or more distinct obligations under a single article, paragraph or sub-paragraph number. But these particular provisions do not contain any paragraphs (Articles 7 and 8 of the *SPS Agreement*), sub-paragraphs (Articles 2.2, 2.3 and 5.5 of the *SPS Agreement*) or further sub-division (Annex C(1)(b) of the *SPS Agreement* and Article 5.2.2 of the *TBT Agreement*).

69. We will now analyse the two above-mentioned categories separately.

(a) Annex B(5) of the SPS Agreement and Articles 2.9, 5.6 and 12 of the TBT Agreement

70. In examining the first category of provisions, we note as an initial matter that we do not understand the Appellate Body report in *Korea – Dairy* to have established that the identification of particular paragraph numbers would, *ipso facto*, be sufficient to constitute a "brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2. In our view, whether specification of particular paragraph numbers is sufficient, will depend on the circumstances of each case, and in particular on the extent to which specification of particular paragraph numbers sheds light on the nature of the obligation at issue.[60]

71. It is useful to examine Annex B(5) of the *SPS Agreement* and Articles 2.9 and 5.6 of the *TBT Agreement* together. They all contain four sub-paragraphs which establish separate obligations. The United States and Canada have confirmed that in

their respective panel requests they did not identify particular sub-paragraphs because they consider that the specific measures at issue are inconsistent with each of the four sub-paragraphs.[61] The United States and Canada argue that this is consistent with their overall approach to the listing of provisions in their panel requests. Essentially, the United States and Canada argue that they have generally cited provisions as precisely as their structure allowed, i.e., at the paragraph or sub-paragraph level, except in cases such as Annex B(5) of the *SPS Agreement* where they wished to allege a violation of all sub-paragraphs. A review of the provisions listed in the United States' and Canada's panel requests supports this interpretation.[62] We therefore accept that, in the specific context of the United States' and Canada's panel requests, the references to Annex B(5) of the *SPS Agreement* and Articles 2.9 and 5.6 of the *TBT Agreement* are sufficient, as such, to give notice to the European Communities that violations are being alleged of each of the sub-paragraphs of these provisions. In reaching this conclusion, we also attach importance to two additional circumstances. *Firstly*, we note that the provisions in question set forth "notice and comment" obligations which, by definition, are interrelated. *Secondly*, we note that none of the sub-paragraphs of the provisions in question appears to be obviously irrelevant to the complaints at hand.

72. Unlike the United States and Canada, Argentina has not explicitly indicated whether it considers the specific measures at issue to be inconsistent with each of the four sub-paragraphs of Annex B(5) of the *SPS Agreement* and Articles 2.9 and 5.6 of the *TBT Agreement*. Argentina has merely said that it has identified the relevant paragraph numbers in its panel request and that there is no requirement to go further and identify sub-paragraph numbers as well.[63] As we have noted above, we do not think that identification of paragraph numbers is automatically sufficient to meet the minimum requirements of Article 6.2. We also note, however, that in *Thailand – H-Beams*, the Appellate Body made the following statement:[64]

> With respect to Article 5 [of the *Anti-Dumping Agreement*], Poland stated that "Thai authorities initiated and conducted this investigation in violation of the procedural ... requirements of Article VI of GATT 1994 and Article 5 ... of the Antidumping Agreement". Article 5 sets out various but closely related procedural steps that investigating authorities must comply with in initiating and conducting an anti-dumping investigation. In view of the interlinked nature of the obligations in Article 5, we are of the view that, in the facts and circumstances of this case, Poland's reference to "the procedural ... requirements" of Article 5 was sufficient to meet the minimum requirements of Article 6.2 of the DSU.[65]

73. In our view, like the procedural obligations in Article 5 of the *Anti-Dumping Agreement*, the "notice and comment" obligations contained in Annex B(5) of the *SPS Agreement* and Articles 2.9 and 5.6 of the *TBT Agreement* are "closely related" and "interlinked". For example, sub-paragraph (d) of Annex B(5) of *SPS Agreement* requires Members to allow a reasonable time for other Members to make comments in writing on a proposed regulation. If this proposed regulation has not been published at an early stage, as required in sub-paragraph (a) of Annex B(5) and brought to the attention of other Members through the notification required in sub-paragraph (b) of Annex B(5), and copies provided upon request as established in sub-paragraph (c) of Annex B(5), it is difficult to imagine how an interested Member

would gain sufficient knowledge of the content fo the proposed regulation to be able to avail itself of the opportunity to submit comments as foreseen in sub-paragraph (d) of Annex B(5). Therefore, we consider that the fact that Argentina's panel request identifies the relevant article and paragraph numbers sheds sufficient light on "the nature of the obligation at issue"[66] to meet the minimum requirements of Article 6.2.

74. We now turn to Article 12 of the *TBT Agreement*, which is listed only in Argentina's panel request. Article 12 is entitled "Special and Differential Treatment of Developing Country Members". It contains ten separate paragraphs. Nevertheless, in response to a question by the Panel, Argentina asserted that Article 12 does not contain multiple obligations, but rather a single obligation to provide differential and more favourable treatment to developing country Members "through several requirements that should be fulfilled"[67]. In support of this view, Argentina points to Article 12.1, which states that "Members shall provide differential and more favourable treatment to developing country Members [...] through the following provisions as well as through the relevant provisions of other Articles of this Agreement".

75. We do not consider that the text of Article 12.1 supports Argentina's view that Article 12 contains a single obligation as opposed to a number of separate obligations. For instance, Article 12.3 requires that in preparing and applying technical regulations, standards and conformity assessment procedures, Members take account of the special needs of developing country Members. This obligation is clearly very different from the obligation set forth in Article 12.10, which requires the Committee on Technical Barriers to Trade to examine periodically the special and differential treatment granted to developing country Members on national and international levels, for instance.

76. Argentina's panel request refers to Article 12, but does not specify particular paragraph numbers. We recall that the Appellate Body has made it quite clear that it is important for panel requests to be precise in identifying the legal basis of the relevant complaint.[68] We have asked Argentina to indicate why it referred to Article 12 without specifying any paragraph numbers. Argentina replied that this is because during the consultations the European Communities failed to answer a question by Argentina "related to the general obligation embodied in Article 12 [...] regarding the behaviour due by the EC to Argentina in the treatment and approval of agricultural biotech products"[69]. We acknowledge that failure by a responding party to co-operate promptly may affect the clarity with which a complaining party can set out its claims in a panel request.[70] However, Argentina has adduced no evidence which would enable us to determine whether the European Communities failed to answer Argentina's question. Nor is it clear to us from Argentina's reply precisely how the alleged lack of co-operation by the European Communities affected the precision with which Argentina identified the obligations at issue.

77. We note that the European Communities recognizes that of the various obligations set out in Article 12, four are potentially relevant to Argentina's complaint.[71] In our view, the potentially relevant obligations are those contained in Articles 12.1, 12.2, 12.3 and 12.7.[72] Article 12.1 is relevant whenever there is a violation of one of the other provisions of Article 12, such as Articles 12.2, 12.3 or 12.7. Article 12.3 is a specific application of the obligation in Article 12.2 to take account of developing country needs in the implementation of the *TBT Agreement* at

the national level. As regards Article 12.7, however, it becomes clear, upon closer inspection, that that provision cannot reasonably be considered to be applicable in this dispute. Article 12.7 requires the European Communities to provide technical assistance to developing country Members. But Argentina's panel request does not challenge the European Communities with respect to a failure to provide technical assistance. The request only refers to an alleged failure by the European Communities to consider applications for approval of biotech products. In the light of the above elements, and in particular the fact that Articles 12.4 to 12.10 are not applicable in this dispute, the above-noted substantive similarity between Articles 12.2 and 12.3 and the fact that Article 12.1 incorporates the obligations set out in Articles 12.2 and 12.3 by reference, we consider that Argentina's reference to Article 12 sheds sufficient light on "the nature of the obligation at issue"[73] to allow the European Communities to begin preparing its defence. We, therefore, find that, in the specific circumstances of this case, the reference to Article 12 is sufficient to meet the minimum requirements of Article 6.2.

(b) Articles 2.2, 2.3, 5.5, 7, 8 and Annex C(1)(b) of the SPS Agreement and Article 5.2.2 of the TBT Agreement

78. We now address the second category of provisions. It will be recalled that this category consists of provisions which contain two or more distinct obligations under a single article, paragraph or sub-paragraph number, but which do not contain any paragraphs, sub-paragraphs or further sub-division. Argentina argues, without much elaboration, that, in such cases, there is no requirement to identify specific clauses or sub-clauses within an article, paragraph or sub-paragraph. The United States notes in this regard that it is unaware of any panel or Appellate Body report faulting a panel request for not citing to specific clauses or sub-clauses within an article, paragraph or sub-paragraph.

79. We do not consider that, for the purposes of an Article 6.2 inquiry, the structure of the provisions contained in the WTO agreements constitutes some kind of "safe haven", such that it would always be sufficient to specify sub-paragraph numbers in cases where a provision has several sub-paragraphs, etc. In our view, whether a particular manner of citing provisions is sufficient will depend on the circumstances of each case, and in particular on the extent to which the particular citation sheds light on the nature of the obligation at issue. Having said this, we think that the fact that two or more distinct obligations are set out, e.g., in one and the same sub-paragraph may provide a strong indication that those obligations are very similar in nature. In such cases, specification of the relevant sub-paragraph number may shed sufficient light on the nature of the obligation at issue to meet the minimum standard of precision required under Article 6.2.

80. In the present case, the European Communities has identified a number of provisions where it considers that citation in keeping with the maximum level of precision envisaged in the structure of the relevant agreement is not sufficient. In view of this assertion, we find it appropriate to do a provision-by-provision analysis.

81. We begin our analysis with Annex C(1)(b) of the *SPS Agreement* and Article 5.2.2 of the *TBT Agreement*. We analyse these provisions together, since they have almost identical wording. Both provisions contain a number of sub-clauses which set out certain procedural obligations that Members must observe in the

operation of approval or conformity assessment procedures. The United States and Canada argue that in their respective panel requests they did not identify particular sub-clauses because they consider that the specific measures at issue are inconsistent with each of the sub-clauses of the provisions in question.[74] Argentina has not explicitly indicated whether it considers the specific measures at issue to be inconsistent with each of the sub-clauses of Annex C(1)(b) and Article 5.2.2. Argentina has merely said that it has identified the relevant paragraph numbers in its panel request and that there is no requirement to go further and identify particular sub-clauses as well.[75] In our view, in much the same way as the "notice and comment" obligations contained in Annex B(5) of the *SPS Agreement* and Articles 2.9 and 5.6 of the *TBT Agreement*, the various procedural obligations set out in Annex C(1)(b) and Article 5.2.2 are closely related and interlinked. Therefore, we consider that the fact that the Complaining Parties' panel requests identify the relevant article and paragraph numbers sheds sufficient light on "the nature of the obligation at issue"[76] to meet the minimum requirements of Article 6.2.

82. Article 2.2 of the *SPS Agreement* appears to set out three different "basic" obligations: (1) that SPS measures must be applied only "to the extent necessary" to protect life or health, (2) that they must be "based on scientific principles" and (3) that they must not be "maintained without sufficient scientific evidence". The three obligations contained in Article 2.2 are further spelt out and applied in different provisions of the *SPS Agreement*, namely, Articles 5.1, 5.2 and 5.6.[77] We note that all Complaining Parties have listed Articles 5.1, 5.2 and 5.6 in their panel requests as separate legal bases. In the light of this, we consider that it is sufficiently clear from the Complaining Parties' panel requests that each of the obligations contained in Article 2.2 is at issue in the three complaints. Accordingly, we find that, in the circumstances of this case, referring to Article 2.2 is sufficient to meet the minimum requirements of Article 6.2.

83. Article 2.3 of the *SPS Agreement* stipulates that SPS measures must not arbitrarily or unjustifiably discriminate between Members and that they must not be used in a manner which would constitute a disguised restriction on trade. In addressing the sufficiency of a listing of Article 2.3, we find relevant the fact that all Complaining Parties have also listed Articles I:1, III:4 and XI:1 of the GATT 1994 as legal bases of their complaints. Articles I:1 and III:4 of the GATT 1994 prohibit certain forms of discrimination against foreign products, whereas Article XI:1 of the GATT 1994 prohibits quantitative import restrictions. We think it can be inferred from the references to these GATT 1994 provisions that both obligations set out in Article 2.3 – i.e., the obligation to avoid arbitrary or unjustifiable discrimination and the obligation not to apply SPS measures in a manner which would constitute a disguised restriction on trade – are at issue in the three complaints. We therefore find that, in the circumstances of this case, referring to Article 2.3 is sufficient to meet the minimum requirements of Article 6.2.

84. Article 5.5 of the *SPS Agreement* obligates Members (1) to avoid arbitrary or unjustifiable distinctions in the levels of sanitary or phytosanitary protection which they consider to be appropriate in different situations and (2) to co-operate in the Committee on Sanitary and Phytosanitary Measures to develop guidelines to further the practical implementation of that article. None of the three panel requests suggests that the European Communities is being challenged in respect of a failure to co-operate with a view to developing certain guidelines. Indeed, as noted by Canada,

Members have already discharged their collective obligation to develop appropriate guidelines.[78] Thus, it is clear that the obligation at issue in the three panel requests is the obligation to avoid arbitrary or unjustifiable distinctions in the levels of sanitary or phytosanitary protection. Therefore, we consider that the reference in the Complaining Parties' panel requests to Article 5.5 is sufficient to meet the minimum requirements of Article 6.2.

85. Article 7 of the *SPS Agreement* imposes an obligation on Members to notify changes in SPS measures and to provide information on SPS measures in accordance with the provisions of Annex B of the *SPS Agreement*. Regarding the obligation to "provide information" on SPS measures, we note that the Complaining Parties have specified in their panel requests which particular provisions of Annex B they consider to have been violated. We therefore think it is clear that the reference to Article 7 cannot be taken as an indication that the Complaining Parties are alleging violations of *all* provisions of Annex B. Regarding the obligation to "notify changes" in SPS measures, we note that it is not necessary, for the purposes of our preliminary ruling, to determine whether that obligation is, or is not, further elaborated in Annex B. We consider that that obligation is very similar in nature to the other obligation set out in Article 7, that is to say, the obligation to "provide information" on SPS measures in accordance with Annex B. As a result, it is our view that the reference in the Complaining Parties' panel requests to Article 7 sheds sufficient light on "the nature of the obligation at issue"[79] to meet the minimum requirements of Article 6.2.

86. Article 8 of the *SPS Agreement* requires Members to observe the provisions of Annex C in the operation of control, inspection and approval procedures and to otherwise ensure that their procedures are not inconsistent with the *SPS Agreement*. Here, too, it seems clear that the Complaining Parties cannot be understood to allege violations of *all* provisions of Annex C, given that they have specified particular provisions of Annex C which they consider to have been violated. Regarding the obligation to "otherwise ensure" compliance with the *SPS Agreement*, we consider that in view of the very similar nature of this obligation and the obligation to observe the provisions of Annex C, the reference in the Complaining Parties' panel requests to Article 7 is sufficient to meet the minimum requirements of Article 6.2.

Listing of provisions which are mutually exclusive or subject to other provisions

87. We note that another concern expressed by the European Communities relates to the fact that the Complaining Parties' panel requests list certain provisions which are mutually exclusive (such as those contained in the *SPS Agreement* and in the *TBT Agreement*) or otherwise in a clearly defined relationship with one another (such as the provisions of the GATT 1994 in relation to the provisions contained in the other WTO agreements at issue). According to the European Communities, it is unclear, due to the mere listing of these provisions, whether these provisions are alleged to apply to different aspects of the same measure, or whether some of these provisions are alleged to apply only if the Panel determines that other listed provisions are not applicable.

88. We recall that in accordance with Article 6.2 a panel request is to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. Thus, the requirement is to state clearly what is the alleged legal basis of a complaint.[80] Neither the text of Article 6.2 nor relevant jurisprudence suggests that a

complaining party needs to explain, in the panel request, the reasons for identifying particular treaty provisions. Such explanation is to be provided through arguments to be developed in the complaining party's written submissions and oral statements.[81] Accordingly, we do not consider that the Complaining Parties' panel requests are defective because they do not explain why certain provisions are listed even though they may be mutually exclusive or may apply subject to other provisions. Nor do we consider that the panel requests are defective because they do not make it clear whether all of the provisions listed are alleged to apply to the same aspect of a particular measure, or whether some provisions are alleged to apply to different aspects of the same measure. It is sufficient to recall in this regard that a panel request need not set out arguments "as to which specific aspects of the measures at issue relate to which specific provisions of [the] agreements [alleged to have been violated]"[82].

(ii) Indication of which measures violate which provisions

89. The □□r□□e□n □□□ □ □n□□e□ argues that where a panel request covers several measures, it should indicate which provisions may be relevant for the examination of each measure, possibly describing the substantive aspects or the effects of the measures which are allegedly in breach of those provisions. The European Communities argues that the panel requests do not provide the slightest explanation in this regard. According to the European Communities, it is completely in the dark about which provisions are alleged to have been violated by which measures.

90. The European Communities further asserts that the fact that over sixty obligations have been listed means that, in total, there could be more than three thousand possible claims in respect of which the European Communities might have to prepare a defence. The European Communities considers that it has a right to know what case it will have to defend. In the European Communities' view, the panel request must contain the necessary information.

91. The □n□□ed □□□□e□ argues that its panel request clearly alleges that each of the listed EC measures violates each of the provisions cited in the panel request. According to the United States, the language used – "These measures appear to be inconsistent with the following provisions […]" – is clear in tying the covered measures to the claimed violations.

92. The United States further argues that the European Communities overstates the number of obligations covered in the United States' panel request. The United States also contends that Article 6.2 does not impose an entirely different standard on a panel request on the basis that the responding party has engaged in violations of numerous WTO provisions. Finally, the United States expects that during the course of the panel proceeding, not all violations of the provisions in its panel request will receive the same level of attention.

93. □□n□d□ recalls that its panel request indicates that "[t]hese measures are inconsistent with the obligations of the EC" and then goes on to specify which provisions are being violated. Canada also notes that the listing of the specific provisions alleged to be violated must be read in the overall context of the panel request. According to Canada, some provisions are obviously relevant to some

claims, and just as obviously irrelevant to other claims. Specifically, Canada argues that those provisions establishing procedural obligations for the approval procedures and conformity assessment procedures (Article 8 and Annex C(1)(a), C(1)(b), C(1)(c), and C(1)(e) of the *SPS Agreement* and Articles 5.1, 5.2.1, 5.2.2, 5.2.3, 5.6 and 5.8 of the *TBT Agreement*) are not relevant to the national measures by EC member States which ban products that have already been approved by the European Communities. Canada submits that they are relevant only to those measures which concern the functioning of the European Communities' pre-marketing approval processes.

94. Canada further argues that the European Communities is incorrect in suggesting that Canada's panel request "should indicate which provisions may be relevant for the examination of each measure, possibly describing the substantive aspects or the effects of the measures which are allegedly in breach of those provisions". Canada submits that what the European Communities is complaining about here is that Canada has not provided an indication as to the legal arguments it intends to pursue, which, according to the jurisprudence, Canada is not required to do in its panel request.

95. **Ar□en□n□** maintains that its panel request is clear in relation to the link between the provisions alleged to be violated and the measures at issue. Argentina also maintains that the way in which the listed provisions are violated is a matter to be developed in Argentina's first written submission and subsequent statements.

96. The □□**ne**□ notes that the panel in *Canada – Wheat Exports and Grain Imports* also confronted the issue whether a particular panel request made it clear which measures were alleged to violate which provisions. The panel in that case reached the following conclusion:

> We do not agree with Canada's assertion that the panel request does not make it clear which laws, regulations or actions are inconsistent with which obligation. The panel request states that "the laws, regulations *and* actions of the Government of Canada and the CWB related to exports of wheat appear to be […] inconsistent with paragraph 1(b) of Article XVII of the GATT 1994 […]" (emphasis added). This wording suggests to us – and we consider that it should suggest to Canada and the third parties as well – that the United States may have wished to claim before us that each of the three categories of measures identified – laws, regulations and actions – is inconsistent with both obligations of Article XVII:1(b). This way of presenting the Article XVII claim does not, in our view, have as a consequence that Canada does not know what case it has to answer and so cannot begin to prepare its defence, or that the third parties are uninformed as to the legal basis of the complaint and thus lack an opportunity effectively to respond to the United States' complaint.[83]

97. In the present case, the three panel requests each set out the three different EC measures at issue[84] and then go on to state:

> (a) "These measures appear to be inconsistent with the following provisions [...]" (United States' panel request)[85];

(b) "The measures violate the following provisions [...]" (Canada's panel request)[86]; and

(c) "The measures in question taken by the European Communities and several of its member States infringe the following provisions [...]" (Argentina's panel request)[87].

98. Thus, similar to the situation in *Canada – Wheat Exports and Grain Imports*, the wording of the panel requests in the present case suggests that each of the measures at issue in the three requests is inconsistent with each of the provisions identified in the three requests.

99. Referring to its own request, Canada points out, however, that the provisions establishing procedural obligations for approval procedures and conformity assessment procedures are "obviously irrelevant" to the third EC measure identified in its panel request, namely, the marketing and import bans allegedly maintained by certain EC member States, because these member State measures ban biotech product that have already been approved by the European Communities.[88] Neither the United States nor Argentina have expressed the view that the procedural provisions referred to by Canada are "obviously irrelevant" to the alleged member State marketing and import bans which they are also challenging in their respective requests. But the United States has noted that it "*currently* does not intend to pursue its claims that the procedures used in the adoption of national marketing and import bans violate the EC's WTO obligations" (emphasis added).[89] This statement suggests that, originally, the United States may have wished to pursue such claims. It also suggests that the irrelevance of the procedural provisions in question to the third EC measure covered in the three panel requests is perhaps not as obvious as Canada makes it out to be.

100. As noted by us above, the three panel requests as worded indicate that each of the measures at issue in these requests is alleged to violate each of the provisions identified. We consider, therefore, that the claims that may be pursued are "sufficiently identified in the panel request[s]"[90] and that the European Communities knows what case it may have to answer and that it can begin to prepare its defence based on that knowledge. If Canada never intended to claim that the marketing and import bans allegedly maintained by certain EC member States violate the provisions establishing procedural obligations for approval procedures and conformity assessment procedures, its panel request could arguably have stated that intention more clearly. As currently worded, Canada's panel request leaves little doubt that Canada may have wished to pursue such a claim.

101. The European Communities has noted that if the panel requests are read to mean that each of the measures identified is alleged to violate each of the provisions listed, the European Communities might have to begin to prepare a defence against a large number of claims. We agree.[91] However, we do not think that this fact supports a different reading of the panel requests. Nor do we think that this means that the legal standard of clarity against which these panel requests must be measured is higher than it would have been had the panel requests identified fewer claims. Having said this, we certainly share the European Communities' view that where a panel request sets forth a large number of claims it is particularly important that a complaining party identify the claims it may wish to pursue with as much clarity as possible.

102. The European Communities also suggests that the panel requests should have described and explained "the substantive aspects or the effects of the measures which are allegedly in breach of those provisions". Here again, we agree that it is desirable for a complaining party to provide this type of information in its panel request. However, we recall that the Appellate Body in *EC – Bananas III* agreed with the panel in that case that a panel request need not set out arguments "as to which specific aspects of the measures at issue relate to which specific provisions of those agreements".[92]

(iii) Conclusion

103. In the light of the above considerations[93], the Panel concludes that the European Communities has failed to establish that any of the Complaining Parties' panel requests falls short of the requirement in Article 6.2 that a panel request provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

5 [illegible]

104. In view of our conclusions in Sections 4 and 5 above, there is no need to examine the issue of the prejudice, if any, sustained by the European Communities as a result of the allegedly defective panel request(s).

105. Overall, we thus conclude that the European Communities has failed to establish that any of the Complaining Parties' panel requests, when examined on its face and in the light of the attendant circumstances, is inconsistent with Article 6.2 of the DSU. Accordingly, we decline the European Communities' request that we issue a preliminary ruling to the effect that the Complaining Parties' panel requests do not meet the requirements of Article 6.2 of the DSU.

A[illegible]

[illegible] *SPS* And *TBT Agreements* [illegible]

(a) SPS Agreement

(i) Article 2.2

> Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

(ii) Article 2.3

> Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members

where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

(iii) Article 5.5

With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. Members shall cooperate in the Committee, in accordance with paragraphs 1, 2 and 3 of Article 12, to develop guidelines to further the practical implementation of this provision. In developing the guidelines, the Committee shall take into account all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves.

(iv) Article 7

Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B.

(v) Article 8

Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement.

(vi) Annex B(5)

Whenever an international standard, guideline or recommendation does not exist or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other Members, Members shall:

(a) publish a notice at an early stage in such a manner as to enable interested Members to become acquainted with the proposal to introduce a particular regulation;

(b) notify other Members, through the Secretariat, of the products to be covered by the regulation together with a brief

indication of the objective and rationale of the proposed regulation. Such notifications shall take place at an early stage, when amendments can still be introduced and comments taken into account;

(c) provide upon request to other Members copies of the proposed regulation and, whenever possible, identify the parts which in substance deviate from international standards, guidelines or recommendations;

(d) without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account.

(vii) Annex C(1)(b)

Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that: [...] the standard processing period of each procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the procedure in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the procedure if the applicant so requests; and that upon request, the applicant is informed of the stage of the procedure, with any delay being explained;

(b) TBT Agreement

(i) Article 2.9

Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on trade of other Members, Members shall:

2.9.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular technical regulation;

2.9.2 notify other Members through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage,

when amendments can still be introduced and comments taken into account;

2.9.3 upon request, provide to other Members particulars or copies of the proposed technical regulation and, whenever possible, identify the parts which in substance deviate from relevant international standards;

2.9.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

(ii) Article 5.2.2

When implementing the provisions of paragraph 1, Members shall ensure that: [...] the standard processing period of each conformity assessment procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the assessment in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the conformity assessment if the applicant so requests; and that, upon request, the applicant is informed of the stage of the procedure, with any delay being explained;

(iii) Article 5.6

Whenever a relevant guide or recommendation issued by an international standardizing body does not exist or the technical content of a proposed conformity assessment procedure is not in accordance with relevant guides and recommendations issued by international standardizing bodies, and if the conformity assessment procedure may have a significant effect on trade of other Members, Members shall:

5.6.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular conformity assessment procedure;

5.6.2 notify other Members through the Secretariat of the products to be covered by the proposed conformity assessment procedure, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;

5.6.3 upon request, provide to other Members particulars or copies of the proposed procedure and, whenever possible, identify the parts which in substance deviate from relevant guides or recommendations issued by international standardizing bodies;

5.6.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

(iv) Article 12

12.1 Members shall provide differential and more favourable treatment to developing country Members to this Agreement, through the following provisions as well as through the relevant provisions of other Articles of this Agreement.

12.2 Members shall give particular attention to the provisions of this Agreement concerning developing country Members' rights and obligations and shall take into account the special development, financial and trade needs of developing country Members in the implementation of this Agreement, both nationally and in the operation of this Agreement's institutional arrangements.

12.3 Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.

12.4 Members recognize that, although international standards, guides or recommendations may exist, in their particular technological and socio-economic conditions, developing country Members adopt certain technical regulations, standards or conformity assessment procedures aimed at preserving indigenous technology and production methods and processes compatible with their development needs. Members therefore recognize that developing country Members should not be expected to use international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs.

12.5 Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies and international systems for conformity assessment

are organized and operated in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members.

12.6 Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies, upon request of developing country Members, examine the possibility of, and, if practicable, prepare international standards concerning products of special interest to developing country Members.

12.7 Members shall, in accordance with the provisions of Article 11, provide technical assistance to developing country Members to ensure that the preparation and application of technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to the expansion and diversification of exports from developing country Members. In determining the terms and conditions of the technical assistance, account shall be taken of the stage of development of the requesting Members and in particular of the least-developed country Members.

12.8 It is recognized that developing country Members may face special problems, including institutional and infrastructural problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures. It is further recognized that the special development and trade needs of developing country Members, as well as their stage of technological development, may hinder their ability to discharge fully their obligations under this Agreement. Members, therefore, shall take this fact fully into account. Accordingly, with a view to ensuring that developing country Members are able to comply with this Agreement, the Committee on Technical Barriers to Trade provided for in Article 13 (referred to in this Agreement as the "Committee") is enabled to grant, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement. When considering such requests the Committee shall take into account the special problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures, and the special development and trade needs of the developing country Member, as well as its stage of technological development, which may hinder its ability to discharge fully its obligations under this Agreement. The Committee shall, in particular, take into account the special problems of the least-developed country Members.

12.9 During consultations, developed country Members shall bear in mind the special difficulties experienced by developing country Members in formulating and implementing standards and technical regulations and conformity assessment procedures, and in their desire to assist developing country Members with their efforts in this direction, developed country Members shall take account of the special needs of the former in regard to financing, trade and development.

12.10 The Committee shall examine periodically the special and differential treatment, as laid down in this Agreement, granted to developing country Members on national and international levels."

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[1] WT/DS291/23.
[2] WT/DS292/17.
[3] WT/DS293/17.
[4] None of the parties requested a preliminary hearing on the issues raised in the European Communities' request of 8 March 2004.
[5] (original footnote) *Ibid*., para. 143.
[6] Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*US – Carbon Steel* "), WT/DS213/AB/R and Corr.1, adopted 19 December 2002, para. 127 (footnotes omitted).
[7] The United States has further argued that, in addition to being groundless, the European Communities' objections to the United States' panel request are also untimely and that the Panel should reject the European Communities' preliminary ruling request also on that basis. See United States' comments on the European Communities' preliminary ruling request, para. 38. The issue of the timeliness of the European Communities' objections needs to be addressed only if the Panel concludes that the European Communities has failed to establish that the United States' panel request does not meet the requirements of Article 6.2 of the DSU.
[8] WT/DS291/23, paras. 1-3.
[9] (original footnote) Directive 2001/18, O.J. L 106 17.4.2001, p. 1 (and its predecessor, Directive 90/220, O.J. L 117, 8.5.1990, p. 15, as amended by Directive 94/15, O.J. L 103, 22.4.1994, p. 20 and Directive 97/35, O.J. L 169, 27.6.1997, p. 72); and Regulation 258/97, O.J. L 043, 14.2.1997, p. 1.
[10] WT/DS292/17, paras. 1, 2 and 5.
[11] (original footnote) As set out in EC Directive No. 2001/18 of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EC ([2001] O.J. L 106/1) (and its predecessor, EEC Directive No. 90/220 of 23 April 1990 on the deliberate release into the environment of genetically modified organisms ([1990] O.J. L117/15), EC Regulation No. 258/97 of 27 January 1997 concerning novel foods and novel food ingredients ([1997] O.J. L 43/1), and related legislative instruments specifically referred to in them.
[12] WT/DS293/17, paras. 2-5.
[13] (original footnote) See Annex I.
[14] (original footnote) EC legislation on biotech product approval includes Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001, published in Official Journal No. 106 of 17 April 2001, pages 0001-0039 (and its predecessor Council Directive 90/220/EEC of 23 April 1990, published in Official Journal No. 117 of 8 May 1990 and amended by Directive 94/15, published in Official Journal No. 103 of 22 April 1994, and by Directive 97/35, published in Official Journal No. 169 of 27 June 1997), and Regulation (EC) No. 258/1997 of the European Parliament and of the Council of 27 January 1997, published in Official Journal No. 043 of 14 February 1997.
[15] (original footnote) See Annex II.

[16] Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain* ("*Canada – Wheat Exports and Grain Imports*"), WT/DS276/R, dated 6 April 2004, not yet adopted, para. 6.10, Article 6.2 ruling para. 14.
[17] *Ibid*, Article 6.2 ruling paras. 17 and 20.
[18] Appellate Body Report, Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment* ("*EC – Computer Equipment*"), WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851, para. 69.
[19] *The Concise Oxford Dictionary*, 10th ed., J. Pearsall (ed.) (Clarendon Press, 1999), p. 1443.
[20] *Ibid*.
[21] For the text of the introductory paragraph, see, *supra*, para. 8.
[22] United States' comments on the European Communities' preliminary ruling request, para. 4. The United States' panel request does not explicitly refer to a "*de facto*" moratorium. However, at the first DSB meeting at which the United States' panel request was discussed, the United States confirmed the *de facto* nature of the moratorium, saying that "[t]he existence of the moratorium [is] indisputable: the EC [has] not considered a biotech product for approval in nearly five years, and high-level EC officials [have] acknowledged its existence in public statements". See WT/DSB/M/154, p. 6.
[23] Panel Report, *Canada – Wheat Exports and Grain Imports*, Article 6.2 ruling para. 20.
[24] *Ibid*., Article 6.2 ruling paras. 20 and 27.
[25] We note that this distinction has played a role in a number of GATT/WTO dispute settlement proceedings. See, notably, Panel Report, *Japan – Trade in Semi-Conductors* ("*Japan – Semi-Conductors* "), adopted 4 May 1988, BISD 35S/116, paras. 110-117.
[26] United States' comments on the European Communities' preliminary ruling request, paras. 4, 5 and 16; Exhibits US-1 and US-2.
[27] European Communities' preliminary ruling request, para. 22.
[28] Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams* "), WT/DS122/AB/R, adopted 5 April 2001, para. 88.
[29] We consider that the United States' panel request also adequately informs the third parties of the specific measure that is being challenged. We note in this regard that none of the third parties has offered any comments on the European Communities' objections to the United States' panel request.
[30] United States' comments on the European Communities' preliminary ruling request, para. 18.
[31] European Communities' preliminary ruling request, para. 25.
[32] For the text of the introductory paragraph, see, *supra*, para. 9.
[33] See, *supra*, para. 20.
[34] See, *supra*, para. 22.
[35] Canada's comments on the European Communities' preliminary ruling request, paras. 18-19; Exhibits CDA-4 and CDA-5.
[36] See, *supra*, para. 23.
[37] Appellate Body Report, *Thailand – H-Beams*, para. 88.
[38] We consider that Canada's panel request also adequately informs the third parties of the specific measure that is being challenged. We note in this regard that none of the third parties has offered any comments on the European Communities' objections to Canada's panel request.
[39] European Communities' preliminary ruling request, para. 25.
[40] See, *supra*, para. 20.
[41] For the text of the second paragraph, see, *supra*, para. 10.
[42] It appears that Argentina intends to illustrate the "*de facto* moratorium" by referring to Annex I of its panel request, which sets out specific biotech products and the status of the corresponding applications for approval.
[43] See, *supra*, para. 22.
[44] See, *supra*, para. 23.
[45] Appellate Body Report, *Thailand – H-Beams*, para. 88.
[46] We consider that Argentina's panel request also adequately informs the third parties of the specific measure that is being challenged. We note in this regard that none of the third parties has offered any comments on the European Communities' objections to Argentina's panel request.
[47] We note that at the first meeting of the DSB at which Argentina's panel request was discussed, Argentina similarly explained that "[t]he measures at issue include[...], depending on the case, failure to consider *or* the

suspension of consideration of applications for the endorsement or approval of agricultural biotechnology products [...]" (emphasis added). See WT/DSB/M/154, p. 7.
[48] European Communities' preliminary ruling request, para. 25.
[49] WT/DS291/23, para. 4.
[50] WT/DS292/17, paras. 6-7.
[51] WT/DS293/17, paras. 5-6.
[52] Appellate Body Report, *Thailand – H-Beams*, para. 88.
[53] (original footnote) *Ibid*., para. 123.
[54] (original footnote) While arguments will be further clarified in the first written submission, and in subsequent documents, there is, as we [the Appellate Body] said in *European Communities – Bananas*, a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims. See Appellate Body Report, *supra*, footnote 30, para. 142.
[55] Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea – Dairy* "), WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3, para. 124.
[56] (original footnote) See Appellate Body Report, *Brazil – Desiccated Coconut*, *supra*, footnote 21, p. 22; Appellate Body Report, *European Communities – Bananas*, *supra*, footnote 13, paras. 145 and 147; and Appellate Body Report, *India – Patents*, *supra*, footnote 21, paras. 89, 92 and 93.
[57] Appellate Body Report, *US – Carbon Steel*, para. 130.
[58] (original footnote) Appellate Body Report, *Korea – Dairy*, para. 124.
[59] We set out the text of these provisions in the Annex to the present preliminary ruling. While the European Communities appears to suggest that it has identified these particular provisions merely by way of "illustration" (European Communities' request for a preliminary ruling, para. 38), it is for the European Communities to indicate precisely how and why the Complaining Parties' panel requests are deficient. The Panel will therefore limit its analysis to those provisions which have been specified by the European Communities.
[60] See Appellate Body Report, *US – Carbon Steel*, para. 130, quoted, *supra*, at para. 54.
[61] United States' comments on the European Communities' preliminary ruling request, note 15; Canada's reply to Panel question No. 5.
[62] We note that there appears to be one inconsistency in the United States' panel request, in that the United States did not cite Article 5.1 of the *TBT Agreement* as a whole, but instead specified both of its two sub-paragraphs. However, this inconsistency does not detract from our view that, when all of the provisions listed in the United States' panel request are considered together, the United States' failure to specify sub-paragraph numbers in referring to Annex B(5) of the *SPS Agreement* and Articles 2.9 and 5.6 of the *TBT Agreement* suggests that it wished to allege violations of each of the sub-paragraphs.
[63] Argentina's reply to Panel question No. 9.
[64] Appellate Body Report, *Thailand – H-Beams*, para. 93.
[65] (original footnote) See also Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, para. 111.
[66] Appellate Body Report, *US – Carbon Steel*, para. 130, quoted, *supra*, para. 54.
[67] Argentina's reply to Panel question No. 8.
[68] Specifically, the Appellate Body noted that "[i]n view of the importance of the request for the establishment of a panel, we encourage complaining parties to be precise in identifying the legal basis of the complaint". Appellate Body Report, *Thailand – H-Beams*, para. 97.
[69] Argentina's reply to Panel question No. 8.
[70] See Panel Report, *Canada – Wheat Exports and Grain Imports*, Article 6.2 ruling para. 43.
[71] European Communities' preliminary ruling request, para. 38. The European Communities does not indicate the paragraph numbers which contain these four obligations.
[72] Article 12.4 deals with measures taken by developing country Members. Articles 12.5 and 12.6 relate to Members' obligations in connection with the work of international standardizing bodies. Article 12.8 concerns the problems faced by developing country Members in discharging their obligations under the *TBT Agreement* and the possibility of obtaining time-limited exceptions from obligations under the *TBT Agreement*. Article 12.9 relates to "consultations" in a situation where a developing country Member is "formulating and implementing" standards, technical regulations or conformity assessment procedures. However, Argentina's panel request nowhere suggests that the European Communities failed to comply with its obligations during

consultations between Argentina and the European Communities. Also, Argentina's complaint plainly is not about the formulation and implementation of its own standards, technical regulations or conformity assessment procedures. Article 12.10 sets out a requirement to be satisfied by the Committee on Technical Barriers to Trade.
[73] Appellate Body Report, *US – Carbon Steel*, para. 130, quoted, *supra*, para. 54.
[74] United States' reply to Panel question No. 3; Canada's reply to Panel question No. 5.
[75] Argentina's reply to Panel question No. 9.
[76] Appellate Body Report, *US – Carbon Steel*, para. 130, quoted, *supra*, para. 54.
[77] See Appellate Body Report, *Australia – Measures Affecting Importation of Salmon* ("*Australia – Salmon* "), WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327, para. 138; Panel Report, *EC Measures Concerning Meat and Meat Products* (*Hormones*) *– Complaint by Canada* ("*EC – Hormones* (*Canada*)"), WT/DS48/R/CAN, adopted 13 February 1998, as modified by the Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:II, 235, para. 8.99.
[78] See G/SPS/15.
[79] Appellate Body Report, *US – Carbon Steel*, para. 130, quoted, *supra*, para. 54.
[80] See, e.g., Appellate Body Report, *US – Carbon Steel*, para. 172.
[81] See Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*EC – Bananas III* "), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, para. 141.
[82] *Ibid*.
[83] Panel Report, *Canada – Wheat Exports and Grain Imports*, Article 6.2 ruling para. 29.
[84] See, *supra*, paras. 8, 9 and 10. It is important to note that in listing the three EC measures, all three panel requests use the separator "and".
[85] WT/DS291/23.
[86] WT/DS292/17.
[87] WT/DS293/17.
[88] Canada's comments on the European Communities preliminary ruling request, para. 33; Canada's reply to Panel question No. 6. For a list of the relevant provisions, see, *supra*, para. 93.
[89] United States' reply to Panel question No. 2, note 1.
[90] Appellate Body Report, *US – Carbon Steel*, para. 173.
[91] We are not convinced, however, that the European Communities might potentially have to defend itself against more than three thousands claims. In particular, we note that the European Communities itself is of the view that some of the provisions cited in the panel requests are mutually exclusive or subject to other provisions. European Communities' preliminary ruling request, para. 40.
[92] Appellate Body Report, *EC – Bananas III*, para. 141.
[93] We note, in addition, that just like we do not consider that the summaries of the legal basis of the complaints provided in the Complaining Parties' panel requests result in the European Communities not knowing what case it has to answer and hence being unable to begin preparing its defence, so also we do not consider that those summaries result in the third parties being uninformed as to the legal basis of the Complaining Parties' complaints and thus unable effectively to respond to these complaints. We recall in this regard that none of the third parties has offered any comments on the European Communities' objections to the Complaining Parties' panel requests.

7.48 In relation to the above preliminary ruling, we note that in *US – Gambling*, the Appellate Body found that "without demonstrating the source of the prohibition, a complaining party may not challenge a 'total prohibition' as a "measure", *per se*, in dispute settlement proceedings under the GATS".[235] This statement relates to a measure which was different in nature from the first measure challenged by the Complaining Parties in this case (the alleged general EC moratorium). Indeed, in *US – Gambling*, the Appellate Body's conclusion was based on the argument that without knowing the precise source of the "total prohibition", the responding party in that case was not in a position to prepare adequately its defence, particularly because it had been alleged that numerous federal and

[235] Appellate Body Report, *US – Gambling*, para. 126.

state laws underlay the "total prohibition".[236] In the present case, there is no allegation that numerous EC laws and regulations underlie the first measure challenged by the Complaining Parties. The Complaining Parties are alleging the very opposite, namely, that there are no formal laws or regulations underlying the first measure and that, as a result, no such laws or regulations could have been identified. In the light of this, we see no inconsistency between our approach and that of the Appellate Body in *US – Gambling*.[237] In any event, we have determined above that the description of the first measure covered in the Complaining Parties' respective panel requests, when read together with other information provided in those requests, adequately identifies the specific measure that is being challenged, and that the European Communities has failed to persuade us that the information contained in the Complaining Parties' respective descriptions of the first measure did not allow the European Communities to prepare adequately its defence.

7 The relevance of other rules of international law in the interpretation of the WTO agreements at issue in this dispute

7.49 The European Communities argues that in *US – Gasoline* the Appellate Body stated that "the General Agreement is not to be read in clinical isolation from public international law". More specifically, the European Communities notes that the WTO agreements – including the *SPS Agreement*, the *TBT Agreement* and the GATT 1994 – must be interpreted and applied by reference to relevant rules of international law arising outside the WTO context, as reflected in international agreements and declarations. The European Communities notes that notwithstanding the aforementioned statement by the Appellate Body, the Complaining Parties in these proceedings treat the legal issues concerning the authorization and international trade of GMOs as though they are regulated exclusively by WTO rules, and make no reference whatsoever to the relevant rules of public international law which have been adopted to regulate the concerns and requirements which arise from the particular characteristics of GMOs.

7.50 In view of the European Communities' argument, the Panel now turns to address the issue of the relevance of other rules of international law to the interpretation of the WTO agreements at issue in this dispute.

(a) Other applicable rules of international law as an interpretative element to be taken into account together with the "context" (Article 31(3)(c) of the *Vienna Convention on the Law of Treaties*)

7.51 In approaching this issue, we first consider whether there are other applicable rules of international law which we are required to take into account in interpreting the WTO agreements at issue in this dispute.

7.52 The European Communities asserts that the Panel is required to interpret the relevant rules of WTO law consistently with other rules of international law that may be relevant to these proceedings. The European Communities notes in this regard that the customary rules of interpretation of public international law are reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (hereafter "the *Vienna Convention*") and they include the requirement to take into account other relevant rules of international law, in addition to the context of the treaty itself. The European Communities notes in this regard that the Appellate Body has interpreted WTO rules by reference to treaties which are not binding on all parties to the proceedings. More specifically, the European Communities refers to treaties invoked by the Appellate Body in the *US – Shrimp* case – in

[236] *Ibid*., para. 125.
[237] For our approach, *see* Preliminary Ruling, paras. 22-24, 34-35 and 45-46.

support of arguments made by the United States – treaties which that country had not signed or had signed but not ratified. The European Communities asserts that the Panel is bound to follow the approach set forth in *US – Shrimp.*

7.53 The European Communities considers that the binding international law instruments relevant to this case are the *1992 Convention on Biological Diversity* (hereafter "the *Convention on Biological Diversity*") and the *2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity* (hereafter "the *Biosafety Protocol*"). According to the European Communities, the *Convention on Biological Diversity* is binding on the European Communities, Argentina and Canada and has been signed by the United States. Regarding the *Biosafety Protocol*, the European Communities points out that the *Protocol* is binding on the European Communities (which has obligations under it *vis-à-vis* third parties) and has been signed by Argentina and Canada. Regarding the United States, the European Communities indicates that the United States is participating in the *Protocol's* Clearing-House Mechanism (under Articles 11 and 20) and must therefore be taken to have no objection to the approach required by the *Protocol*. More generally, the European Communities argues that under Article 18 of the *Vienna Convention* (which, according to the European Communities, reflects customary international law) a State which has signed a treaty is bound to "refrain from acts which would defeat [its] object and purpose".

7.54 The European Communities argues that the *Biosafety Protocol* is the international agreement which is most directly relevant to the matters raised by the present proceedings. The relationship between the *Protocol* and other international agreements, including trade agreements, is addressed by the last three recitals of the Preamble. They recall the concept of mutual supportiveness between trade and environment agreements; they furthermore affirm that the *Protocol* shall not be interpreted as implying a change in the rights and obligations of Parties under any other existing international agreement, but recall that such statement shall not mean that the *Protocol* is subordinated to other international agreements. The European Communities submits that the Complaining Parties ignore the rules of international law reflected in the *Biosafety Protocol* on the precautionary principle and on risk assessment.

7.55 The European Communities argues that although the *Biosafety Protocol* has not been invoked in previous WTO dispute settlement proceedings, there is ample authority to support the proposition that the *Biosafety Protocol* and the *SPS Agreement* (as well as the *TBT Agreement* and GATT 1994) are so closely connected that they should be interpreted and applied consistently with each other, to the extent that is possible (as is the case in this dispute). The European Communities indicates in this regard that there is no *a priori* inconsistency between the WTO agreements (*SPS Agreement*, *TBT Agreement*, GATT 1994) and the *Biosafety Protocol*; that the two instruments are complementary; and that the Protocol's provisions on precaution and risk assessment inform the meaning and effect of the relevant provisions of the WTO agreements. Furthermore, the European Communities submits that the negotiators of the *Biosafety Protocol* were acutely aware of its relationship with WTO agreements and cannot have intended that there should be an inconsistency of approach. Reasonable governments have concluded that the authorization of GMOs (including import requirements) requires a particular approach, and they can hardly have intended that approach to be inconsistent with WTO rules. The European Communities argues, finally, that the application of its internal measures is fully consistent with the WTO agreements, and that this is confirmed by the requirements of the *Biosafety Protocol*.

7.56 The □n□□ed □□□e□argues that there are no binding international law instruments of relevance to this dispute, other than the *WTO Agreement*. Furthermore, the United States notes that under the DSU, the Panel's terms of reference are to examine the matter at issue "in light of the relevant provisions [...] in the covered agreements cited by the parties to the dispute". The matter is *not* to be

considered in light of the provisions of the *Biosafety Protocol*, nor of other sources of international law.

7.57 The United States argues that the only way other sources of international law could be pertinent to this dispute is if, under Article 3.2 of the DSU, those other sources of law would assist the Panel in "clarifying the existing provisions of the [covered] agreements in accordance with customary rules of interpretation of public international law". As pertinent here, customary rules of interpretation of public international law are reflected in Article 31 of the *Vienna Convention*. This provision states that the terms of a treaty must be interpreted "in accordance with [their] ordinary meaning [...] in their context and in the light of [the treaty's] object and purpose". The United States notes that international law other than the *WTO Agreement* is only pertinent in so far as it would assist the Panel in interpreting the particular terms of the covered agreements at issue in this dispute.

7.58 The United States disagrees with any notion that the *Biosafety Protocol* is a rule of international law for the purposes of interpreting the *WTO Agreement* in accordance with the principles in Article 31(3) of the *Vienna Convention*. Under Article 31(3), the international rule must be "applicable in the relations between the parties". The United States notes that in this case, the *Biosafety Protocol* is not applicable to relations between the United States and the European Communities, because the United States is not a party to the *Biosafety Protocol*. The United States indicates that the European Communities' argument to the contrary is entirely without merit. The European Communities notes that the United States participates in the *Biosafety Protocol* Clearing-House Mechanism, and from this the European Communities leaps to the conclusion that the United States must thus have no objection to the "approach" required by the *Biosafety Protocol*. The United States argues that its good-faith effort to share information regarding living modified organisms that have completed regulatory review in the United States is in no way an endorsement of the *Protocol* itself.

7.59 Moreover, the United States does not agree that the Panel would need to look to the *Biosafety Protocol* in interpreting the *WTO Agreement* even in a dispute between WTO Members that were both parties to the *Biosafety Protocol*. The United States submits that the European Communities itself acknowledges that the *Protocol* explicitly provides that parties may not disregard their existing international obligations in their implementation of the *Biosafety Protocol*. The United States submits that the *Biosafety Protocol* has a clear and unequivocal statement that the *Protocol* does not change the rights and obligations under any existing international agreement. In addition, the United States notes that in this dispute, the European Communities has not identified how the *Biosafety Protocol* or a "precautionary principle" would be of relevance to interpreting any particular provision of the *WTO Agreement*. Moreover, the United States notes that the European Communities does not argue that any provision of the *Protocol* is in any way inconsistent with the European Communities' full compliance with its WTO obligations. According to the United States, the *Biosafety Protocol* foresees a functioning regulatory system in each Party country – a system that works in a predictable manner to make informed decisions on imports of "living modified organisms" within a specified timeframe. Nowhere does the *Protocol* require or even condone the adoption of moratoria on decision-making, or undue delays in such decision-making.

7.60 □□**n**□**d**□ argues that with the possible exception of the 1979 *International Plant Protection Convention*, there are no binding international law instruments relevant to this case. In relation to the *Biosafety Protocol*, Canada notes that the only possible relevance of the *Protocol* to this dispute could be for interpretive purposes. Initially, Canada submitted in this regard that in view of the fact that the Complaining Parties to this dispute are not parties to the *Biosafety Protocol*, the *Biosafety Protocol* is not a "relevant rule[] of international law applicable in the relations between the parties" (Article 31(3)(c) of the *Vienna Convention*). However, at a later stage Canada argued that the

reference to "parties" in Article 31(3)(c) is a reference to the parties to the treaty that is being interpreted. On that basis, Canada submitted that in the case of the *WTO Agreement*, the rules of international law in question would have to be applicable in the relations among all the WTO members.

7.61 Canada further argues that, in any event, the *Biosafety Protocol* should not be taken into account in the interpretation of the obligations under the *WTO Agreement*, given that the *Protocol*'s own terms emphasize that "this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements." Furthermore, Canada notes that the European Communities has offered no explanation for how the *Biosafety Protocol* might assist it. In particular, the *Biosafety Protocol* does not entitle the European Communities to take measures that disregard the conclusions of its scientific risk assessments or suspend the working of its risk assessment process. According to Canada there is no inconsistency between the obligations of the *Biosafety Protocol* and the WTO obligations relevant to this dispute. The *Biosafety Protocol* is premised on transparent, scientifically-sound risk assessment as the basis for decisions regarding the importation of the products to which it applies. Canada argues that the European Communities' measures – its moratorium, its product-specific marketing bans and its member State bans – are stark refutations of this premise. Also, the scope of the *Biosafety Protocol* is limited to "living modified organisms" or LMOs. The European Communities repeatedly attempts to equate the term LMOs with GMOs. As the *Biosafety Protocol* is concerned with the impact of LMOs on biodiversity, even under the European Communities' theory, the *Protocol* is of no relevance to the risk assessment of biotech products for food use under Regulation 258/97. Canada submits that, for all these reasons, the European Communities will find no justification for its measures under the *WTO Agreement* by appealing to other international agreements.

7.62 **Ar□en□n□** argues that according to Article 3.2 of the DSU, as interpreted by the Appellate Body, any treaty interpreter must resort to the *Vienna Convention* in order to interpret the covered agreements. Argentina indicates that in this case, with respect to the "extra-WTO" rules invoked by the European Communities, it is necessary to resort to Article 31 of the *Vienna Convention*.

7.63 Furthermore, Argentina argues that the rules of international law referred to by the European Communities are clearly not an agreement "relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" within the meaning of Article 31(2)(a) of the *Vienna Convention*. Nor are they an "instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" within the meaning of Article 31(2)(b) of the *Vienna Convention*. Moreover, Argentina submits that the rules cited by the European Communities are not a "subsequent agreement between the parties regarding the interpretation of the treaty or the applications of its provisions" within the meaning of Article 31.3(a). In addition, Argentina asserts that the *Biosafety Protocol* cannot be regarded as "any relevant rule of international law applicable in the relations between the parties" within the meaning of Article 31(3)(c) of the *Vienna Convention*, since the European Communities is the only party in this WTO dispute bound by the provisions of the *Biosafety Protocol*.

7.64 The □□**ne**□ begins its analysis by offering some general observations before considering the relevance of the rules of international law which the European Communities claims should have a bearing on our interpretation of WTO provisions.

(i) General

7.65 Pursuant to Article 3.2 of the DSU, we are to interpret the WTO agreements "in accordance with customary rules of interpretation of public international law". These customary rules are reflected, in part, in Article 31 of the *Vienna Convention*.[238]

7.66 Article 31 provides in relevant part:

> Article 31
> General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.

7.67 Article 31(3)(c) directly speaks to the issue of the relevance of other rules of international law to the interpretation of a treaty. In considering the provisions of Article 31(3)(c), we note, initially, that it refers to "rules of international law". Textually, this reference seems sufficiently broad to encompass all generally accepted sources of public international law, that is to say, (i) international conventions (treaties), (ii) international custom (customary international law), and (iii) the recognized general principles of law. In our view, there can be no doubt that treaties and customary rules of international law are "rules of international law" within the meaning of Article 31(3)(c). We therefore agree with the European Communities that a treaty like the *Biosafety Protocol* would qualify as a "rule of international law". Regarding the recognized general *principles* of law which are applicable in international law, it may not appear self-evident that they can be considered as "*rules* of international law" within the meaning of Article 31(3)(c). However, the Appellate Body in *US – Shrimp* made it clear that pursuant to Article 31(3)(c) general principles of international law are to be

[238] Appellate Body Report, *US – Carbon Steel*, paras. 61-62.

taken into account in the interpretation of WTO provisions.[239] As we mention further below, the European Communities considers that the principle of precaution is a "general principle of international law". Based on the Appellate Body report on *US – Shrimp*, we would agree that if the precautionary principle is a general principle of international law, it could be considered a "rule of international law" within the meaning of Article 31(3)(c).

7.68 Furthermore, and importantly, Article 31(3)(c) indicates that it is only those rules of international law which are "applicable in the relations between the parties" that are to be taken into account in interpreting a treaty. This limitation gives rise to the question of what is meant by the term "the parties". In considering this issue, we note that Article 31(3)(c) does not refer to "one or more parties".[240] Nor does it refer to "the parties to a dispute".[241] We further note that Article 2.1(g) of the *Vienna Convention* defines the meaning of the term "party" for the purposes of the *Vienna Convention*. Thus, "party" means "a State which has consented to be bound by the treaty and for which the treaty is in force". It may be inferred from these elements that the rules of international law applicable in the relations between "the parties" are the rules of international law applicable in the relations between the States which have consented to be bound by the treaty which is being interpreted, and for which that treaty is in force.[242] This understanding of the term "the parties" leads logically to the view that the rules of international law to be taken into account in interpreting the WTO agreements at issue in this dispute are those which are applicable in the relations between the WTO Members.[243]

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[239] Appellate Body Report, *US – Shrimp*, para. 158 and footnote 157. The Appellate Body found in that case that the principle of good faith was at once a general principle of law and a general principle of international law.

[240] We note that, by contrast, Article 31(2)(b) of the *Vienna Convention* refers to "one or more parties".

[241] By contrast, Article 66 of the *Vienna Convention*, which deals with procedures for judicial settlement, arbitration and conciliation, refers to "the parties to a dispute". We note that the absence of a reference to "the parties to a dispute" in Article 31 is not surprising given that Article 31 does not purport to lay down rules of interpretation which are applicable solely in the context of international (quasi-)judicial proceedings.

[242] We are aware that Article 31(2)(a) of the *Vienna Convention* refers to "all the parties". However, we do not consider that Article 31(2)(a) rules out our interpretation of the term "the parties" in Article 31(3)(c). In our view, the reference to "all the parties" is used in Article 31(2)(a) to make clear the difference between the class of documents at issue in that provision (namely, agreements relating to a treaty which were made between "all the parties") and the class of documents at issue in Article 31(2)(b) (namely, instruments made by "one or more parties" and accepted by "the other parties" as related to a treaty). In other words, we think that the use of the term "all the parties" in Article 31(2)(a) is explained, and necessitated, by the existence of Article 31(2)(b). Consistent with this view, we think that the absence of a reference to "all the parties" in Article 31(3)(c) is explained by the fact that Article 31(3) contains no provision like Article 31(2)(b), *i.e.*, that Article 31(3) contains no provision which refers to "one or more parties" and hence could render unclear or ambiguous the reference to "the parties" in Article 31(3)(c).

It is useful to note, in addition, that the view that the term "the parties" in Article 31(3)(c) should be understood as referring to all the parties to a treaty has also been expressed by Mustafa Yasseen, "L'interprétation des Traités d'après la Convention de Vienne sur le Droit des Traités", in *Recueil des Cours de l'Académie de Droit International* (1976), Vol. III, p. 63, para. 7.

[243] We find further support for this view in the provisions of Article 31(3)(b). Article 31(3)(b), which is part of the immediate context of Article 31(3)(c), provides that a treaty interpreter must take into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". Like Article 31(3)(c), this provision makes reference to "the parties". In *EC – Chicken Cuts*, the Appellate Body appeared to agree with the panel in that case that the term "the parties" in Article 31(3)(b) means the parties to a treaty and in the WTO context must be understood as meaning the WTO Members. Appellate Body Report, *EC – Chicken Cuts*, paras. 272 (referring to "a treaty party" and agreement with a practice by "other WTO Members") and 273 (referring to the "issue of how to establish the agreement by

7.69 It is important to note that Article 31(3)(c) mandates a treaty interpreter to take into account other rules of international law ("[t]here shall be taken into account"); it does not merely give a treaty interpreter the option of doing so.[244] It is true that the obligation is to "take account" of such rules, and thus no particular outcome is prescribed. However, Article 31(1) makes clear that a treaty is to be interpreted "in good faith". Thus, where consideration of all other interpretative elements set out in Article 31 results in more than one permissible interpretation, a treaty interpreter following the instructions of Article 31(3)(c) in good faith would in our view need to settle for that interpretation which is more in accord with other applicable rules of international law.[245]

7.70 Taking account of the fact that Article 31(3)(c) mandates consideration of other applicable rules of international law, and that such consideration may prompt a treaty interpreter to adopt one interpretation rather than another, we think it makes sense to interpret Article 31(3)(c) as requiring consideration of those rules of international law which are applicable in the relations between all parties to the treaty which is being interpreted. Requiring that a treaty be interpreted in the light of other rules of international law which bind the States parties to the treaty ensures or enhances the consistency of the rules of international law applicable to these States and thus contributes to avoiding conflicts between the relevant rules.

7.71 The European Communities appears to suggest that we must interpret the WTO agreements at issue in this dispute in the light of other rules of international law even if these rules are not binding on all Parties to this dispute.[246] In addressing this argument, we first recall our view that Article 31(3)(c) should be interpreted to mandate consideration of rules of international law which are applicable in the relations between all parties to the treaty which is being interpreted.[247] The parties to a dispute over compliance with a particular treaty are, of course, parties to that treaty. In relation to the present dispute it can thus be said that if a rule of international law is not applicable to one of the four WTO Members which are parties to the present dispute, the rule is not applicable in the relations

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Members that have not engaged in a practice"). *See also* Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 13 (referring to "the agreement of the parties [to a treaty] regarding its interpretation"). It is true that the Appellate Body found that "the interpretation of a treaty provision on the basis of subsequent practice is binding on all parties, including those that have not actually engaged in such practice". Appellate Body Report, *EC – Chicken Cuts*, para. 273. But it also found that it is necessary "to establish agreement of those that have not engaged in a practice". Appellate Body Report, *EC – Chicken Cuts* , para. 271. Thus, our interpretation of the term "the parties" in Article 31(3)(c) is consistent with, and indeed supported by, the Appellate Body's interpretation of the same term in Article 31(3)(b). In our view, it would be incongruous to allow the interpretation of a treaty to be affected by rules of international law which are not applicable in the relations between all parties to the treaty, but not by a subsequent practice which does not establish the agreement of all parties to the treaty regarding the meaning of that treaty.

[244] This view is confirmed by the negotiating history of Article 31(3). The International Law Commission, in its commentary to Article 27 of the draft *Vienna Convention*, which contained language identical to the current Article 31 of the *Vienna Convention*, stated that "the three elements [the three sub-paragraphs of what is now Article 31(3)] are all of an obligatory character and by their very nature could not be considered to be norms of interpretation in any way inferior to those which precede them". *Yearbook of the International Law Commission* (1966), Vol. II, p. 220, para. 9.

[245] We are not suggesting that other applicable rules of international law invariably or exclusively serve as a kind of "tie-breaker" in the interpretative process.

[246] The European Communities considers that the Appellate Body report on *US – Shrimp* supports its view. We do not agree. In our view, that report does not stand for the proposition that panels are required to interpret WTO agreements in the light of other rules of international law even if they are not applicable to all parties to a dispute. We further address the Appellate Body report on *US – Shrimp*, and in particular how we understand it, in the next sub-section.

[247] We recall that we have reached this view after determining that the text and context of Article 31(3)(c) do not support interpreting the term "the parties" as meaning "the parties to a dispute".

between all WTO Members. Accordingly, based on our interpretation of Article 31(3)(c), we do not consider that in interpreting the relevant WTO agreements we are required to take into account other rules of international law which are not applicable to one of the Parties to this dispute. But even independently of our own interpretation, we think Article 31(3)(c) cannot reasonably be interpreted as the European Communities suggests. Indeed, it is not apparent why a sovereign State would agree to a mandatory rule of treaty interpretation which could have as a consequence that the interpretation of a treaty to which that State is a party is affected by other rules of international law which that State has decided not to accept.[248]

7.72 Before applying our interpretation of Article 31(3)(c) to the present case, it is important to note that the present case is not one in which relevant rules of international law are applicable in the relations between all parties to the dispute, but not between all WTO Members, and in which all parties to the dispute argue that a multilateral WTO agreement should be interpreted in the light of these other rules of international law. Therefore, we need not, and do not, take a position on whether in such a situation we would be entitled to take the relevant other rules of international law into account.

(ii) Convention on Biological Diversity and Biosafety Protocol

7.73 With the foregoing observations in mind, we now consider whether the multilateral treaties identified by the European Communities are "relevant rules of international law applicable in the relations between the parties". The European Communities has identified two multilateral treaties, the *Convention on Biological Diversity* and the *Biosafety Protocol*. We first address the *Convention on Biological Diversity*.

7.74 We note that like most other WTO Members, Argentina, Canada and the European Communities have ratified the *Convention on Biological Diversity* and are thus parties to it.[249] The United States has signed it in 1993, but has not ratified it since.[250] Thus, the United States is not a party to the *Convention on Biological Diversity*, and so for the United States the *Convention* is not in force. In other words, the *Convention on Biological Diversity* is not "applicable" in the relations between the United States and all other WTO Members. The mere fact that the United States has signed the *Convention on Biological Diversity* does not mean that the *Convention* is applicable to it.[251] Nor does it mean that the United States will ratify it, or that it is under an obligation to do so. We

[248] It is useful to recall that there are several ways in which a sovereign State can decide not to accept other rules of international law. Thus, in the case of other rules of international law embodied in a treaty, a State may have decided not to participate in the negotiation of the treaty; it may have decided not to sign the final text of the treaty in question; or the legislature of a State may have decided not to ratify the treaty after it had been signed by its executive branch. There are also cases of ratifications with objections/exceptions. In the case of customary rules of international law, a State may have persistently objected to such a rule during its formation.

[249] The *Convention on Biological Diversity* entered into force on 29 December 1993.

[250] We have no information on whether the United States has ever made its intentions clear after 1993 as to whether it still wished to become a party to the 1992 Convention.

[251] We note that pursuant to Article 18 of the *Vienna Convention* a State which has signed a treaty must refrain from acts which would defeat the object and purpose of that treaty, at least until it has made its intention clear not to become a party. Initially, we note that there is an issue whether the provisions of Article 18 reflect customary international law. Even disregarding this issue, we note that Article 18 refers to "acts" which rise to the level of "defeat[ing] the object and purpose" of a treaty, not to acts which are inconsistent with specific terms of that treaty. It does not follow from Article 18 that a State which has signed a treaty has obligations pursuant to the specific terms of that treaty and that the treaty is applicable to it as such. In any event, Article 31(3)(c) refers to applicable "rules" of international law. We think the "object and purpose" of a treaty cannot be reasonably considered to constitute a "rule" of international law.

have said that if a rule of international law is not applicable to one of the Parties to this dispute, it is not applicable in the relations between all WTO Members. Therefore, in view of the fact that the United States is not a party to the *Convention on Biological Diversity*, we do not agree with the European Communities that we are required to take into account the *Convention on Biological Diversity* in interpreting the multilateral WTO agreements at issue in this dispute.

7.75 Turning to the *Biosafety Protocol*, we note that it entered into force only on 11 September 2003, *i.e.*, after this Panel was established by the DSB. Among the WTO Members parties to the *Biosafety Protocol* is the European Communities. Argentina and Canada have signed the *Biosafety Protocol*, but have not ratified it since.[252] Hence, they are not parties to it. The United States has not signed the *Biosafety Protocol*. While this does not preclude the United States from ratifying the *Protocol*, the United States has so far not done so.[253] Accordingly, it, too, is not a party to the *Biosafety Protocol*. We do not consider that the rules of the *Biosafety Protocol* can be deemed to be applicable to the United States merely because the United States participates in the Protocol's Clearing-House Mechanism. It follows that the *Biosafety Protocol* is not in force for Argentina, Canada or the United States.[254] We deduce from this that the *Biosafety Protocol* is not "applicable" in the relations between these WTO Members and all other WTO Members. As we have said above, in our view, the mere fact that WTO Members like Argentina and Canada have signed the *Biosafety Protocol* does not mean that the *Protocol* is applicable to them. In view of the fact that several WTO Members, including the Complaining Parties to this dispute, are not parties to the *Biosafety Protocol*, we do not agree with the European Communities that we are required to take into account the *Biosafety Protocol* in interpreting the multilateral WTO agreements at issue in this dispute.

(iii) Precautionary principle

7.76 We have stated earlier that, in our view, the relevant rules of international law to be taken into account include general principles of law. The European Communities contends that the so-called "precautionary principle" is a relevant principle of this kind, and so we address this issue below, after summarizing the Parties' arguments.

7.77 The [illegible] states that certain GMOs present potential threats to human health and the environment. The European Communities submits that the existence of a potential threat justifies the assessment of risks on a case-by-case basis and special measures of protection based on the precautionary principle.

7.78 The European Communities asserts that the precautionary principle has by now become a fully-fledged and general principle of international law. According to the European Communities, the precautionary principle was first recognised in the *World Charter for Nature*, adopted by the UN General Assembly in 1982, and was subsequently incorporated into various international conventions on the protection of the environment. Furthermore, the *Rio Declaration* that concluded the 1992 Rio Conference on the Environment and Development codified an application of this principle in its Principle 15[255]. Since then, the *United Nations Framework Convention on Climate Change and the Convention of Biological Diversity* have referred to the precautionary principle. More recently, in the

[252] We have no information on whether Argentina and Canada have made their intentions clear after signing the 2000 Protocol as to whether they still wished to become a party to the 2000 Protocol.

[253] We have no information on whether the United States has made its intentions clear as to whether it wishes to become a party to the 2000 Protocol.

[254] We note that it is also not in force for several third parties to this dispute, including Australia, Chile, Honduras, Thailand and Uruguay. *See* http://www.biodiv.org/world/parties.asp.

[255] For the text of Principle 15 of the *Rio Declaration*, *see infra* footnote 263.

specific field of GMOs, the *Biosafety Protocol* has confirmed the key function of the precautionary principle in the decision to restrict or prohibit imports of GMOs in the face of scientific uncertainty.

7.79 The European Communities further points out that in many countries approval systems are based on the need to take precautionary action. As examples, the European Communities cites the Australian Gene Technology Act (2000), the Swiss GMO legislation and the New Zealand Hazardous Substances and New Organisms Act. Additionally, the European Communities notes that the precautionary principle is one of the "salutary principles which govern the law of the environment" in India and has been applied by the Indian Supreme Court.[256]

7.80 The United States argues that the European Communities has not identified how a "precautionary principle" would be of relevance to interpreting any particular provision of the *WTO Agreement*. Moreover, the United States notes that in the *EC – Hormones* dispute, the Appellate Body examined at length nearly identical arguments presented by the European Communities regarding the relationship between a purported "precautionary principle" and the *SPS Agreement*. The European Communities has not presented, and cannot argue, that any different results should apply here. The United States considers that as the Appellate Body found it unnecessary and imprudent in the *EC – Hormones* case to make a finding on the status of the precautionary principle in international law, the Panel should have no need to address this theoretical issue.

7.81 The United States nonetheless notes that it strongly disagrees that "precaution" has become a rule of international law. According to the United States, the "precautionary principle" cannot be considered a general principle or norm of international law because it does not have a single, agreed formulation. The United States notes in this regard that, on the contrary, the concept of precaution has many permutations across a number of different factors. Thus, the United States considers precaution to be an "approach", rather than a "principle" of international law.

7.82 Furthermore, the United States submits that if precaution is not a principle of international law, then it is *a fortiori* not a rule of customary international law. The United States submits that precaution does not fulfil any of the requirements to become a rule of customary international law for the following reasons: (i) it cannot be considered a "rule" because it has no clear content and therefore cannot be said to provide any authoritative guide for a State's conduct; (ii) it cannot be said to reflect the practice of States, as it cannot even be uniformly defined by those who espouse it; and (iii) given that precaution cannot be defined and, therefore, could not possibly be a legal norm, one could not argue that States follow it from a sense of legal obligation.

7.83 Finally, the United States argues that even if a precautionary principle were considered a relevant rule of international law under Article 31(3) of the *Vienna Convention*, it would be useful only for interpreting particular treaty terms, and could not override any part of the of the *SPS Agreement*.

7.84 Canada argues that while the *Biosafety Protocol* may reflect the "precautionary approach contained in Principle 15 of the *Rio Declaration*", the precautionary principle "finds reflection" in several provisions of the *SPS Agreement*, including Article 5.7. Canada notes that the Appellate Body in *EC – Hormones* has previously held that the precautionary principle cannot be invoked as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of the *SPS Agreement*.

[256] *See T.N. Godavarman Thirumalpad v. Union of India* (2002) 10 SCC 606.

7.85 **Ar□en□n□** states that the Appellate Body has addressed the status of this so-called "principle" of precaution in *EC – Hormones*.

7.86 The □□**ne**□notes the European Communities' contention that the precautionary principle has "by now" become a fully-fledged and general principle of international law. The European Communities has not explained exactly what it means by the term "general principle of international law". We note that this term may be understood as encompassing either rules of customary law or the recognized general principles of law or both.[257] Given this, we are prepared to consider whether the precautionary principle fits within either of these categories. This approach is consistent with the position taken by the European Communities in *EC – Hormones* where the European Communities contended on appeal that the precautionary principle was a general customary rule of international law or at least a general principle of law.[258]

7.87 In its report on *EC – Hormones*, the Appellate Body had this to say in response to the aforementioned contention by the European Communities:[259]

> "The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international *environmental* law. Whether it has been widely accepted by Members as a principle of *general* or *customary international law* appears less than clear.[260] We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. We note that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation.[261]

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[257] *See*, *e.g.*, Ian Brierly, *Principles of Public International Law*, 5th ed. (Clarendon Press, 1998), pp. 18-19.

[258] Appellate Body Report, *EC – Hormones*, para. 121.

[259] *Ibid*., paras. 123-124.

[260] (*original footnote*) Authors like P. Sands, J. Cameron and J. Abouchar, while recognizing that the principle is still evolving, submit nevertheless that there is currently sufficient state practice to support the view that the precautionary principle is a principle of customary international law. See, for example, P. Sands, *Principles of International Environmental Law*, Vol. I (Manchester University Press 1995) p. 212; J. Cameron, "The Status of the Precautionary Principle in International Law", in J. Cameron and T. O'Riordan (eds.), *Interpreting the Precautionary Principle* (Cameron May, 1994) 262, p. 283; J.Cameron and J. Abouchar, "The Status of the Precautionary Principle in International Law", in D. Freestone and E. Hey (eds.), *The Precautionary Principle in International Law* (Kluwer, 1996) 29, p. 52. Other authors argue that the precautionary principle has not yet reached the status of a principle of international law, or at least, consider such status doubtful, among other reasons, due to the fact that the principle is still subject to a great variety of interpretations. See, for example, P. Birnie and A. Boyle, *International Law and the Environment* (Clarendon Press, 1992), p. 98; L. Gündling, "The Status in International Law of the Precautionary Principle" (1990), 5:1,2,3 *International Journal of Estuarine and Coastal Law* 25, p. 30; A. deMestral (et. al), *International Law Chiefly as Interpreted and Applied in Canada*, 5th ed. (Emond Montgomery, 1993), p. 765; D. Bodansky, in *Proceedings of the 85th Annual Meeting of the American Society of International Law* (ASIL, 1991), p. 415.

[261] (*original footnote*) In *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*, the International Court of Justice recognized that in the field of environmental protection "... new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight ...". However, we note that the Court did not identify the precautionary principle as one of those recently developed norms. It also

> It appears to us important, nevertheless, to note some aspects of the relationship of the precautionary principle to the *SPS Agreement*. First, the principle has not been written into the *SPS Agreement* as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement. Secondly, the precautionary principle indeed finds reflection in Article 5.7 of the *SPS Agreement*. We agree, at the same time, with the European Communities, that there is no need to assume that Article 5.7 exhausts the relevance of a precautionary principle. It is reflected also in the sixth paragraph of the preamble and in Article 3.3. These explicitly recognize the right of Members to establish their own appropriate level of sanitary protection, which level may be higher (i.e., more cautious) than that implied in existing international standards, guidelines and recommendations. Thirdly, a panel charged with determining, for instance, whether "sufficient scientific evidence" exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned. Lastly, however, the precautionary principle does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the *SPS Agreement*."

7.88 The Appellate Body made this statement in January 1998. It appears to us from the Parties' arguments and other available materials that the legal debate over whether the precautionary principle constitutes a recognized principle of general or customary international law is still ongoing. Notably, there has, to date, been no authoritative decision by an international court or tribunal which recognizes the precautionary principle as a principle of general or customary international law.[262] It is correct that provisions explicitly or implicitly applying the precautionary principle have been incorporated into numerous international conventions and declarations, although, for the most part, they are environmental conventions and declarations.[263] Also, the principle has been referred to and applied

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declined to declare that such principle could override the obligations of the Treaty between Czechoslovakia and Hungary of 16 September 1977 concerning the construction and operation of the Gabcíkovo/Nagymaros System of Locks. See, *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Judgement, 25 September 1997, paras. 140, 111-114.

[262] We note that in the *Southern Bluefin Tuna Cases* brought before the International Tribunal for the Law of the Sea, two judges referred to the precautionary principle in their separate opinions. Judge Treves indicated understanding for "the reluctance of the Tribunal in taking a position as to whether the precautionary approach is a binding principle of customary international law", noting also that "[o]ther courts and tribunals, recently confronted with this question, have avoided to give an answer". Judge Laing considered that it was "not possible, on the basis of the materials available and arguments presented [...], to determine whether [...] customary international law recognizes a precautionary principle", adding that "treaties and formal instruments use different language of obligation; the notion is stated variously (as a principle, approach, concept, measures, action); no authoritative judicial decision unequivocally supports the notion; doctrine is indecisive; and domestic juridical materials are uncertain or evolving". International Tribunal for the Law of the Sea, *Southern Bluefin Tuna Cases* (*New Zealand v. Japan*; *Australia v. Japan*) *(Requests for Provisional Measures)*, 1999, para. 9 (Separate Opinion of Judge Treves) and para. 16 (Separate Opinion of Judge Laing).

[263] We note, by way of example, Principle 15 of the 1992 *Rio Declaration on Environment and Development*:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

by States at the domestic level, again mostly in domestic environmental law.[264] On the other hand, there remain questions regarding the precise definition and content of the precautionary principle.[265] Finally, regarding doctrine, we note that many authors have expressed the view that the precautionary principle exists as a general principle in international law.[266] At the same time, as already noted by the Appellate Body, others have expressed scepticism and consider that the precautionary principle has not yet attained the status of a general principle in international law.[267]

7.89 Since the legal status of the precautionary principle remains unsettled, like the Appellate Body before us, we consider that prudence suggests that we not attempt to resolve this complex issue, particularly if it is not necessary to do so. Our analysis below makes clear that for the purposes of

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> We also note preambular paragraph 9 of the *Convention on Biological Diversity*, which states:
>
> Noting also that where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.
>
> Finally, we note the *Biosafety Protocol*, which states in Article 1:
>
> In accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements.
>
> Furthermore, Article 10(6) of the *Protocol* states:
>
> Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of the living modified organism in question as referred to in paragraph 3 above, in order to avoid or minimize such potential adverse effects.

[264] We note, for instance, the European Communities' reference to a decision of the Indian Supreme Court. Another example is provided by Article 1(6) of Colombia's Law 99 of 1993, which provides that "[i]n formulating environmental policy, account shall be taken of the results of the scientific investigation process. However, the environmental authorities and individuals shall apply the precautionary principle according to which, where there are threats of serious and irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation" (Panel's translation from Spanish).

[265] This point was made, for instance, by Judge Laing in his previously mentioned separate opinion in the *Southern Bluefin Tuna Cases*.

[266] *See, e.g.*, O. McIntyre/T. Mosedale, "The Precautionary Principle as a Norm of Customary International Law", *Journal of Environmental Law* 9 (1997), pp. 222-223; J. Cameron/W. Wade-Gery/J. Abouchar, "Precautionary Principle and Future Generations", in E. Agius *et al.* (eds.), *Future Generations and International Law*, London, 1998, p. 96; P. Sands, *Principles of International Environmental Law*, 2nd ed. (Cambridge University Press, 2003), p. 279.

[267] *See, e.g.*, L. M. Jurgielewicz, *Global Environmental Change and International Law* (Lanham, 1996), p. 64; P.-M. Dupuy, "Où en est le droit international de l'environnement à la fin du siècle?", *Revue Générale de Droit International Public* 4 (1997), pp. 889-890; J. O. McGinnis, "The Appropriate Hierarchy of Global Multilateralism and Customary International Law: The Example of the WTO", *Virginia Journal of International Law* 44 (2003), pp. 260-261.

disposing of the legal claims before us, we need not take a position on whether or not the precautionary principle is a recognized principle of general or customary international law. Therefore, we refrain from expressing a view on this issue.

(b) Other rules of international law as evidence of the ordinary meaning of terms used in a treaty

7.90 Up to this point, we have examined whether there are other applicable rules of international law which we are required to take into account, in accordance with Article 31(3)(c) of the *Vienna Convention*, in interpreting the WTO agreements at issue in this dispute. We now turn to examine whether other rules of international law could be considered by us in the interpretation of the WTO agreements at issue even if these rules are not applicable in the relations between the WTO Members and thus do not fall within the category of rules which is at issue in Article 31(3)(c).

7.91 The European Communities notes in this regard that in *US – Shrimp* the Appellate Body interpreted WTO rules by reference to treaties which were not binding on all parties to the proceedings. More specifically, the European Communities points out that the Appellate Body in that case invoked treaties in support of arguments made by the United States, even though the United States had either not signed or not ratified these treaties. The European Communities notes that one such treaty was the *Convention on Biological Diversity*.

7.92 The European Communities recalls that pursuant to Article 31(1) of the *Vienna Convention*, the terms of a treaty must be interpreted in accordance with the "ordinary meaning" to be given to these terms in their context and in the light of its object and purpose. The ordinary meaning of treaty terms is often determined on the basis of dictionaries. We think that, in addition to dictionaries, other relevant rules of international law may in some cases aid a treaty interpreter in establishing, or confirming, the ordinary meaning of treaty terms in the specific context in which they are used.[268] Such rules would not be considered because they are legal rules, but rather because they may provide evidence of the ordinary meaning of terms in the same way that dictionaries do.[269] They would be considered for their informative character. It follows that when a treaty interpreter does not consider another rule of international law to be informative, he or she need not rely on it.

7.93 In the light of the foregoing, we consider that a panel may consider other relevant rules of international law when interpreting the terms of WTO agreements if it deems such rules to be informative. But a panel need not necessarily rely on other rules of international law, particularly if it considers that the ordinary meaning of the terms of WTO agreements may be ascertained by reference to other elements.

7.94 This approach is consistent with the Appellate Body's approach in *US – Shrimp*, as we understand it. In that case, the Appellate Body had to interpret the term "exhaustible natural resources" in Article XX(g) of the GATT 1994. The Appellate Body found that this term was by definition evolutionary and therefore found it "pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-

[268] It is useful to note in this context that the Appellate Body has stated that "dictionaries are important guides to, not dispositive statements of, definitions of words appearing in agreements and legal documents". Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 248.

[269] A treaty interpreter would have to keep in mind, of course, that other rules of international law may be negotiated rules and, as such, may assign meanings to particular terms which may not be reflective of the ordinary meaning of those terms. We note that this possibility is recognized in Article 31(4) of the *Vienna Convention*, which states that "[a] special meaning shall be given to a term if it is established that the parties so intended".

living resources".[270] Thus, as we understand it, the Appellate Body drew on other rules of international law because it considered that they were informative and aided it in establishing the meaning and scope of the term "exhaustible natural resources".[271] The European Communities correctly points out that the Appellate Body referred to conventions which were not applicable to all disputing parties. However, the mere fact that one or more disputing parties are not parties to a convention does not necessarily mean that a convention cannot shed light on the meaning and scope of a treaty term to be interpreted.[272]

7.95 In the present case, in response to a question from the Panel[273], the European Communities has identified a number of provisions of the *Convention on Biological Diversity* and of the *Biosafety Protocol* which it considers must be taken into account by the Panel.[274] The European Communities has not explained how these provisions are relevant to the interpretation of the WTO agreements at issue in this dispute. We have carefully considered the provisions referred to by the European Communities. Ultimately, however, we did not find it necessary or appropriate to rely on these particular provisions in interpreting the WTO agreements at issue in this dispute.

7.96 Furthermore, we recall that after consulting the Parties, we have requested several international organizations (Codex, FAO, the IPPC Secretariat, WHO, OIE, the CBD Secretariat and UNEP) to identify materials (reference works, glossaries, official documents of the relevant international organizations, including conventions, standards and guidelines, etc.) that might aid us in determining the ordinary meaning of certain terms used in the definitions provided in Annex A to the *SPS Agreement*. The materials we have obtained in this way have been taken into account by us, as appropriate.

B. OVERVIEW OF MEASURES AT ISSUE

7.97 In this section, we provide an overview of the measures at issue in this dispute. We have pointed out earlier that the three Complaining Parties in this dispute have filed legally separate complaints, but that each of these complaints relates to the same matter and that the DSB therefore decided to have them examined by a single panel.

7.98 The specific measures which are being contested in each complaint are indeed quite similar. As the case name suggests, the measures at issue in all three complaints are certain EC measures affecting the approval and marketing of biotech products. More specifically, the Complaining Parties are each challenging three identical categories of EC measures. The categories in question are:

(i) the alleged general EC moratorium on approvals of biotech products (hereafter the "general EC moratorium");

(ii) various product-specific EC measures affecting the approval of specific biotech products (hereafter the "product-specific EC measures"); and

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[270] Appellate Body Report, *US – Shrimp*, para. 130.

[271] We note that the Appellate Body did not suggest that it was looking to other rules of international law because it was required to do so pursuant to the provisions of Article 31(3)(c) of the *Vienna Convention*. Indeed, the Appellate Body did not even mention Article 31(3)(c).

[272] Equally, in a case where all disputing parties are parties to a convention, this fact would not necessarily render reliance on that convention appropriate.

[273] Panel question No. 4.

[274] The European Communities refers to the Preamble and Article 8(g) of the *Convention on Biological Diversity* and Articles 1, 8, 10, 11, 15, 23, 26 and Annex III of the *Biosafety Protocol*.

Annex 18

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

RESPONSIBILITIES AND OBLIGATIONS OF STATES SPONSORING PERSONS AND ENTITIES WITH RESPECT TO ACTIVITIES IN THE AREA (REQUEST FOR ADVISORY OPINION SUBMITTED TO THE SEABED DISPUTES CHAMBER)

List of cases: No. 17

ADVISORY OPINION OF 1 FEBRUARY 2011

2011

TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

RESPONSABILITÉS ET OBLIGATIONS DES ETATS QUI PATRONNENT DES PERSONNES ET DES ENTITÉS DANS LE CADRE D'ACTIVITÉS MENÉES DANS LA ZONE (DEMANDE D'AVIS CONSULTATIF SOUMISE À LA CHAMBRE POUR LE RÈGLEMENT DES DIFFÉRENDS RELATIFS AUX FONDS MARINS)

Rôle des affaires : No. 17

AVIS CONSULTATIF DU 1ER FÉVRIER 2011

Official citation:

Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10

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Responsabilités et obligations des Etats dans le cadre d'activités menées dans la Zone, avis consultatif, 1er février 2011, TIDM Recueil 2011, p. 10

1 FEBRUARY 2011
ADVISORY OPINION

RESPONSIBILITIES AND OBLIGATIONS OF STATES SPONSORING PERSONS AND ENTITIES WITH RESPECT TO ACTIVITIES IN THE AREA (REQUEST FOR ADVISORY OPINION SUBMITTED TO THE SEABED DISPUTES CHAMBER)

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1ER FÉVRIER 2011
AVIS CONSULTATIF

SEABED DISPUTES CHAMBER OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

YEAR 2011

1 February 2011

List of cases:
No. 17

RESPONSIBILITIES AND OBLIGATIONS OF STATES SPONSORING PERSONS AND ENTITIES WITH RESPECT TO ACTIVITIES IN THE AREA

ADVISORY OPINION

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ADVISORY OPINION

Present: *President* TREVES; *Judges* MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, WOLFRUM, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN; *Registrar* GAUTIER.

On Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area,

THE SEABED DISPUTES CHAMBER,

composed as above,

gives the following Advisory Opinion:

Introduction

I. The Request

1. The questions on which the advisory opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (hereinafter "the Chamber") has been requested are set forth in decision ISBA/16/C/13 adopted by the Council of the International Seabed Authority (hereinafter "the Council") on 6 May 2010 at its sixteenth session. By letter dated 11 May 2010, transmitted electronically to the Registry of the Tribunal on 14 May 2010, the Secretary-General of the International Seabed Authority (hereinafter "the Secretary-General") officially communicated to the Chamber the decision taken by the Council. The original of that letter was received in the Registry on 17 May 2010. Certified true copies of the English and French versions of the Council's decision were forwarded by the Legal Counsel of the International Seabed Authority (hereinafter "the Legal Counsel") on 8 June 2010 and received in the Registry on the same date. The decision of the Council reads:

The Council of the International Seabed Authority,

Considering the fact that developmental activities in the Area have already commenced,

Bearing in mind the exchange of views on legal questions arising within the scope of activities of the Council,

Decides, in accordance with Article 191 of the United Nations Convention on the Law of the Sea ("the Convention"), to request the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, pursuant to Article 131 of the Rules of the Tribunal, to render an advisory opinion on the following questions:

1. What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI, and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982?
2. What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention, in particular Part XI, and the 1994 Agreement, by an entity whom it has sponsored under Article 153, paragraph 2 (b), of the Convention?
3. What are the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?

2. The Request was entered in the List of cases as No. 17 and the case was named "Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area".

3. In his letter of 11 May 2010, the Secretary-General informed the Chamber of the appointment of the Legal Counsel as the representative of the International Seabed Authority (hereinafter "the Authority") for the proceedings.

II. Events leading to the Request

4. The Chamber considers it necessary to describe the events that led to the request for an advisory opinion:

- On 10 April 2008, the Authority received two applications for approval of a plan of work for exploration in the areas reserved for the conduct of activities by the Authority through the Enterprise or in association with developing States pursuant to Annex III, article 8, of the United Nations Convention on the Law of the Sea (hereinafter "the Convention"). These applications were submitted by Nauru Ocean Resources Inc. (sponsored by the Republic of Nauru) and Tonga Offshore Mining Ltd. (sponsored by the Kingdom of Tonga);
- These applications were submitted to the Legal and Technical Commission of the Authority. On 5 May 2009, the applicants submitted to the Authority a request that consideration of the applications should be postponed. At the fifteenth session of the Authority, held from 25 May to 5 June 2009, the Legal and Technical Commission decided to defer further consideration of the item;
- On 1 March 2010, the Republic of Nauru transmitted to the Secretary-General a proposal, set out in document ISBA/16/C/6, to seek an advisory opinion from the Chamber on a number of specific questions regarding the responsibility and liability of sponsoring States;
- In support of its proposal, Nauru submitted, inter alia, the following considerations:

> In 2008 the Republic of Nauru sponsored an application by Nauru Ocean Resources Inc. for a plan of work to explore for polymetallic nodules in the Area. Nauru, like many other developing States, does not yet possess the technical and financial capacity to undertake seafloor mining in international waters. To participate effectively in activities in the Area, these States must engage entities in the global private sector (in much the same way as some developing countries require foreign direct investment). Not only do some developing States lack the financial capacity to execute a seafloor mining project in international waters, but some also cannot afford exposure to the legal risks potentially associated with such a project. Recognizing this, Nauru's sponsorship of Nauru Ocean Resources Inc. was originally premised on the assumption that Nauru could effectively mitigate (with a high degree of certainty) the potential liabilities or costs arising from its sponsorship. This was important, as these liabilities or costs could, in some

> circumstances, far exceed the financial capacities of Nauru (as well as those of many other developing States). Unlike terrestrial mining, in which a State generally only risks losing that which it already has (for example, its natural environment), if a developing State can be held liable for activities in the Area, the State may potentially face losing more than it actually has. (ISBA/16/C/6, paragraph 1);
>
> Ultimately, if sponsoring States are exposed to potential significant liabilities, Nauru, as well as other developing States, may be precluded from effectively participating in activities in the Area, which is one of the purposes and principles of Part XI of the Convention, in particular as provided for in article 148; article 150, subparagraph (c); and article 152, paragraph 2. As a result, Nauru considers it crucial that guidance be provided on the interpretation of the relevant sections of Part XI pertaining to responsibility and liability, so that developing States can assess whether it is within their capabilities to effectively mitigate such risks and in turn make an informed decision on whether or not to participate in activities in the Area. (ISBA/16/C/6, paragraph 5);

– Nauru's proposal was included in the agenda for the sixteenth session of the Council of the Authority, during which intensive discussions on this agenda item were held at the 155th, 160th and 161st meetings;
– The Council decided not to adopt the proposal as formulated by Nauru. In view of the wishes of many participants in the debate, it decided to request an advisory opinion on three more abstract but concise questions;
– These questions were formulated in decision ISBA/16/C/13, adopted by the Council at its 161st meeting on 6 May 2010. As indicated by the Authority in its written statement and at the hearing, the decision adopted by the Council on 6 May 2010 was taken "without a vote" and "without objection" (written statement of the Authority, paragraph 2.4; ITLOS/PV.2010/1/Rev.1, p. 10, lines 16-21).

III. Chronology of the procedure

5. Pursuant to article 133, paragraph 1, of the Rules of the Tribunal (hereinafter "the Rules"), the Registrar, by Note Verbale dated 17 May 2010, notified all States Parties to the United Nations Convention on the Law of the Sea (hereinafter "States Parties") of the request for an advisory opinion.

6. By letter dated 18 May 2010, pursuant to article 4 of the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Registrar notified the Secretary-General of the United Nations of the request for an advisory opinion.

7. By Order dated 18 May 2010, pursuant to article 133, paragraph 2, of the Rules, the President decided that the Authority and the organizations invited as intergovernmental organizations to participate as observers in the Assembly of the Authority (hereinafter "the Assembly") were considered likely to be able to furnish information on the questions submitted to the Chamber for an advisory opinion. Accordingly, the President invited the States Parties, the Authority and the aforementioned intergovernmental organizations to present written statements on those questions. By the same Order, in accordance with article 133, paragraph 3, of the Rules, the President fixed 9 August 2010 as the time-limit within which written statements on those questions might be submitted to the Chamber. In the Order, in accordance with article 133, paragraph 4, of the Rules, the President further decided that oral proceedings would be held and fixed 14 September 2010 as the date for the opening of the hearing. States Parties, the Authority and the aforementioned intergovernmental organizations were invited to participate in the hearing and to indicate to the Registrar, not later than 3 September 2010, their intention to make oral statements.

8. Article 191 of the Convention requires the Chamber to give advisory opinions "as a matter of urgency". In the present case, the time-limits for the submission of written statements and the date of the opening of the hearing, as set out in the Orders of the President, were fixed with a view to meeting this requirement.

9. By Order dated 28 July 2010, in light of a request submitted to the Chamber, the President extended the time-limit for the submission of written statements to 19 August 2010.

10. By letter dated 30 July 2010, pursuant to article 131 of the Rules, the Legal Counsel transmitted to the Chamber a dossier containing documents in support of the Request. The dossier was posted on the Tribunal's website.

11. Within the time-limit fixed by the President, written statements were submitted by the following 12 States Parties, which are listed in the order in which their statements were received: the United Kingdom, Nauru, the Republic of Korea, Romania, the Netherlands, the Russian Federation, Mexico, Germany, China, Australia, Chile, and the Philippines. Within the same time-limit, written statements were also submitted by the Authority and two organizations, namely, the Interoceanmetal Joint Organization and the International Union for Conservation of Nature and Natural Resources.

12. Upon receipt of those statements, in accordance with article 133, paragraph 3, of the Rules, the Registrar transmitted copies thereof to the States Parties, the Authority and the organizations that had submitted written statements. On 19 August 2010, pursuant to article 134 of the Rules, the written statements submitted to the Chamber were made accessible to the public on the Tribunal's website.

13. On 17 August 2010, the Registry received a statement submitted jointly by Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature. The statement was accompanied by a petition from these two non-governmental organizations in which they requested permission to participate in the advisory proceedings as *amici curiae*. At the request of the President, by separate letters dated 27 August 2010, the Registrar informed those organizations that their statement would not be included in the case file since it had not been submitted under article 133 of the Rules; it would, however, be transmitted to the States Parties, the Authority and the intergovernmental organizations that had submitted written statements, which would be informed that the document was not part of the case file and that it would be posted on a separate section of the Tribunal's website. By communication dated 27 August 2010, the States Parties, the Authority and the intergovernmental organizations in question were so informed.

14. On 10 September 2010, the Chamber, having considered a petition from Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature requesting permission to participate in the advisory proceedings as *amici curiae*, decided not to grant that request. The decision was communicated to the two organizations on the same day by a letter from the President.

15. By e-mail dated 26 August 2010, the Legal Counsel transmitted to the Registrar, at the latter's request, a note containing a summary of potential environmental impacts of seabed mining. This document was posted on the Tribunal's website.

16. By letter dated 1 September 2010, after the expiry of the time-limit for the submission of written statements, the United Nations Environment

Programme submitted a written statement that was received by the Registry on 2 September 2010. The President nevertheless decided that the statement should be included in the case file. Accordingly, on 3 September 2010, the Registrar transmitted an electronic copy of that document to the States Parties, the Authority and the intergovernmental organizations that had submitted written statements. The document was also posted on the Tribunal's website.

17. Within the time-limit fixed in the Order of the President of 18 May 2010, nine States Parties expressed their intention to participate in the oral proceedings, namely, Argentina, Chile, Fiji, Germany, Mexico, Nauru, the Netherlands, the Russian Federation and the United Kingdom. Within the same time-limit, the Authority and two organizations, namely, the Intergovernmental Oceanographic Commission (IOC) of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the International Union for Conservation of Nature and Natural Resources also expressed their intention to participate in the oral proceedings.

18. Prior to the opening of the oral proceedings, the Chamber held initial deliberations on 10, 13 and 14 September 2010.

19. At four public sittings held on 14, 15 and 16 September 2010, the Chamber heard oral statements, in the following order, by:

For the International Seabed Authority:	Mr Nii Odunton, Secretary-General, Mr Michael Lodge, Legal Counsel, Mr Kening Zhang, Senior Legal Officer, and Ms Gwenaëlle Le Gurun, Legal Officer;
For the Federal Republic of Germany:	Ms Susanne Wasum-Rainer, Legal Adviser, Director-General for Legal Affairs, Federal Foreign Office;
For the Kingdom of the Netherlands:	Ms Liesbeth Lijnzaad, Legal Adviser, Ministry of Foreign Affairs;
For the Argentine Republic:	Ms Susana Ruiz Cerutti, Ambassador, Legal Adviser, Ministry of Foreign Affairs International Trade and Worship;

For the Republic of Chile:	Mr Roberto Plaza, Minister Counsellor, Consul General of Chile in Hamburg;
For the Republic of Fiji:	Mr Pio Bosco Tikoisuva, High Commissioner of Fiji to the United Kingdom of Great Britain and Northern Ireland;
For the United Mexican States:	Mr Joel Hernández G., Ambassador, Legal Adviser, Ministry of Foreign Affairs;
For the Republic of Nauru:	Mr Peter Jacob, First Secretary, Nauru High Commission in Suva (Fiji), and Mr Robert Haydon, Advisor;
For the United Kingdom of Great Britain and Northern Ireland:	Sir Michael Wood KCMG, Member of the English Bar and Member of the International Law Commission;
For the Russian Federation:	Mr Vasiliy Titushkin, Deputy Director, Legal Department, Ministry of Foreign Affairs;
For the Intergovernmental Oceanographic Commission (IOC) of the United Nations Educational, Scientific and Cultural Organization (UNESCO):	Mr Ehrlich Desa, Deputy Executive Secretary;
For the International Union for Conservation of Nature and Natural Resources:	Ms Cymie R. Payne, Member of the Bar of the State of California, the Commonwealth of Massachusetts, and the Supreme Court of the United States of America, Counsel, Mr Robert A. Makgill, Barrister and Solicitor of the High Court of New Zealand, Counsel, and

Mr Donald K. Anton, Barrister and Solicitor of the Supreme Court of Victoria, the Supreme Court of New South Wales and the High Court of Australia; Member of the Bar of the State of Missouri, the State of Idaho, and the Supreme Court of he United States; and Senior Lecturer in International Law at the Australian National University College of Law, Counsel.

20. The hearing was broadcast over the internet as a webcast.

21. By letter dated 13 September 2010, pursuant to article 76, paragraph 1, of the Rules, the Registrar transmitted to the Authority, prior to the hearing, a list of the following points that the Chamber wished the Authority to address:

1. With reference to article 153, paragraph 4, of the Convention, how has the Authority been exercising control over activities in the Area for the purpose of securing compliance with the relevant provisions of the Convention and what experience has the Authority accumulated over the years in this regard?

2. In what form has assistance been provided so far to the Authority by sponsoring States, including the case of various States sponsoring one contractor, for the purpose of securing compliance with provisions referred to in article 153, paragraph 4, and what experience has the Authority accumulated over the years in this regard?

3. What are the activities in the Area, including activities associated with exploration and exploitation, which so far have been controlled by the Authority?

4. Would it be possible for the Authority to provide the certificates of sponsorship regarding the contracts it has concluded with contractors, as well as copies of the sponsorship agreements if available?

22. Responses to points 1 to 3 of this list were provided in the oral statements made on behalf of the Authority during the sitting held on 14 September 2010. By letter dated 17 September 2010, the Legal Counsel communicated information on point 4 of the list. This letter was posted on the Tribunal's website.

23. At the request of the President, by letter dated 13 October 2010, the Registrar asked the Legal Counsel to provide the Chamber with information

on the various phases of the process of exploration and exploitation of resources in the Area (collection, transportation to the surface, initial treatment, etc.), as well as information on the technology available. The Legal Counsel provided this information by letter dated 15 November 2010. The information was posted on the Tribunal's website.

24. As indicated by the President at the opening of the oral proceedings, one Member of the Chamber, Judge Chandrasekhara Rao, was prevented by illness from sitting on the bench during the hearing. However, with the approval of the Chamber, he participated in the subsequent deliberations on the advisory opinion.

IV. Role of the Chamber in advisory proceedings

25. The Chamber is a separate judicial body within the Tribunal entrusted, through its advisory and contentious jurisdiction, with the exclusive function of interpreting Part XI of the Convention and the relevant annexes and regulations that are the legal basis for the organization and management of activities in the Area.

26. The advisory jurisdiction is connected with the activities of the Assembly and the Council, the two principal organs of the Authority. The Authority is the international organization established by the Convention in order to "organize and control activities in the Area" (article 157, paragraph 1, of the Convention and section 1, paragraph 1, of the Annex to the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (hereinafter "the 1994 Agreement")). In order to exercise its functions properly in accordance with the Convention, the Authority may require the assistance of an independent and impartial judicial body. This is the underlying reason for the advisory jurisdiction of the Chamber. In the exercise of that jurisdiction, the Chamber is part of the system in which the Authority's organs operate, but its task within that system is to act as an independent and impartial body.

27. According to article 159, paragraph 10, and article 191 of the Convention, the advisory function of the Chamber concerns legal questions submitted by the Assembly and by the Council. Advisory opinions requested under article 159, paragraph 10, of the Convention serve to assist the Assembly during its decision-making process. The Chamber's advisory jurisdiction under article 191 of the Convention concerns "legal questions arising within the scope" of the activities of either the Assembly or the Council.

28. As provided in article 187 of the Convention, the Chamber also has contentious jurisdiction to settle different categories of disputes referred to in that article with respect to activities in the Area.

29. The functions of the Chamber, set out in Part XI of the Convention, are relevant for the good governance of the Area. The Secretary-General made this point at the hearing: "The Chamber has a high responsibility to ensure that the provisions of Part XI of the Convention and the 1994 Agreement are implemented properly and the regime for deep seabed mining as a whole is properly interpreted and applied" (ITLOS/PV.2010/1/Rev.1, p. 5, lines 16-19).

30. The Chamber is mindful of the fact that by answering the questions it will assist the Council in the performance of its activities and contribute to the implementation of the Convention's regime.

V. Jurisdiction

31. The Chamber will first determine whether it has jurisdiction to give the advisory opinion requested by the Council. The conditions to be met in order to establish the jurisdiction of the Chamber are set out in article 191 of the Convention which reads as follows:

> The Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency.

32. As regards the present proceedings, the conditions to be met are: (a) that there is a request from the Council; (b) that the request concerns legal questions; and (c) that these legal questions have arisen within the scope of the Council's activities.

33. As to the first condition, the Chamber observes that article 191 of the Convention confers on the Assembly and the Council the power to request advisory opinions from the Chamber. In the present case, the decision to request an advisory opinion from the Chamber was adopted by the Council.

34. Rule 56, paragraph 1, of the Rules of Procedure of the Council provides that, as a general rule, decision-making in the Council should be by consensus. Section 3, paragraph 2, of the Annex to the 1994 Agreement states that "[a]s a general rule, decision-making in the organs of the Authority should be by consensus". According to article 161, paragraph 8 (e), of the Convention and rule 59 of the Rules of Procedure of the Council, "consensus" means the absence of any formal objection.

35. In its written statement, the Authority declared that "[t]he decision of the Council to request the Chamber for an advisory opinion was taken without objection and can thus be regarded as having been taken by consensus". The information provided by the Authority also shows that the Council's decision was taken in accordance with the internal rules of procedure of the Authority.

36. The Chamber thus concludes that there is a valid request by the Council.

37. With respect to the second condition, the Chamber must satisfy itself that the advisory opinion requested by the Council concerns "legal questions" within the meaning of article 191 of the Convention.

38. In examining this requirement, the Chamber observes that the three questions before it relate, *inter alia*, to "the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area"; "the extent of liability of a State Party for any failure to comply with the provisions of the Convention . . . by an entity whom it has sponsored"; and the "measures that a sponsoring State must take in order to fulfil its responsibility under the Convention".

39. The questions put to the Chamber concern the interpretation of provisions of the Convention and raise issues of general international law. The Chamber recalls that the International Court of Justice (hereinafter "the ICJ") has stated that "questions 'framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible of a reply based on law'" (*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *Advisory Opinion*, 22 July 2010, paragraph 25; *Western Sahara, Advisory Opinion, I.C.J. Report 1975*, p. 12, at paragraph 15).

40. For these reasons, the Chamber concludes that the questions raised by the Council are of a legal nature.

41. As to the third condition, article 191 of the Convention also requires that an advisory opinion must concern legal questions "arising within the scope of [the] activities" of the Assembly or the Council. In the present case, it is for the Chamber to determine whether the legal questions submitted to it arose within the scope of the activities of the Council. Therefore, it is pertinent to examine the provisions of the Convention and of the 1994 Agreement that define the Council's competence.

42. The powers and functions of the Council are set out in Part XI, section 4, of the Convention and, in particular, article 162 thereof, read together

with the 1994 Agreement. Article 162, paragraphs 1 and 2 (a), of the Convention reads as follows:

> 1. The Council is the executive organ of the Authority. The Council shall have the power to establish, in conformity with this Convention and the general policies established by the Assembly, the specific policies to be pursued by the Authority on any question or matter within the competence of the Authority.
> 2. In addition, the Council shall:
> (a) supervise and coordinate the implementation of the provisions of this Part on all questions and matters within the competence of the Authority and invite the attention of the Assembly to cases of non-compliance.

43. Section 3, paragraph 11 (a), read together with section 1, paragraphs 6 to 11, of the 1994 Agreement, entrusts the Council with the function of approving plans of work in accordance with Annex III, article 6, of the Convention. Article 162, paragraph 2 (l), of the Convention confers on the Council the power to "exercise control over activities in the Area in accordance with article 153, paragraph 4, and the rules, regulations and procedures of the Authority".

44. In light of these provisions, the Chamber concludes that the legal questions before it fall within the scope of the activities of the Council, since they relate to the exercise of its powers and functions, including its power to approve plans of work.

45. For the aforementioned reasons, the Chamber finds that it has jurisdiction to entertain the request for an advisory opinion submitted to it by the Council.

VI. Admissibility

46. The Chamber now turns to questions of admissibility.

47. Some of the participants in the proceedings have drawn attention to the wording of article 191 of the Convention, which states that the Chamber "shall give" advisory opinions, and have compared it to article 65, paragraph 1, of the Statute of the ICJ, which states that the Court "may give" an advisory opinion. In light of this difference, they have argued that, contrary to the discretionary powers of the ICJ, the Chamber, once it has established its jurisdiction, has no discretion to decline a request for an advisory opinion.

48. While noting the difference between the wording of article 191 of the Convention and article 65 of the Statute of the ICJ, the Chamber does not

consider it necessary to pronounce on the consequences of that difference with respect to admissibility in the present case.

49. The Chamber deems it appropriate to render the advisory opinion requested by the Council and will proceed accordingly.

VII. Applicable law and procedural rules

50. The Chamber will now proceed to indicate the applicable law.

51. Article 293, paragraph 1, of the Convention and article 38 of the Statute of the Tribunal (hereinafter "the Statute") set out the law to be applied by the Chamber.

52. Article 293, paragraph 1, of the Convention, reads:

> A court or tribunal having jurisdiction under this section [section II of Part XV of the Convention] shall apply this Convention and other rules of international law not incompatible with this Convention.

53. Article 38 of the Statute reads:

> In addition to the provisions of article 293, the Chamber shall apply:
>
> a) the rules, regulations and procedures of the Authority adopted in accordance with the Convention; and
> b) the terms of contracts concerning activities in the Area in matters relating to those contracts.

54. It should be noted that, in accordance with article 2, paragraph 1, of the 1994 Agreement, the provisions of that Agreement and Part XI of the Convention "shall be interpreted and applied together as a single instrument. In the event of any inconsistency between this Agreement and Part XI, the provisions of this Agreement shall prevail".

55. The procedural rules applicable during advisory proceedings before the Chamber are set out in article 40, paragraph 2, of the Statute and section H ("Advisory proceedings") of the Rules, in particular article 130, paragraph 1, thereof.

56. Article 40, paragraph 2, of the Statute reads:

> In the exercise of its functions relating to advisory opinions, the Chamber shall be guided by the provisions of this Annex relating to procedure before the Tribunal to the extent to which it recognizes them to be applicable.

Article 130, paragraph 1, of the Rules reads:

> In the exercise of its functions relating to advisory opinions, the Seabed Disputes Chamber shall apply this section and be guided, to the extent to which it recognizes them to be applicable, by the provisions of the Statute and of these Rules applicable in contentious cases.

VIII. Interpretation

In general

57. Among the rules of international law that the Chamber is bound to apply, those concerning the interpretation of treaties play a particularly important role. The applicable rules are set out in Part III, Section 3 entitled "Interpretation of Treaties" and comprising articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties (hereinafter "the Vienna Convention"). These rules are to be considered as reflecting customary international law. Although the Tribunal has never stated this view explicitly, it has done so implicitly by borrowing the terminology and approach of the Vienna Convention's articles on interpretation (see the Tribunal's Judgment of 23 December 2002 in the *"Volga" Case* (*ITLOS Reports 2002*, p. 10, at paragraph 77). The ICJ and other international courts and tribunals have stated this view on a number of occasions (see, for example, *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6, at paragraph 41; *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at paragraph 23; *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 12, at paragraph 83; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010*, paragraphs 64-65*; Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau, Arbitral Tribunal, Award of 14 February 1985, UNRIAA, vol. XIX,* pp. 149-196, 25 ILM (1986), p. 252, at paragraph 41; *United States-Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body* (WT/DS2/AB/R), adopted by the Dispute Settlement Body of the World Trade Organization on 20 May 1996, *DSR 1996:I*, p. 3, at pp. 15-16).

58. In light of the foregoing, the rules of the Vienna Convention on the interpretation of treaties apply to the interpretation of provisions of the Convention and the 1994 Agreement.

59. The Chamber is also required to interpret instruments that are not treaties and, in particular, the Regulations adopted by the Authority, namely, the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area of 2000 (hereinafter "the Nodules Regulations"), and the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area of 2010 (hereinafter "the Sulphides Regulations").

60. The fact that these instruments are binding texts negotiated by States and adopted through a procedure similar to that used in multilateral conferences permits the Chamber to consider that the interpretation rules set out in the Vienna Convention may, by analogy, provide guidance as to their interpretation. In the specific case before the Chamber, the analogy is strengthened because of the close connection between these texts and the Convention. The ICJ seems to have adopted a similar approach when it states in its advisory opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, that the rules on interpretation of the Vienna Convention "may provide guidance" as regards the interpretation of resolutions of the United Nations Security Council (ICJ, 22 July 2010, paragraph 94).

Multilingual international instruments

61. In interpreting the provisions of the Convention, it should be borne in mind that it is a multilingual treaty: the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic (article 320 of the Convention). It should also be noted that these six languages are also official languages of the Council and that the Regulations of the Authority, as well as the decision of the Council containing the questions submitted to the Chamber, were adopted in those languages with the original in English.

62. The relevant provision to be considered in the present context is article 33, paragraph 4, of the Vienna Convention. According to this provision, where no particular text prevails according to the treaty and where "a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted".

63. An examination of the relevant provisions of the Convention reveals that the terminology used in the different language versions corresponds to the objective stated by the Drafting Committee of the Third United Nations

Conference on the Law of the Sea, namely, "to improve linguistic concordance, to the extent possible, and to achieve juridical concordance in all cases" (Report of the Chairman of the Drafting Committee, 2 March 1981, A/CONF.62/L.67/Rev.1, in Third United Nations Conference on the Law of the Sea, Official Records, vol. XV, p.145, at paragraph 8). There are certain inconsistencies in the terminology used within the same language version and as between language versions. In the view of the Chamber, there is, however, no difference of meaning between the authentic texts of the relevant provisions of the Convention. A comparison between the terms used in these provisions of the Convention is nonetheless useful in clarifying their meaning.

Meaning of key terms

64. The meaning of the term "responsibility" as used in the English text of article 139, paragraphs 1 and 2; article 235, paragraph 1; and Annex III, article 4, paragraph 4, of the Convention ("States Parties shall have the responsibility to ensure"; "States are responsible for the fulfilment"; "States shall . . . have the responsibility to ensure") does not correspond to the meaning of the same term in article 304 of the Convention ("responsibility and liability for damage") and Annex III, article 22, of the Convention ("responsibility or liability for any damage").

65. In article 139, article 235, paragraph 1, and Annex III, article 4, paragraph 4, of the Convention, the term "responsibility" means "obligation". This emerges not only from the context of the aforementioned articles, but also from a comparison with other linguistic versions. The Spanish text uses the expression "*estarán obligados*" and the French text uses the more indirect but equally explicit expression "*il incombe de*". Similarly, the Arabic text uses the expression "تكون ملزمة". The Chinese text uses the term "义务" and the Russian text the term "обязательство".

66. In the view of the Chamber, in the provisions cited in the previous paragraph, the term "responsibility" refers to the primary obligation whereas the term "liability" refers to the secondary obligation, namely, the consequences of a breach of the primary obligation. Notwithstanding their apparent similarity to the English term "responsibility", the French term "*responsabilité*" and the Spanish term "*responsabilidad*", respectively, indicate also the consequences of the breach of the primary obligation. The same applies to the Arabic term "مسؤولية", the Chinese term "责任" and the Russian term

"ответственность". The fact that the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter "the ILC Articles on State Responsibility"), adopted in 2001, give the term "responsibility" a meaning corresponding to "*responsabilité*", "*responsabilidad*", "مسؤولية", "责任" and "ответственность" may create confusion, which can be avoided by comparing the English text of article 139, article 235, and Annex III, article 4, paragraph 4, of the Convention with the other language versions.

67. It should be further observed that in article 235, paragraph 3, and Annex III, article 22, of the Convention, the English version of which uses the terms "responsibility and liability" together, the term "responsibility" has the same meaning as in the ILC Articles on State Responsibility. This is clear from a comparison of the English version with the French and Spanish versions, which use only the term "*responsabilité*" and "*responsabilidad*". Similarly, the Arabic, Chinese and Russian versions use the term "مسؤولية", "责任" and "ответственность", respectively.

68. This analysis of the terms used in the provisions of the Convention provides a basis for determining their meaning as used in the three Questions.

69. Thus, in Question 1, the expression "legal responsibilities and obligations" refers to primary obligations, that is, to what sponsoring States are obliged to do under the Convention.

70. In Question 2, the English term "liability" refers to the consequences of a breach of the sponsoring State's obligations.

71. In Question 3, as in Question 1, "responsibility" means "obligation". The terms "*responsabilité*" and "*responsabilidad*", used, respectively, in the French and Spanish versions of Question 3, are translations of the English term "responsibility" and were apparently introduced for the sake of uniformity. However, in light of the English version and of the terminology used in the French and Spanish versions of article 139 of the Convention, the meaning intended is that of "obligation". Similarly, the Arabic, Chinese and Russian versions of Question 3 use the term "مسؤولية", "义务" and "обязательство", respectively.

Question 1

72. The first question submitted to the Chamber is as follows:

What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI, and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982?

73. This question concerns the obligations of sponsoring States. Before examining the provisions of the Convention, the 1994 Agreement as well as the Nodules Regulations and the Sulphides Regulations (hereinafter "the Convention and related instruments"), the Chamber must determine the meaning of two of the terms used in the Question, namely: "sponsorship" and "activities in the Area".

I. Sponsorship

74. The notion of "sponsorship" is a key element in the system for the exploration and exploitation of the resources of the Area set out in the Convention. Article 153, paragraph 2, of the Convention describes the "parallel system" of exploration and exploitation activities indicating that such activities shall be carried out by the Enterprise, and, in association with the Authority, by States Parties or state enterprises or natural or juridical persons. It further states that, in order to be eligible to carry out such activities, natural and juridical persons must satisfy two requirements. First, they must be either nationals of a State Party or effectively controlled by it or its nationals. Second, they must be "sponsored by such States". Article 153, paragraph 2(b), of the Convention makes the requirement of sponsorship applicable also to state enterprises.

75. The purpose of requiring the sponsorship of applicants for contracts for the exploration and exploitation of the resources of the Area is to achieve the result that the obligations set out in the Convention, a treaty under international law which binds only States Parties thereto, are complied with by entities that are subjects of domestic legal systems. This result is obtained through the provisions of the Authority's Regulations that apply to such entities and through the implementation by the sponsoring States of their obligations under the Convention and related instruments.

76. The role of the sponsoring State, as set out in the Convention, contributes to the realization of the common interest of all States in the proper application of the principle of the common heritage of mankind which requires faithful compliance with the obligations set out in Part XI. The common-interest role of the sponsoring State is further confirmed by its obligation, set out in article 153, paragraph 4, of the Convention, to "assist" the Authority, which, as stated in article 137, paragraph 2, of the Convention, acts on behalf of mankind.

77. The connection between States Parties and domestic law entities required by the Convention is twofold, namely, that of nationality and that of effective control. All contractors and applicants for contracts must secure and maintain the sponsorship of the State or States of which they are nationals. If another State or its nationals exercises effective control, the sponsorship of that State is also necessary. This is provided for in Annex III, article 4, paragraph 3, of the Convention and confirmed in regulation 11, paragraph 2, of the Nodules Regulations and of the Sulphides Regulations.

78. No provision of the Convention imposes an obligation on a State Party to sponsor an entity that holds its nationality or is controlled by it or by its nationals. As the Convention does not consider the links of nationality and effective control sufficient to obtain the result that the contractor conforms with the Convention and related instruments, it requires a specific act emanating from the will of the State or States of nationality and of effective control. Such act consists in the decision to sponsor.

79. As subjects of international law, States Parties engaged in deep seabed mining under the Convention are directly bound by the obligations set out therein. Consequently, there is no reason to apply to them the requirement of sponsorship. Article 153, paragraph 2(b), of the Convention as well as the identical regulation 11, paragraph 1, of the Nodules Regulations and the Sulphides Regulations confirm that the requirement of sponsorship does not apply to States. This point is further supported by Annex III, article 4, paragraph 5, of the Convention which reads as follows: "The procedures for assessing the qualifications of States Parties which are applicants shall take into account their character as States".

80. The practice of the Authority, however, indicates that at least two contractor States, when applying for a contract, considered it necessary to submit to the Authority documents of sponsorship.

81. It may also be noted that all but one of the existing contractors, as "registered pioneer investors" under the provisional system set out in Resolution II of the Third United Nations Conference on the Law of the Sea,

obtained their contracts for exploration through the simplified procedure set out in section 1, paragraph 6(a)(ii) of the Annex to the 1994 Agreement. As "certifying States" under paragraph 1(c) of Resolution II, they stand in the same relationship to a pioneer investor as would a sponsoring State stand to a contractor pursuant to Annex III, article 4, of the Convention.

II. "Activities in the Area"

82. Question 1 concerns the responsibilities and obligations of sponsoring States in respect of "activities in the Area". This expression is defined in article 1, paragraph 1 (3), of the Convention as "all activities of exploration for, and exploitation of, the resources of the Area". According to article 133 (a) of the Convention, for the purposes of Part XI, the term "resources" means "all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules". The two definitions, however, do not indicate what is meant by "exploration" and "exploitation". It is important to note that according to article 133 (b), "resources, when recovered from the Area, are referred to as 'minerals'".

83. Some indication of the meaning of the term "activities in the Area" may be found in Annex IV, article 1, paragraph 1, of the Convention. It reads as follows:

> The Enterprise is the organ of the Authority which shall carry out activities in the Area directly, pursuant to article 153, paragraph 2(a), as well as the transporting, processing and marketing of minerals recovered from the Area.

84. This provision distinguishes "activities in the Area" which the Enterprise carries out directly pursuant to article 153, paragraph 2(a), of the Convention, from other activities with which the Enterprise is entrusted, namely, the transporting, processing and marketing of minerals recovered from the Area. Consequently, the latter activities are not included in the notion of "activities in the Area" referred to in Annex IV, article 1, paragraph 1, of the Convention.

85. Article 145 of the Convention, which prescribes the taking of "[n]ecessary measures . . . with respect to activities in the Area to ensure

effective protection for the marine environment from harmful effects which may arise from such activities", indicates the activities in respect of which the Authority should adopt rules, regulations and procedures. These activities include: "drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities". In the view of the Chamber, these activities are included in the notion of "activities in the Area".

86. Annex III, article 17, paragraph 2(f), of the Convention, which sets out the criteria for the rules, regulations and procedures concerning protection of the marine environment to be drawn up by the Authority gives further useful indications of what is included in the notion of "activities in the Area". The provision reads as follows:

> Rules, regulations and procedures shall be drawn up in order to secure effective protection of the marine environment from harmful effects directly resulting from activities in the Area or from shipboard processing immediately above a mine site of minerals derived from that mine site, taking into account the extent to which such harmful effects may directly result from drilling, dredging, coring and excavation and from disposal, dumping and discharge into the marine environment of sediment, wastes or other effluents.

87. The provisions considered in the preceding paragraphs confirm that processing and transporting as mentioned in Annex IV, article 1, paragraph 1, of the Convention are excluded from the notion of "activities in the Area". They set out lists of activities whose harmful effects are indicated as directly resulting from such activities. These lists may be seen as an indication of what the Convention considers as included in the notion of "activities in the Area". These activities include: drilling, dredging, coring, and excavation; disposal, dumping and discharge into the marine environment of sediment, wastes or other effluents; and construction and operation or maintenance of installations, pipelines and other devices related to such activities.

88. Under Annex III, article 17, paragraph 2(f), of the Convention, "shipboard processing immediately above a mine site of minerals derived from that mine site" is to be considered as included in "activities in the Area". As the aforementioned list of activities refers without distinction to the harmful effects resulting directly from "activities in the Area" and from "shipboard processing", the two are to be seen as part of the same kind of activities.

89. The Nodules Regulations and the Sulphides Regulations define "exploration" and "exploitation" in the context of polymetallic nodules and polymetallic sulphides, respectively. According to regulation 1, paragraph 3(b) and (a), of the Nodules Regulations:

> "Exploration" means searching for deposits of polymetallic nodules in the Area with exclusive rights, the analysis of such deposits, the testing of collecting systems and equipment, processing facilities and transportation systems, and the carrying out of studies of the environmental, technical, economic, commercial and other appropriate factors that must be taken into account in exploitation.
>
> "Exploitation" means the recovery for commercial purposes of polymetallic nodules in the Area and the extraction of minerals therefrom, including the construction and operation of mining, processing and transportation systems for the production and marketing of metals.

90. The same definitions are set out in regulation 1, paragraph 3(b) and (a), of the Sulphides Regulations.

91. These provisions of the Nodules Regulations and the Sulphides Regulations include in the notion of exploration the testing of processing facilities and transportation systems and in that of exploitation the construction and operation of processing and transportation systems.

92. The scope of "exploration" and "exploitation" as defined in the Regulations seems broader than the "activities in the Area" envisaged in Annex IV, article 1, paragraph 1, and in article 145 and Annex III, article 17, paragraph 2 (f), of the Convention. Processing and transportation are included in the notion of exploration and exploitation of the Regulations, but not in that of "activities in the Area" in the provision of Annex IV of the Convention, which has just been cited.

93. The difference in scope of "activities in the Area" in the provisions of the Convention and in the Nodules Regulations and the Sulphides Regulations makes it necessary to examine the relevant provisions within the broader framework of the Convention. It would seem preferable to consider that the meaning of "activities in the Area" in articles 139 and Annex III, article 4, paragraph 4, of the Convention is consistent with that of article 145 and Annex III, article 17, paragraph 2(f), and Annex IV, article 1, paragraph 1, rather than with that of "exploration" and "exploitation" in the two Regulations. The aforementioned articles of the Convention and of Annexes III and IV, all

belong to the same legal instrument. They were negotiated by the same parties and adopted at the same time. It therefore seems reasonable to assume that the meaning of an expression (or the exclusion of certain activities from the scope of that expression) in one provision also applies to the others. The Regulations are instruments subordinate to the Convention, which, if not in conformity with it, should be interpreted so as to ensure consistency with its provisions. They may, nevertheless be used to clarify and supplement certain aspects of the relevant provisions of the Convention.

94. In light of the above, the expression "activities in the Area", in the context of both exploration and exploitation, includes, first of all, the recovery of minerals from the seabed and their lifting to the water surface.

95. Activities directly connected with those mentioned in the previous paragraph such as the evacuation of water from the minerals and the preliminary separation of materials of no commercial interest, including their disposal at sea, are deemed to be covered by the expression "activities in the Area". "Processing", namely, the process through which metals are extracted from the minerals and which is normally conducted at a plant situated on land, is excluded from the expression "activities in the Area". This is confirmed by the wording of Annex IV, article 1, paragraph 1, of the Convention as well as by information provided by the Authority at the request of the Chamber.

96. Transportation to points on land from the part of the high seas superjacent to the part of the Area in which the contractor operates cannot be included in the notion of "activities in the Area", as it would be incompatible with the exclusion of transportation from "activities in the Area" in Annex IV, article 1, paragraph 1, of the Convention. However, transportation within that part of the high seas, when directly connected with extraction and lifting, should be included in activities in the Area. In the case of polymetallic nodules, this applies, for instance, to transportation between the ship or installation where the lifting process ends and another ship or installation where the evacuation of water and the preliminary separation and disposal of material to be discarded take place. The inclusion of transportation to points on land could create an unnecessary conflict with provisions of the Convention such as those that concern navigation on the high seas.

97. One consequence of the exclusion of water evacuation and disposal of material from "activities in the Area" would be that the activities conducted by the contractor which are among the most hazardous to the environment would be excluded from those to which the responsibilities of the sponsoring State apply. This would be contrary to the general obligation of States Parties, under article 192 of the Convention, "to protect and preserve the marine environment".

III. Prospecting

98. "Prospecting", although mentioned in Annex III, article 2, of the Convention and in the Nodules Regulations and the Sulphides Regulations, is not included in the Convention's definition of "activities in the Area" because the Convention and the two Regulations distinguish it from "exploration" and from "exploitation". Moreover, under the Convention and related instruments, prospecting does not require sponsorship. In conformity with the questions submitted to it, which relate to "activities in the Area" and to sponsoring States, the Chamber will not address prospecting activities. However, considering that prospecting is often treated as the preliminary phase of exploration in mining practice and legislation, the Chamber considers it appropriate to observe that some aspects of the present Advisory Opinion may also apply to prospecting.

IV. Responsibilities and obligations

Key provisions

99. The key provisions concerning the obligations of the sponsoring States are: article 139, paragraph 1; article 153, paragraph 4 (especially the last sentence); and Annex III, article 4, paragraph 4, of the Convention (especially the first sentence).

100. These provisions read:

> Article 139, paragraph 1
> States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. The same responsibility applies to international organizations for activities in the Area carried out by such organizations.

Article 153, paragraph 4
The Authority shall exercise such control over activities in the Area as is necessary for the purpose of securing compliance with the relevant provisions of this Part and the Annexes relating thereto, and the rules, regulations and procedures of the Authority, and the plans of work approved in accordance with paragraph 3. States Parties shall assist the Authority by taking all measures necessary to ensure such compliance in accordance with article 139.

Annex III, article 4, paragraph 4
The sponsoring State or States shall, pursuant to article 139, have the responsibility to ensure, within their legal systems, that a contractor so sponsored shall carry out activities in the Area in conformity with the terms of its contract and its obligations under this Convention. A sponsoring State shall not, however, be liable for damage caused by any failure of a contractor sponsored by it to comply with its obligations if that State Party has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction.

101. A perusal of these three provisions reveals that article 139 plays a central role, as it is referred to both in article 153, paragraph 4, and in Annex III, article 4, paragraph 4, of the Convention. While Annex III, article 4, paragraph 4, of the Convention refers to sponsoring States, articles 139, paragraph 1, and 153, paragraph 4, of the Convention do not do so explicitly. However, since the entities which conduct activities in the Area mentioned in article 139, paragraph 1, of the Convention can do so only when there is a State Party sponsoring them, all three provisions must be read as referring to sponsoring States.

102. It is important to note that the last sentence of article 153, paragraph 4, of the Convention places the obligation of the sponsoring State in relationship with the obligations of the Authority by stating that the former has the obligation to "assist" the latter. As will be seen in the reply to Question 2, the subordinate role of the sponsoring State is reflected in Annex III, article 22, of the Convention, in which the liability of the contractor and of the Authority is mentioned while that of the sponsoring State is not (see paragraph 199).

Obligations of the contractor whose compliance the sponsoring State must ensure

103. The three provisions mentioned in paragraph 100 specify that the obligation (responsibility) of the sponsoring State is "to ensure" that the "activities in the Area" conducted by the sponsored contractor are "in conformity" or in "compliance" with the rules to which they refer.

104. These rules are referred to as "this Part" (Part XI) in article 139 of the Convention, as "the relevant provisions of this Part and the Annexes relating thereto, and the rules, regulations and procedures of the Authority, and the plans of work approved in accordance with paragraph 3" in article 153, paragraph 4, of the Convention, and as "the terms of its contract and its obligations under this Convention" in Annex III, article 4, paragraph 4, of the Convention.

105. The difference between the references contained in articles 139 and 153 of the Convention, cited in the previous paragraphs, is only one of drafting. The reference to Part XI in article 139 of the Convention includes Annexes III and IV. In the view of the Chamber, this reference also includes the rules, regulations and procedures of the Authority and the contracts (or plans of work) for exploration and exploitation, which are based on Part XI and the relevant Annexes thereto.

106. The reference to the contractor's "obligations under this Convention" in Annex III, article 4, paragraph 4, would seem to be broader than the references in articles 139 and 153 of the Convention. This difference would be relevant if there were obligations of sponsored contractors set out in parts of the Convention other than Part XI and the annexes thereto, the rules, regulations and procedures of the Authority, or the relevant contracts. As this is not the case, it would appear that the scope of the obligations of sponsored contractors, although indicated differently in the three key provisions of the Convention referred to in paragraph 100, is in fact substantially the same.

"Responsibility to ensure"

107. The central issue in relation to Question 1 concerns the meaning of the expression "responsibility to ensure" in article 139, paragraph 1, and Annex III, article 4, paragraph 4, of the Convention.

108. "Responsibility to ensure" points to an obligation of the sponsoring State under international law. It establishes a mechanism through which the rules of the Convention concerning activities in the Area, although being treaty

law and thus binding only on the subjects of international law that have accepted them, become effective for sponsored contractors which find their legal basis in domestic law. This mechanism consists in the creation of obligations which States Parties must fulfil by exercising their power over entities of their nationality and under their control.

109. As will be seen in greater detail in the reply to Question 2, a violation of this obligation entails "liability". However, not every violation of an obligation by a sponsored contractor automatically gives rise to the liability of the sponsoring State. Such liability is limited to the State's failure to meet its obligation to "ensure" compliance by the sponsored contractor.

110. The sponsoring State's obligation "to ensure" is not an obligation to achieve, in each and every case, the result that the sponsored contractor complies with the aforementioned obligations. Rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result. To utilize the terminology current in international law, this obligation may be characterized as an obligation "of conduct" and not "of result", and as an obligation of "due diligence".

111. The notions of obligations "of due diligence" and obligations "of conduct" are connected. This emerges clearly from the Judgment of the ICJ in the *Pulp Mills on the River Uruguay: "*An obligation to adopt regulatory or administrative measures . . . and to enforce them is an obligation of conduct. Both parties are therefore called upon, under article 36 [of the Statute of the River Uruguay], to exercise due diligence in acting through the [Uruguay River] Commission for the necessary measures to preserve the ecological balance of the river" (paragraph 187 of the Judgment).

112. The expression "to ensure" is often used in international legal instruments to refer to obligations in respect of which, while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law (see ILC Articles on State Responsibility, Commentary to article 8, paragraph 1).

113. An example may be found in article 194, paragraph 2, of the Convention which reads: "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment . . .".

114. The nature of the obligation to "ensure" in article 139 of the Convention and in the other provisions mentioned in paragraph 100 appears even more clearly in light of the French and Spanish texts of article 139 of the Convention. They use respectively the expression "il incombe aux Etats Parties de veiller à . . ." and "los Estados Partes estarán obligados a velar". "Veiller à" and "velar" point out, even more clearly than "ensure", the idea of exercising diligence. The Arabic text uses the expression "بضمان تكون الدول الأطراف ملزمة", the Chinese text uses the expression "缔约国应有责任确保" and the Russian text uses the expression "Государства-участники обязуются обеспечивать", which point in the same direction.

115. In its Judgment in the *Pulp Mills on the River Uruguay case*, the ICJ illustrates the meaning of a specific treaty obligation that it had qualified as "an obligation to act with due diligence" as follows:

> It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators . . . (Paragraph 197)

116. Similar indications are given by the International Law Commission in its Commentary to article 3 of its Articles on Prevention of Transboundary Harm from Hazardous Activities, adopted in 2001. According to article 3, the State of origin of the activities involving a risk of causing transboundary harm "shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof". The Commentary states:

> The obligation of the State of origin to take preventive or minimization measures is one of due diligence. It is the conduct of the State of origin that will determine whether the State has complied with its obligation under the present articles. The duty of due diligence involved, however, is not intended to guarantee that significant harm be totally prevented, if it is not

possible to do so. In that eventuality, the State of origin is required . . . to exert its best possible efforts to minimize the risk. In this sense, it does not guarantee that the harm would not occur. (Paragraph 7)

The content of the "due diligence" obligation to ensure

117. The content of "due diligence" obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that "due diligence" is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity. As regards activities in the Area, it seems reasonable to state that prospecting is, generally speaking, less risky than exploration activities which, in turn, entail less risk than exploitation. Moreover, activities in the Area concerning different kinds of minerals, for example, polymetallic nodules on the one hand and polymetallic sulphides or cobalt rich ferromanganese crusts on the other, may require different standards of diligence. The standard of due diligence has to be more severe for the riskier activities.

118. Article 153, paragraph 4, last sentence, of the Convention states that the obligation of the sponsoring State in accordance with article 139 of the Convention entails "taking all measures necessary to ensure" compliance by the sponsored contractor. Annex III, article 4, paragraph 4, of the Convention makes it clear that sponsoring States' "responsibility to ensure" applies "within their legal systems". With these indications the Convention provides some elements concerning the content of the "due diligence" obligation to ensure. Necessary measures are required and these must be adopted within the legal system of the sponsoring State.

119. Further light on the expression "measures necessary to ensure" is shed by the Convention if one considers article 139, paragraph 2, last sentence, and Annex III, article 4, paragraph 4, last sentence, of the Convention. The main purpose of these provisions is to exempt sponsoring States that have taken certain measures from liability for damage. The description of the measures to be taken by that State may also be used to clarify its "due diligence" obligation. This description remains in general terms in article 139, paragraph 2, of the Convention which mentions "all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4". The latter provision is more specific as it requires the sponsoring State to adopt "laws and regulations" and to take "administrative

measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction".

120. More specific indications concerning the content of these measures, including aspects relating to their enforcement, with respect to the contents of these measures will be provided in the reply to Question 3. As regards Question 1, it has been established that the "due diligence" obligation "to ensure" requires the sponsoring State to take measures within its legal system and that the measures must be "reasonably appropriate".

V. Direct obligations of sponsoring States

121. The obligations of sponsoring States are not limited to the due diligence "obligation to ensure". Under the Convention and related instruments, sponsoring States also have obligations with which they have to comply independently of their obligation to ensure a certain behaviour by the sponsored contractor. These obligations may be characterized as "direct obligations".

122. Among the most important of these direct obligations incumbent on sponsoring States are: the obligation to assist the Authority in the exercise of control over activities in the Area; the obligation to apply a precautionary approach; the obligation to apply best environmental practices; the obligation to take measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment; the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution; and the obligation to conduct environmental impact assessments. These obligations will be examined in paragraphs 124-150.

123. It must nevertheless be stated, at the outset, that compliance with these obligations can also be seen as a relevant factor in meeting the due diligence "obligation to ensure" and that the said obligations are in most cases couched as obligations to ensure compliance with a specific rule.

The obligation to assist the Authority

124. Pursuant to the last sentence of article 153, paragraph 4, of the Convention, sponsoring States have the obligation to assist the Authority in its task of controlling activities in the Area for the purpose of ensuring compliance with the relevant provisions of Part XI of the Convention and related instruments. This obligation is to be met "by taking all measures necessary to ensure such compliance in accordance with article 139". The obligation of the sponsoring States is a direct one, but it is to be met through compliance with the "due diligence obligation" set out in article 139 of the Convention.

Precautionary approach

125. The Nodules Regulations and the Sulphides Regulations contain provisions that establish a direct obligation for sponsoring States. This obligation is relevant for implementing the "responsibility to ensure" that sponsored contractors meet the obligations set out in Part XI of the Convention and related instruments. These are regulation 31, paragraph 2, of the Nodules Regulations and regulation 33, paragraph 2, of the Sulphides Regulations, both of which state that sponsoring States (as well as the Authority) "shall apply a precautionary approach, as reflected in Principle 15 of the Rio Declaration" in order "to ensure effective protection for the marine environment from harmful effects which may arise from activities in the Area".

126. Principle 15 of the 1992 Rio Declaration on Environment and Development (hereinafter "the Rio Declaration") reads:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

127. The provisions of the aforementioned Regulations transform this non-binding statement of the precautionary approach in the Rio Declaration into a binding obligation. The implementation of the precautionary approach as defined in these Regulations is one of the obligations of sponsoring States.

128. It should be noted that while the first sentence of Principle 15 seems to refer in general terms to the "precautionary approach", the second sentence limits its scope to threats of "serious or irreversible damage" and to "cost-effective" measures adopted in order to prevent "environmental degradation".

129. Moreover, by stating that the precautionary approach shall be applied by States "according to their capabilities", the first sentence of Principle 15 introduces the possibility of differences in application of the precautionary approach in light of the different capabilities of each State (see paragraphs 151-163).

130. The reference to the precautionary approach as set out in the two Regulations applies specifically to the activities envisaged therein, namely, prospecting and exploration for polymetallic nodules and polymetallic sulphides. It is to be expected that the Authority will either repeat or further develop this approach when it regulates exploitation activities and activities concerning other types of minerals.

131. Having established that under the Nodules Regulations and the Sulphides Regulations, both sponsoring States and the Authority are under an obligation to apply the precautionary approach in respect of activities in the Area, it is appropriate to point out that the precautionary approach is also an integral part of the general obligation of due diligence of sponsoring States, which is applicable even outside the scope of the Regulations. The due diligence obligation of the sponsoring States requires them to take all appropriate measures to prevent damage that might result from the activities of contractors that they sponsor. This obligation applies in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks. A sponsoring State would not meet its obligation of due diligence if it disregarded those risks. Such disregard would amount to a failure to comply with the precautionary approach.

132. The link between an obligation of due diligence and the precautionary approach is implicit in the Tribunal's Order of 27 August 1999 in the *Southern Bluefin Tuna Cases (New Zealand* v. *Japan; Australia* v. *Japan*). This emerges from the declaration of the Tribunal that the parties "should in the circumstances act with prudence and caution to ensure that conservation measures are taken . . ." (*ITLOS Reports 1999*, p. 274, at paragraph 77), and is confirmed by the further statements that "there is scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna"

(paragraph 79) and that "although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency" (paragraph 80).

133. It should be further noted that the Sulphides Regulations, Annex 4, section 5.1, in setting out a "standard clause" for exploration contracts, provides that:

> The Contractor shall take necessary measures to prevent, reduce and control pollution and other hazards to the marine environment arising from its activities in the Area as far as reasonably possible applying a precautionary approach and best environmental practices.

Thus, the precautionary approach (called "principle" in the French text of the standard clause just mentioned) is a contractual obligation of the sponsored contractors whose compliance the sponsoring State has the responsibility to ensure.

134. In the parallel provision of the corresponding standard clauses for exploration contracts in the Nodules Regulations, Annex 4, section 5.1, no reference is made to the precautionary approach. However, under the general obligation illustrated in paragraph 131, the sponsoring State has to take measures within the framework of its own legal system in order to oblige sponsored entities to adopt such an approach.

135. The Chamber observes that the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law. This trend is clearly reinforced by the inclusion of the precautionary approach in the Regulations and in the "standard clause" contained in Annex 4, section 5.1, of the Sulphides Regulations. So does the following statement in paragraph 164 of the ICJ Judgment in *Pulp Mills on the River Uruguay* that "a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute" (i.e., the environmental bilateral treaty whose interpretation was the main bone of contention between the parties). This statement may be read in light of article 31, paragraph 3(c), of the Vienna Convention, according to which the interpretation of a treaty should take into account not only the context but "any relevant rules of international law applicable in the relations between the parties".

Best environmental practices

136. Moreover, regulation 33, paragraph 2, of the Sulphides Regulations supplements the sponsoring State's obligation to apply the precautionary approach with an obligation to apply "best environmental practices". The same obligation is established as a contractual obligation in section 5.1 of Annex 4 (Standard Clauses for exploration contracts) of the Sulphides Regulations. There is no reference to "best environmental practices" in the Nodules Regulations; their standard contract clause (Annex 4, section 5.1), merely refers to the "best technology" available to the contractor. The adoption of higher standards in the more recent Sulphides Regulations would seem to indicate that, in light of the advancement in scientific knowledge, member States of the Authority have become convinced of the need for sponsoring States to apply "best environmental practices" in general terms so that they may be seen to have become enshrined in the sponsoring States' obligation of due diligence.

137. In the absence of a specific reason to the contrary, it may be held that the Nodules Regulations should be interpreted in light of the development of the law, as evidenced by the subsequent adoption of the Sulphides Regulations.

Guarantees in the event of an emergency order by the Authority for protection of the marine environment

138. Another obligation which is directly incumbent on the sponsoring State is set out in regulation 32, paragraph 7, of the Nodules Regulations and in regulation 35, paragraph 8, of the Sulphides Regulations. This obligation arises where the contractor has not provided the Council "with a guarantee of its financial and technical capability to comply promptly with emergency orders or to assure that the Council can take such emergency measures". In such a case, under regulation 32, paragraph 7, of the Nodules Regulations:

> the sponsoring State or States shall, in response to a request by the Secretary-General and pursuant to articles 139 and 235 of the Convention, take necessary measures to ensure that the contractor provides such a guarantee or shall take measures to ensure that assistance is provided to the Authority in the discharge of its responsibilities under paragraph 6.

Regulation 35, paragraph 8, of the Sulphides Regulations contains an identical provision.

Availability of recourse for compensation

139. Another direct obligation that gives substance to the sponsoring State's obligation to adopt laws and regulations within the framework of its legal system is set out in article 235, paragraph 2, of the Convention. This provision reads as follows:

> States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

140. This provision applies to the sponsoring State as the State with jurisdiction over the persons that caused the damage. By requiring the sponsoring State to establish procedures, and, if necessary, substantive rules governing claims for damages before its domestic courts, this provision serves the purpose of ensuring that the sponsored contractor meets its obligation under Annex III, article 22, of the Convention to provide reparation for damages caused by wrongful acts committed in the course of its activities in the Area.

VI. Environmental impact assessment

141. The obligation of the contractor to conduct an environmental impact assessment is explicitly set out in section 1, paragraph 7, of the Annex to the 1994 Agreement as follows: "An application for approval of a plan of work shall be accompanied by an assessment of the potential environmental impacts of the proposed activities . . . ". The sponsoring State is under a due diligence obligation to ensure compliance by the sponsored contractor with this obligation.

142. Regulation 31, paragraph 6, of the Nodules Regulations and regulation 33, paragraph 6, of the Sulphides Regulations establish a direct obligation of the sponsoring State concerning environmental impact assessment, which can also be read as a relevant factor for meeting the sponsoring State's due diligence obligation. This obligation is linked to the direct obligation of assisting the Authority considered at paragraph 124. The abovementioned provisions of the two Regulations read as follows: "[c]ontractors, sponsoring States and other interested States or entities shall cooperate with the Authority in the

establishment and implementation of programmes for monitoring and evaluating the impacts of deep seabed mining on the marine environment". This provision is designed to clarify and ensure compliance with the sponsoring State's obligation to cooperate with the Authority in the exercise of the latter's control over activities in the Area under article 153, paragraph 4, of the Convention, and of its general obligation of due diligence under article 139 thereof. The sponsoring State is obliged not only to cooperate with the Authority in the establishment and implementation of impact assessments, but also to use appropriate means to ensure that the contractor complies with its obligation to conduct an environmental impact assessment.

143. Contractors and sponsoring States must cooperate with the Authority in the establishment of monitoring programmes to evaluate the impact of deep seabed mining on the marine environment, particularly through the creation of "impact reference zones" and "preservation reference zones" (regulation 31, paragraphs 6 and 7, of the Nodules Regulations and regulation 33, paragraph 6, of the Sulphides Regulations). A comparison between environmental conditions in the "impact reference zone" and in the "preservation reference zone" makes it possible to assess the impact of activities in the Area.

144. As clarified in paragraph 10 of the Recommendations for the Guidance of the Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Polymetallic Nodules in the Area, issued by the Authority's Legal and Technical Commission in 2002 pursuant to regulation 38 of the Nodules Regulations (ISBA/7/LTC/1/Rev.1 of 13 February 2002), certain activities require "prior environmental impact assessment, as well as an environmental monitoring programme". These activities are listed in paragraph 10 (a) to (c) of the Recommendations.

145. It should be stressed that the obligation to conduct an environmental impact assessment is a direct obligation under the Convention and a general obligation under customary international law.

146. As regards the Convention, article 206 states the following:

> When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the

marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.
[Article 205 refers to an obligation to publish reports.]

147. With respect to customary international law, the ICJ, in its Judgment in *Pulp Mills on the River Uruguay*, speaks of:

> a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works. (Paragraph 204)

148. Although aimed at the specific situation under discussion by the Court, the language used seems broad enough to cover activities in the Area even beyond the scope of the Regulations. The Court's reasoning in a transboundary context may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction; and the Court's references to "shared resources" may also apply to resources that are the common heritage of mankind. Thus, in light of the customary rule mentioned by the ICJ, it may be considered that environmental impact assessments should be included in the system of consultations and prior notifications set out in article 142 of the Convention with respect to "resource deposits in the Area which lie across limits of national jurisdiction".

149. It must, however, be observed that, in the view of the ICJ, general international law does not "specify the scope and content of an environmental impact assessment" (paragraph 205 of the Judgment in *Pulp Mills on the River Uruguay*). While article 206 of the Convention gives only few indications of this scope and content, the indications in the Regulations, and especially in the Recommendations referred to in paragraph 144, add precision and specificity to the obligation as it applies in the context of activities in the Area.

150. In light of the above, the Chamber is of the view that the obligations of the contractors and of the sponsoring States concerning environmental impact assessments extend beyond the scope of application of specific provisions of the Regulations.

VII. Interests and needs of developing States

151. With respect to activities in the Area, the fifth preambular paragraph of the Convention states that the achievement of the goals set out in previous preambular paragraphs:

> will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked.

152. Accordingly, it is necessary to examine whether developing sponsoring States enjoy preferential treatment as compared with that granted to developed sponsoring States under the Convention and related instruments.

153. Under article 140, paragraph 1, of the Convention:

> Activities in the Area shall, as specifically provided for in this Part, be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, and taking into particular consideration the interests and needs of developing States . . .

154. According to article 148 of the Convention:

> The effective participation of developing States in activities in the Area shall be promoted as specifically provided for in this Part, having due regard to their special interests and needs, and in particular to the special needs of the land-locked and geographically disadvantaged among them to overcome obstacles arising from their disadvantaged location, including remoteness from the Area and difficulty of access to and from it.

155. These provisions develop, with respect to activities in the Area, the statement in the fifth preambular paragraph of the Convention.

156. For the purposes of the present Advisory Opinion, and in particular of Question 1, it is important to determine the meaning of article 148 of the Convention. According to this provision, the general purpose of promoting the participation of developing States in activities in the Area taking into account their special interests and needs is to be achieved "as specifically provided for" in Part XI (an expression also found in article 140 of the Convention). This means that there is no general clause for the consideration of such interests and needs beyond what is provided for in specific provisions of Part XI of the Convention. A perusal of Part XI shows immediately that there are several provisions designed to ensure the participation of developing States in activities in the Area and to take into particular consideration their interests and needs.

157. The approach of the Convention to this is particularly evident in the provisions granting a preference to developing States that wish to engage in mining in areas of the deep seabed reserved for the Authority (Annex III, articles 8 and 9, of the Convention); in the obligation of States to promote international cooperation in marine scientific research in the Area in order to ensure that programmes are developed "for the benefit of developing States" (article 143, paragraph 3, of the Convention); and in the obligation of the Authority and of States Parties to promote the transfer of technology to developing States (article 144, paragraph 1, of the Convention and section 5 of the Annex to the 1994 Agreement), and to provide training opportunities for personnel from developing States (article 144, paragraph 2, of the Convention and section 5 of the Annex to the 1994 Agreement); in the permission granted to the Authority in the exercise of its powers and functions to give special consideration to developing States, notwithstanding the rule against discrimination (article 152 of the Convention); and in the obligation of the Council to take "into particular consideration the interests and needs of developing States" in recommending, and approving, respectively, rules regulations and procedures on the equitable sharing of financial and other benefits derived from activities in the Area (articles 160, paragraph 2(f)(i), and 162, paragraph 2(o)(i), of the Convention).

158. However, none of the general provisions of the Convention concerning the responsibilities (or the liability) of the sponsoring State "specifically provides" for according preferential treatment to sponsoring States that are developing States. As observed above, there is no provision requiring the consideration of such interests and needs beyond what is specifically stated in Part

XI. It may therefore be concluded that the general provisions concerning the responsibilities and liability of the sponsoring State apply equally to all sponsoring States, whether developing or developed.

159. Equality of treatment between developing and developed sponsoring States is consistent with the need to prevent commercial enterprises based in developed States from setting up companies in developing States, acquiring their nationality and obtaining their sponsorship in the hope of being subjected to less burdensome regulations and controls. The spread of sponsoring States "of convenience" would jeopardize uniform application of the highest standards of protection of the marine environment, the safe development of activities in the Area and protection of the common heritage of mankind.

160. These observations do not exclude that rules setting out direct obligations of the sponsoring State could provide for different treatment for developed and developing sponsoring States.

161. As pointed out in paragraph 125, the provisions of the Nodules Regulations and the Sulphides Regulations that set out the obligation for the sponsoring State to apply a precautionary approach in ensuring effective protection of the marine environment refer to Principle 15 of the Rio Declaration. As mentioned earlier, Principle 15 provides that the precautionary approach shall be applied by States "according to their capabilities". It follows that the requirements for complying with the obligation to apply the precautionary approach may be stricter for the developed than for the developing sponsoring States. The reference to different capabilities in the Rio Declaration does not, however, apply to the obligation to follow "best environmental practices" set out, as mentioned above, in regulation 33, paragraph 2, of the Sulphides Regulations.

162. Furthermore, the reference to "capabilities" is only a broad and imprecise reference to the differences in developed and developing States. What counts in a specific situation is the level of scientific knowledge and technical capability available to a given State in the relevant scientific and technical fields.

163. It should be pointed out that the fifth preambular paragraph of the Convention emphasizes that the achievement of the goals of the Convention will "contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or landlocked". As noted above, article 148 of the Convention speaks about the promotion of the effective participation of developing States in activities in the Area. What is more important is that Annex III,

article 9, paragraph 4, of the Convention specifically refers to the right of a developing State or any natural or juridical person sponsored by it and effectively controlled by it, to inform the Authority that it wishes to submit a plan of work with respect to a reserved area. These provisions have the effect of reserving half of the proposed contract areas in favour of the Authority and developing States. Together with those provisions mentioned in paragraph 157, they require effective implementation with a view to enabling the developing States to participate in deep seabed mining on an equal footing with developed States. Developing States should receive necessary assistance including training.

Question 2

164. The second question submitted to the Chamber is as follows:

What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention in particular Part XI, and the 1994 Agreement, by an entity whom it has sponsored under Article 153, paragraph 2(b), of the Convention?

I. Applicable provisions

165. In replying to this question, the Chamber will proceed from article 139, paragraph 2, of the Convention, read in conjunction with the second sentence of Annex III, article 4, paragraph 4, of the Convention.

166. Article 139, paragraph 2, of the Convention reads:

> Without prejudice to the rules of international law and Annex III, article 22, damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability; States Parties or international organizations acting together shall bear joint and several liability. A State Party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under article 153, paragraph 2(b), if the State Party has taken all

necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4.

167. Annex III, article 4, paragraph 4, second sentence, of the Convention states:

> A sponsoring State shall not, however, be liable for damage caused by any failure of a contractor sponsored by it to comply with its obligations if that State Party has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction.

168. The Chamber will further take into account articles 235 and 304 as well as Annex III, article 22, of the Convention. Lastly, it will consider, as appropriate, the relevant rules on liability set out in the Nodules Regulations and the Sulphides Regulations. In this context, the Chamber notes that the Regulations issued to date by the Authority deal only with prospecting and exploration. Considering that the potential for damage, particularly to the marine environment, may increase during the exploitation phase, it is to be expected that member States of the Authority will further deal with the issue of liability in future regulations on exploitation. The Chamber would like to emphasize that it does not consider itself to be called upon to lay down such future rules on liability. The member States of the Authority may, however, take some guidance from the interpretation in this Advisory Opinion of the pertinent rules on the liability of sponsoring States in the Convention.

169. Since article 139, paragraph 2, and article 304 of the Convention refer, respectively, to the "rules of international law" and to "the application of existing rules and the development of further rules regarding responsibility and liability under international law", account will have to be taken of such rules under customary law, especially in light of the ILC Articles on State Responsibility. Several of these articles are considered to reflect customary international law. Some of them, even in earlier versions, have been invoked as such by the Tribunal *(The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10, at paragraph 171) as well as by the ICJ (for example, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 168, at paragraph 160).

II. Liability in general

170. At the outset, the Chamber would like to state its understanding of the system of liability in regard to sponsoring States as set out in the Convention and related instruments.

171. Article 139, paragraph 2, of the Convention and the related provisions referred to above, prescribe or refer to different sources of liability, namely, rules concerning the liability of States Parties (article 139, paragraph 2, first sentence, of the Convention), rules concerning sponsoring State liability (article 139, paragraph 2, second sentence, of the Convention), and rules concerning the liability of the contractor and the Authority (referred to in Annex III, article 22, of the Convention). The "without prejudice" clause in the first sentence of article 139, paragraph 2, of the Convention refers to the rules of international law concerning the liability of States Parties and international organizations. A reference to the international law rules on liability is also contained in article 304 of the Convention. The Chamber considers that these rules supplement the rules concerning the liability of the sponsoring State set out in the Convention.

172. From the wording of article 139, paragraph 2, of the Convention, it is evident that liability arises from the failure of the sponsoring State to carry out its own responsibilities. The sponsoring State is not, however, liable for the failure of the sponsored contractor to meet its obligations (see paragraph 182).

173. There is, however, a link between the liability of the sponsoring State and the failure of the sponsored contractor to comply with its obligations, thereby causing damage. An examination of article 139 of the Convention and Annex III, article 4, paragraph 4, second sentence, of the Convention will establish more precisely the link between the damage caused by the contractor and the sponsoring State's liability (see paragraph 181).

174. Whereas the first sentence of article 139, paragraph 2, of the Convention covers the failure of States Parties, including sponsoring States, to carry out their responsibilities in general, the second sentence deals only with the liability of sponsoring States.

III. Failure to carry out responsibilities

175. The Chamber will now turn to the interpretation of the elements constituting liability as set out in article 139, paragraph 2, of the Convention, read in conjunction with Annex III, article 4, paragraph 4, of the Convention.

176. The wording of article 139, paragraph 2, of the Convention clearly establishes two conditions for liability to arise: the failure of the sponsoring State to carry out its responsibilities (see paragraphs 64 to 71 on the meaning of key terms); and the occurrence of damage.

177. The failure of a sponsoring State to carry out its responsibilities, referred to in article 139, paragraph 2, of the Convention, may consist in an act or an omission that is contrary to that State's responsibilities under the deep seabed mining regime. Whether a sponsoring State has carried out its responsibilities depends primarily on the requirements of the obligation which the sponsoring State is said to have breached. As stated above in the reply to Question 1 (see paragraph 121), sponsoring States have both direct obligations of their own and obligations in relation to the activities carried out by sponsored contractors. The nature of these obligations also determines the scope of liability. Whereas the liability of the sponsoring State for failure to meet its direct obligations is governed exclusively by the first sentence of article 139, paragraph 2, of the Convention, its liability for failure to meet its obligations in relation to damage caused by a sponsored contractor is covered by both the first and second sentences of the same paragraph.

IV. Damage

178. As stated above, according to the first sentence of article 139, paragraph 2, of the Convention, the failure of a sponsoring State to carry out its responsibilities entails liability only if there is damage. This provision covers neither the situation in which the sponsoring State has failed to carry out its responsibilities but there has been no damage, nor the situation in which there has been damage but the sponsoring State has met its obligations. This constitutes an exception to the customary international law rule on liability since, as stated in the *Rainbow Warrior Arbitration (Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair, UNRIAA, 1990, vol. XX*, p. 215, at paragraph 110), and in paragraph 9 of the Commentary to article 2 of the ILC Articles on State Responsibility, a State may be held liable under customary international law even if no material damage results from its failure to meet its international obligations.

179. Neither the Convention nor the relevant Regulations (regulation 30 of the Nodules Regulations and regulation 32 of the Sulphides Regulations) specifies what constitutes compensable damage, or which subjects may be entitled to claim compensation. It may be envisaged that the damage in question would include damage to the Area and its resources constituting the common heritage of mankind, and damage to the marine environment. Subjects entitled to claim compensation may include the Authority, entities engaged in deep seabed mining, other users of the sea, and coastal States.

180. No provision of the Convention can be read as explicitly entitling the Authority to make such a claim. It may, however, be argued that such entitlement is implicit in article 137, paragraph 2, of the Convention, which states that the Authority shall act "on behalf" of mankind. Each State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area. In support of this view, reference may be made to article 48 of the ILC Articles on State Responsibility, which provides:

> Any State other than an injured State is entitled to invoke the responsibility of another State . . . if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole.

Causal link between failure and damage

181. Article 139, paragraph 2, first sentence, of the Convention refers to "damage caused", which clearly indicates the necessity of a causal link between the damage and the failure of the sponsoring State to meet its responsibilities. The second sentence of article 139, paragraph 2, of the Convention does not mention this causal link. It refers only to a causal link between the activity of the sponsored contractor and the consequent damage. Nevertheless, the Chamber is of the view that, in order for the sponsoring State's liability to arise, there must be a causal link between the failure of that State and the damage caused by the sponsored contractor.

182. Article 139, paragraph 2, of the Convention establishes that sponsoring States are responsible for ensuring that activities in the Area are carried out in conformity with Part XI of the Convention (see paragraph 108). This means

that the sponsoring State's liability arises not from a failure of a private entity but rather from its own failure to carry out its own responsibilities. In order for the sponsoring State's liability to arise, it is necessary to establish that there is damage and that the damage was a result of the sponsoring State's failure to carry out its responsibilities. Such a causal link cannot be presumed and must be proven. The rules on the liability of sponsoring States set out in article 139, paragraph 2, of the Convention and in the related instruments are in line with the rules of customary international law on this issue. Under international law, the acts of private entities are not directly attributable to States except where the entity in question is empowered to act as a State organ (article 5 of the ILC Articles on State Responsibility) or where its conduct is acknowledged and adopted by a State as its own (article 11 of the ILC Articles on State Responsibility). As explained in the present paragraph, the liability regime established in Annex III to the Convention and related instruments does not provide for the attribution of activities of sponsored contractors to sponsoring States.

183. In the event that no causal link pertaining to the failure of the sponsoring States to carry out their responsibilities and the damage caused can be established, the question arises whether they may nevertheless be held liable under the customary international law rules on State responsibility. This issue is dealt with in paragraphs 208 to 211.

184. For these reasons, the Chamber concludes that the liability of sponsoring States arises from their failure to carry out their own responsibilities and is triggered by the damage caused by sponsored contractors. There must be a causal link between the sponsoring State's failure and the damage, and such a link cannot be presumed.

V. Exemption from liability

185. The Chamber will now direct its attention to the meaning of the clause "shall not however be liable for damage" in article 139, paragraph 2, second sentence, and in Annex III, article 4, paragraph 4, second sentence, of the Convention.

186. This clause provides for the exemption of the sponsoring State from liability. Its effect is that, in the event that the sponsored contractor fails to comply with the Convention, the Regulations or its contract, and such failure results in damage, the sponsoring State cannot be held liable. The condition for exemption of the sponsoring State from liability is that, as specified in article 139, paragraph 2, of the Convention, it has taken "all necessary and appropriate

measures to secure effective compliance" under article 153, paragraph 4, and Annex III, article 4, paragraph 4, of the Convention.

187. It may be pointed out that Annex III, article 4, paragraph 4, of the Convention does not give sponsoring States unlimited discretionary powers concerning the measures to be taken in order to avoid liability. This matter is dealt with in detail in the reply to Question 3.

VI. Scope of liability under the Convention

188. The Chamber will now deal with the scope of liability under article 139, paragraph 2, second sentence, of the Convention. This requires addressing several issues, namely, the standard of liability, multiple sponsorship, the amount and form of compensation and the relationship between the liability of the contractor and of the sponsoring State.

Standard of liability

189. With regard to the standard of liability, it was argued in the proceedings that the sponsoring State has strict liability, i.e., liability without fault. The Chamber, however, would like to point out that liability for damage of the sponsoring State arises only from its failure to meet its obligation of due diligence. This rules out the application of strict liability.

Multiple sponsorship

190. According to Annex III, article 4, paragraph 3, of the Convention, in certain situations, applicants for contracts of exploration or exploitation may require the sponsorship of more than one State Party. This occurs when the applicant holds more than one nationality or where it holds the nationality of one State and is controlled by another State or by nationals of another State.

191. Neither article 139, paragraph 2, nor Annex III, article 4, paragraph 4, of the Convention, indicates how sponsoring States are to share their liability. The Nodules Regulations and the Sulphides Regulations also do not provide guidance in this respect, with an exception as far as the certification of financial viability of the contractor is concerned. Such certification as required under regulation 12, paragraph 5(c), of the Nodules Regulations and under

regulation 13, paragraph 4(c), of the Sulphides Regulations must be provided by the State that controls the applicant. Consequently, in this case, a failure of that State to comply with its obligations entails liability.

192. Apart from the exception mentioned in paragraph 191, the provisions of article 139, paragraph 2, of the Convention and related instruments dealing with sponsorship do not differentiate between single and multiple sponsorship. Accordingly, the Chamber takes the position that, in the event of multiple sponsorship, liability is joint and several unless otherwise provided in the Regulations issued by the Authority.

Amount and form of compensation

193. As regards the amount of compensation payable, it is pertinent to refer again to Annex III, article 22, of the Convention, which states, with respect to the Authority and the sponsored contractor, that "[l]iability in every case shall be for the actual amount of damage." In this context, note should be taken of regulation 30 of the Nodules Regulations, the identical regulation 32 of the Sulphides Regulations, and the identical section 16.1 of the Standard Clauses for exploration contracts (Annex 4 to the said Regulations).

194. The obligation for a State to provide for a full compensation or *restituto in integrum* is currently part of customary international law. This conclusion was first reached by the Permanent Court of International Justice in the *Factory of Chorzów* case (*P.C.I.J. Series A, No. 17*, p. 47). This obligation was further reiterated by the International Law Commission. According to article 31, paragraph 1, of the ILC Articles on State Responsibility: "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act". The Chamber notes in this context that treaties on specific topics, such as nuclear energy or oil pollution, provide for limitations on liability together with strict liability.

195. In the light of the foregoing, it is the view of the Chamber that the provisions concerning liability of the contractor for the actual amount of damage, referred to in paragraph 193, are equally valid with regard to the liability of the sponsoring State.

196. As far as the form of the reparation is concerned, the Chamber wishes to refer to article 34 of the ILC Articles on State Responsibility. It reads:

> Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either

> singly or in combination, in accordance with the provisions of this chapter.

197. It is the view of the Chamber that the form of reparation will depend on both the actual damage and the technical feasibility of restoring the situation to the *status quo ante*.

198. It should be noted that, according to regulation 30 of the Nodules Regulations and regulation 32 of the Sulphides Regulations, the contractor remains liable for damage even after the completion of the exploration phase. In the view of the Chamber, this is equally valid for the liability of the sponsoring State.

Relationship between the liability of the contractor and of the sponsoring State

199. Concerning the relationship between the contractor's liability and that of the sponsoring State, attention may be drawn to Annex III, article 22, of the Convention. This provision reads as follows:

> The contractor shall have responsibility or liability for any *damage arising out of wrongful acts* in the conduct of its operations, *account being taken of contributory acts or omissions by the Authority*. Similarly, the Authority shall have responsibility or liability for any *damage arising out of wrongful acts in the exercise of its powers and functions*, including violations under article 168, paragraph 2, *account being taken of contributory acts or omissions by the contractor*. Liability in every case shall be for the actual amount of damage. (Emphasis added)

200. No reference is made in this provision to the liability of sponsoring States. It may therefore be deduced that the main liability for a wrongful act committed in the conduct of the contractor's operations or in the exercise of the Authority's powers and functions rests with the contractor and the Authority, respectively, rather than with the sponsoring State. In the view of the Chamber, this reflects the distribution of responsibilities for deep seabed mining activities between the contractor, the Authority and the sponsoring State.

201. In this context, the question of whether the contractor and the sponsoring State bear joint and several liability was raised in the proceedings. Nothing in the Convention and related instruments indicates that this is the case. Joint and several liability arises where different entities have contributed

to the same damage so that full reparation can be claimed from all or any of them. This is not the case under the liability regime established in article 139, paragraph 2, of the Convention. As noted above, the liability of the sponsoring State arises from its own failure to carry out its responsibilities, whereas the contractor's liability arises from its own non-compliance. Both forms of liability exist in parallel. There is only one point of connection, namely, that the liability of the sponsoring State depends upon the damage resulting from activities or omissions of the sponsored contractor (see paragraph 181). But, in the view of the Chamber, this is merely a trigger mechanism. Such damage is not, however, automatically attributable to the sponsoring State.

202. If the contractor has paid the actual amount of damage, as required under Annex III, article 22, of the Convention, in the view of the Chamber, there is no room for reparation by the sponsoring State.

203. The situation becomes more complex if the contractor has not covered the damage fully. It was pointed out in the proceedings that a gap in liability may occur if, notwithstanding the fact that the sponsoring State has taken all necessary and appropriate measures, the sponsored contractor has caused damage and is unable to meet its liability in full. It was further pointed out that a gap in liability may also occur if the sponsoring State failed to meet its obligations but that failure is not causally linked to the damage. In their written and oral statements, States Parties have expressed different views on this issue. Some have argued that the sponsoring State has a residual liability, that is, the liability to cover the damage not covered by the sponsored contractor although the conditions for a liability of the sponsoring State under article 139, paragraph 2, of the Convention are not met. Other States Parties have taken the opposite position.

204. In the view of the Chamber, the liability regime established by article 139 of the Convention and in related instruments leaves no room for residual liability. As outlined in paragraph 201, the liability of the sponsoring State and the liability of the sponsored contractor exist in parallel. The liability of the sponsoring State arises from its own failure to comply with its responsibilities under the Convention and related instruments. The liability of the sponsored contractor arises from its failure to comply with its obligations under its contract and its undertakings thereunder. As has been established, the liability of the sponsoring State depends on the occurrence of damage resulting from the

failure of the sponsored contractor. However, as noted in paragraph 182, this does not make the sponsoring State responsible for the damage caused by the sponsored contractor.

205. Taking into account that, as shown above in paragraph 203, situations may arise where a contractor does not meet its liability in full while the sponsoring State is not liable under article 139, paragraph 2, of the Convention, the Authority may wish to consider the establishment of a trust fund to compensate for the damage not covered. The Chamber draws attention to article 235, paragraph 3, of the Convention which refers to such possibility.

VII. Liability of sponsoring States for violation of their direct obligations

206. As stated in paragraph 121, the Convention and related instruments provide for direct obligations of sponsoring States. Liability for violation of such obligations is covered by article 139, paragraph 2, first sentence, of the Convention.

207. In the event of failure to comply with direct obligations, it is not possible for the sponsoring State to claim exemption from liability as article 139, paragraph 2, second sentence, of the Convention does not apply.

VIII. "Without prejudice" clause

208. The Chamber will now consider the impact of international law on the deep seabed liability regime. Articles 139, paragraph 2, first sentence, and 304 of the Convention, state that their provisions are "without prejudice" to the rules of international law (see paragraph 169). It remains to be considered whether such statement may be used to fill a gap in the liability regime established in Part XI of the Convention and related instruments.

209. As already indicated, if the sponsoring State has not failed to meet its obligations, there is no room for its liability under article 139, paragraph 2, of the Convention even if activities of the sponsored contractor have resulted in damage. A gap in liability which might occur in such a situation cannot be

closed by having recourse to liability of the sponsoring State under customary international law. The Chamber is aware of the efforts made by the International Law Commission to address the issue of damages resulting from acts not prohibited under international law. However, such efforts have not yet resulted in provisions entailing State liability for lawful acts. Here again (see paragraph 205) the Chamber draws the attention of the Authority to the option of establishing a trust fund to cover such damages not covered otherwise.

210. The failure by a sponsoring State to meet its obligations not resulting in material damage is covered by customary international law which does not make damage a requirement for the liability of States. As already stated in paragraph 178, this is confirmed by the ILC Articles on State Responsibility.

211. Lastly, the Chamber would like to point out that article 304 of the Convention refers not only to existing international law rules on responsibility and liability, but also to the development of further rules. The regime of international law on responsibility and liability is not considered to be static. Article 304 of the Convention thus opens the liability regime for deep seabed mining to new developments in international law. Such rules may either be developed in the context of the deep seabed mining regime or in conventional or customary international law.

Question 3

212. The third question submitted to the Chamber is as follows:

What are the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?

I. General aspects

213. The focus of Question 3, as of Questions 1 and 2, is on sponsoring States. The Question seeks to find out the "necessary and appropriate measures" that the sponsoring State "must" take in order to fulfil its responsibility

under the Convention, in particular article 139 and Annex III, and the 1994 Agreement. The starting point for this inquiry is article 153 of the Convention, since it introduces for the first time the concept of the sponsoring State and the measures that it must take. Article 153 does not specify the measures to be taken by the sponsoring State. It makes a cross-reference to article 139 of the Convention for guidance in the matter.

214. Article 139, paragraph 2, of the Convention provides that the sponsoring State shall not be liable for damage caused by any failure to comply with Part XI of the Convention by an entity sponsored by it under article 153, paragraph 2(b), of the Convention, "if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4".

215. Article 139, paragraph 2, of the Convention does not specify the measures that are "necessary and appropriate". It simply draws attention to article 153, paragraph 4, and Annex III, article 4, paragraph 4, of the Convention. The relevant part of Annex III, article 4, paragraph 4, reads as follows:

> A sponsoring State shall not, however, be liable for damage caused by any failure of a contractor sponsored by it to comply with its obligations if that State Party has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction.

216. Although the terminology used in these provisions varies slightly, they deal in essence with the same subject matter and convey the same meaning. Annex III, article 4, paragraph 4, of the Convention contains an explanation of the words "necessary and appropriate measures" in article 139, paragraph 2, of the Convention.

217. Under these provisions, in the system of the responsibilities and liability of the sponsoring State, the "necessary and appropriate measures" have two distinct, although interconnected, functions as set out in the Convention. On the one hand, these measures have the function of ensuring compliance by the contractor with its obligations under the Convention and related instruments as well as under the relevant contract. On the other hand, they also have the function of exempting the sponsoring State from liability for damage caused by the sponsored contractor, as provided in article 139, paragraph 2, as well as in Annex III, article 4, paragraph 4, of the Convention. The first of these functions has been illustrated in the reply to Question 1, in

connection with the due diligence obligation of the sponsoring State to ensure compliance by the sponsored contractor, while the second has been partially addressed in the reply to Question 2 and will be further addressed in the following paragraphs.

II. Laws and regulations and administrative measures

218. Annex III, article 4, paragraph 4, of the Convention requires the sponsoring State to adopt laws and regulations and to take administrative measures. Thus, there is here a stipulation that the adoption of laws and regulations and the taking of administrative measures are necessary. The scope and extent of the laws and regulations and administrative measures required depend upon the legal system of the sponsoring State. The adoption of laws and regulations is prescribed because not all the obligations of a contractor may be enforced through administrative measures or contractual arrangements alone, as specified in paragraphs 223 to 226. Support for the enforcement of contractor's obligations under the domestic law of the sponsoring State is an essential requirement in a number of national jurisdictions. But laws and regulations by themselves may not provide a complete answer in this regard. Administrative measures aimed at securing compliance with them may also be needed. Laws, regulations and administrative measures may include the establishment of enforcement mechanisms for active supervision of the activities of the sponsored contractor. They may also provide for the co-ordination between the various activities of the sponsoring State and those of the Authority with a view to eliminating avoidable duplication of work.

219. Since the sponsoring State is responsible for ensuring that the contractor acts in accordance with the terms of the contract and with its obligations under the Convention, that State's laws, regulations and administrative measures should be in force at all times that a contract with the Authority is in force. While the existence of such laws, regulations and administrative measures is not a condition precedent for concluding a contract with the Authority, it is a necessary requirement for compliance with the obligation of due diligence of the sponsoring State and for its exemption from liability.

220. It may be observed in this regard that the Nodules Regulations were approved after the pioneer investors had been registered. In view

of this, certifying States are required, if necessary, to bring their laws, regulations and administrative measures in keeping with the provisions of the Regulations.

221. The national measures to be taken by the sponsoring State should also cover the obligations of the contractor even after the completion of the exploration phase, as provided for in regulation 30 of the Nodules Regulations and regulation 32 of the Sulphides Regulations.

222. As already indicated, the national measures, once adopted, may not be appropriate in perpetuity. It is the view of the Chamber that such measures should be kept under review so as to ensure that they meet current standards and that the contractor meets its obligations effectively without detriment to the common heritage of mankind.

III. Compliance by means of a contract?

223. It is the requirement in Annex III, article 4, paragraph 4, of the Convention, that the measures to be taken by the sponsoring State should be in the form of laws and regulations and administrative measures. This means that a sponsoring State could not be considered as complying with its obligations only by entering into a contractual arrangement, such as a sponsoring agreement, with the contractor. Not only would this be incompatible with the provision referred to above but also with the Convention in general and Part XI thereof in particular.

224. Mere contractual obligations between the sponsoring State and the sponsored contractor may not serve as an effective substitute for the laws and regulations and administrative measures referred to in Annex III, article 4, paragraph 4, of the Convention. Nor would they establish legal obligations that could be invoked against the sponsoring State by entities other than the sponsored contractor.

225. The "contractual" approach would, moreover, lack transparency. It will be difficult to verify, through publicly available measures, that the sponsoring State had met its obligations. A sponsorship agreement may not be publicly available and, in fact, may not be required at all. Annex III of the Convention, and the Nodules Regulations and the Sulphides Regulations contain no requirement that a sponsorship agreement, if any, between the sponsoring States and the contractor should be submitted to the Authority or made publicly available. The only requirement is the submission of a certificate of sponsorship issued by the sponsoring State (regulation 11, paragraph 3(f), of the Nodules Regulations and of the Sulphides Regulations), in which the

sponsoring State declares that it "assumes responsibility in accordance with article 139, article 153, paragraph 4, and Annex III, article 4, paragraph 4, of the Convention".

226. As stated above, the role of the sponsoring State is to contribute to the common interest of all States in the proper implementation of the principle of the common heritage of mankind by assisting the Authority and by acting on its own with a view to ensuring that entities under its jurisdiction conform to the rules on deep seabed mining. Contractual arrangements alone cannot satisfy the obligation undertaken by the sponsoring State. The sponsoring State could not claim to be assisting the Authority under article 153, paragraph 4, of the Convention by the mere fact that it had concluded a contract under its domestic law.

IV. Content of the measures

227. The Convention leaves it to the sponsoring State to determine what measures will enable it to discharge its responsibilities. Policy choices on such matters must be made by the sponsoring State. In view of this, the Chamber considers that it is not called upon to render specific advice as to the necessary and appropriate measures that the sponsoring State must take in order to fulfil its responsibilities under the Convention. Judicial bodies may not perform functions that are not in keeping with their judicial character. Nevertheless, without encroaching on the policy choices a sponsoring State may make, the Chamber deems it appropriate to indicate some general considerations that a sponsoring State may find useful in its choice of measures under articles 139, paragraph 2, 153, paragraph 4, and Annex III, article 4, paragraph 4, of the Convention.

228. What is expected with regard to the responsibility of the sponsoring State in terms of Annex III, article 4, paragraph 4, of the Convention is made clear in the second sentence of the same paragraph. It requires the sponsoring State to adopt laws and regulations and to take administrative measures which are, within the framework of its legal system, "reasonably appropriate" for securing compliance by persons under its jurisdiction. The standard for determining what is appropriate is not open-ended. The measures taken must be "reasonably appropriate". The appropriateness of the measures taken may be justified only if they are agreeable to reason and not arbitrary.

229. The measures to be taken by the sponsoring State must be determined by that State itself within the framework of its legal system. This

determination is, therefore, left to the discretion of the sponsoring State. Annex III, article 4, paragraph 4, of the Convention requires the sponsoring State to put in place laws and regulations and to take administrative measures that are "reasonably appropriate" so that it may be absolved from liability for damage caused by any failure of a contractor sponsored by it to comply with its obligations. The obligation is to act within its own legal system, taking into account, among other things, the particular characteristics of that system.

230. In view of the above, it may be relevant to deal with some general considerations pertaining to the measures to be taken by the sponsoring State. The sponsoring State does not have an absolute discretion with respect to the action it is required to take under Annex III, article 4, paragraph 4, of the Convention. In the sphere of the obligation to assist the Authority acting on behalf of mankind as a whole, while deciding what measures are reasonably appropriate, the sponsoring State must take into account, objectively, the relevant options in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole. It must act in good faith, especially when its action is likely to affect prejudicially the interests of mankind as a whole. The need to act in good faith is also underlined in articles 157, paragraph 4, and 300 of the Convention. Reasonableness and non-arbitrariness must remain the hallmarks of any action taken by the sponsoring State. Any failure on the part of the sponsoring State to act reasonably may be challenged before this Chamber under article 187 (b) (i) of the Convention.

231. It may be pertinent to inquire whether there are any restrictions on what a sponsoring State may provide for in its laws and regulations applicable in this regard. Attention may be drawn to Annex III, article 21, paragraph 3, of the Convention. This paragraph reads as follows:

> No State Party may impose conditions on a contractor that are inconsistent with Part XI. However, the application by a State Party to contractors sponsored by it, or to ships flying its flag, of environmental or other laws and regulations more stringent than those in the rules, regulations and procedures of the Authority adopted pursuant to article 17, paragraph 2(f), of this Annex shall not be deemed inconsistent with Part XI.

232. This provision imposes a general obligation on the sponsoring State not to impose on a contractor conditions that are "inconsistent" with Part XI of the Convention. At the same time, however, it establishes an exception thereto. The exception provides the sponsoring State with the option to apply to contractors sponsored by it, or to ships flying its flag, environmental or other laws

and regulations more stringent than those in the rules, regulations and procedures of the Authority adopted pursuant to Annex III, article 17, paragraph 2(f), of the Convention (dealing with protection of the marine environment).

233. While dealing with the obligation of the sponsoring State contained in Annex III, article 21, paragraph 3, of the Convention, account has to be taken of the obligation of the contractor under the legal regime for deep seabed mining and the corresponding obligations of the sponsoring State. According to Annex III, article 4, paragraph 4, of the Convention the contractor shall carry out its activities in the Area "in conformity with" the terms of its contract with the Authority and its obligations under the Convention. The same provision states that it is the responsibility of the sponsoring State to ensure that the contractor carries out this obligation (see paragraph 75).

234. The sponsoring State may find it necessary, depending upon its legal system, to include in its domestic law provisions that are necessary for implementing its obligations under the Convention. These provisions may concern, *inter alia*, financial viability and technical capacity of sponsored contractors, conditions for issuing a certificate of sponsorship and penalties for non-compliance by such contractors.

235. Additionally, the Convention itself specifies in various provisions the issues that should be covered by the sponsoring State's laws and regulations. In particular, article 39 of the Statute dealing with enforcement of decisions of the Chamber provides:

> The decisions of the Chamber shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought.

Reference may also be made to Annex III, article 21, paragraph 2, of the Convention which provides: "Any final decision rendered by a court or tribunal having jurisdiction under this Convention relating to the rights and obligations of the Authority and of the contractor shall be enforceable in the territory of each State Party". In a number of national jurisdictions, these provisions may require specific legislation for implementation.

236. Other indications may be found in the provisions that establish direct obligations of the sponsoring States (see paragraph 121). These include: the obligations to assist the Authority in the exercise of control over activities in the Area; the obligation to apply a precautionary approach; the obligation to apply best environmental practices; the obligation to take measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment; the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution; and the obligation to conduct environmental impact assessments. It is important to stress that these obligations are mentioned only as examples.

237. In this context, the Chamber takes note of the Deep Seabed Mining Law adopted by Germany and of similar legislation adopted by the Czech Republic.

238. While the applicable contract is a contract between the Authority and the contractor only and as such does not bind the sponsoring State, the sponsoring State is nevertheless under an obligation to ensure that the contractor complies with its contract. This means that the sponsoring State must adopt laws and regulations and take administrative measures which do not hinder the contractor in the effective fulfilment of its contractual obligations but rather assist the contractor in that respect.

239. It is inherent in the "due diligence" obligation of the sponsoring State to ensure that the obligations of a sponsored contractor are made enforceable.

240. Under Annex III, article 21, paragraph 3, of the Convention, the rules, regulations and procedures concerning environmental protection adopted by the Authority are used as a minimum standard of stringency for the environmental or other laws and regulations that the sponsoring State may apply to the sponsored contractor. It is implicit in this provision that sponsoring States may apply to the contractors they sponsor more stringent standards as far as the protection of the marine environment is concerned.

241. Article 209, paragraph 2, of the Convention is based on the same approach. According to this provision, the requirements contained in the laws and regulations that States adopt concerning pollution of the marine environment from activities in the Area "undertaken by vessels, installations, structures and other devices flying their flag or of their registry or operating under their authority . . . shall be no less effective than the international rules, regulations, and procedures" established under Part XI, which consist primarily of the international rules, regulations and procedures adopted by the Authority.

242. For these reasons,

THE CHAMBER,

1. Unanimously,

Decides **that it has jurisdiction to give the advisory opinion requested.**

2. Unanimously,

Decides **to respond to the request for an advisory opinion.**

3. Unanimously,

Replies **to Question 1 submitted by the Council as follows:**

Sponsoring States have two kinds of obligations under the Convention and related instruments:

A. The obligation to ensure compliance by sponsored contractors with the terms of the contract and the obligations set out in the Convention and related instruments.

This is an obligation of "due diligence". The sponsoring State is bound to make best possible efforts to secure compliance by the sponsored contractors.

The standard of due diligence may vary over time and depends on the level of risk and on the activities involved.

This "due diligence" obligation requires the sponsoring State to take measures within its legal system. These measures must consist of laws and regulations and administrative measures. The applicable standard is that the measures must be "reasonably appropriate".

B. Direct obligations with which sponsoring States must comply independently of their obligation to ensure a certain conduct on the part of the sponsored contractors.

Compliance with these obligations may also be seen as a relevant factor in meeting the "due diligence" obligation of the sponsoring State.

The most important direct obligations of the sponsoring State are:

(a) the obligation to assist the Authority set out in article 153, paragraph 4, of the Convention;
(b) the obligation to apply a precautionary approach as reflected in Principle 15 of the Rio Declaration and set out in the Nodules Regulations and the Sulphides Regulations; this obligation is also to be considered an integral part of the "due diligence" obligation of the sponsoring State and applicable beyond the scope of the two Regulations;
(c) the obligation to apply the "best environmental practices" set out in the Sulphides Regulations but equally applicable in the context of the Nodules Regulations;
(d) the obligation to adopt measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment; and
(e) the obligation to provide recourse for compensation.

The sponsoring State is under a due diligence obligation to ensure compliance by the sponsored contractor with its obligation to conduct an environmental impact assessment set out in section 1, paragraph 7, of the Annex to the 1994 Agreement. The obligation to conduct an environmental impact assessment is also a general obligation under customary law and is set out as a direct obligation for all States in article 206 of the Convention and as an aspect of the sponsoring State's obligation to assist the Authority under article 153, paragraph 4, of the Convention.

Obligations of both kinds apply equally to developed and developing States, unless specifically provided otherwise in the applicable provisions, such as Principle 15 of the Rio Declaration, referred to in the Nodules Regulations and the Sulphides Regulations, according to which States shall apply the precautionary approach "according to their capabilities".

The provisions of the Convention which take into consideration the special interests and needs of developing States should be effectively implemented with a view to enabling the developing States to participate in deep seabed mining on an equal footing with developed States.

4. Unanimously,

***Replies* to Question 2 submitted by the Council as follows:**

The liability of the sponsoring State arises from its failure to fulfil its obligations under the Convention and related instruments. Failure of the sponsored contractor to comply with its obligations does not in itself give rise to liability on the part of the sponsoring State.

The conditions for the liability of the sponsoring State to arise are:

(a) failure to carry out its responsibilities under the Convention; and
(b) occurrence of damage.

The liability of the sponsoring State for failure to comply with its due diligence obligations requires that a causal link be established between such failure and damage. Such liability is triggered by a damage caused by a failure of the sponsored contractor to comply with its obligations.

The existence of a causal link between the sponsoring State's failure and the damage is required and cannot be presumed.

The sponsoring State is absolved from liability if it has taken "all necessary and appropriate measures to secure effective compliance" by the sponsored contractor with its obligations. This exemption from liability does not apply to the failure of the sponsoring State to carry out its direct obligations.

The liability of the sponsoring State and that of the sponsored contractor exist in parallel and are not joint and several. The sponsoring State has no residual liability.

Multiple sponsors incur joint and several liability, unless otherwise provided in the Regulations of the Authority.

The liability of the sponsoring State shall be for the actual amount of the damage.

Under the Nodules Regulations and the Sulphides Regulations, the contractor remains liable for damage even after the completion of the exploration phase. This is equally valid for the liability of the sponsoring State.

The rules on liability set out in the Convention and related instruments are without prejudice to the rules of international law. Where the

sponsoring State has met its obligations, damage caused by the sponsored contractor does not give rise to the sponsoring State's liability. If the sponsoring State has failed to fulfil its obligation but no damage has occurred, the consequences of such wrongful act are determined by customary international law.

The establishment of a trust fund to cover the damage not covered under the Convention could be considered.

5. Unanimously,

***Replies* to Question 3 submitted by the Council as follows:**

The Convention requires the sponsoring State to adopt, within its legal system, laws and regulations and to take administrative measures that have two distinct functions, namely, to ensure compliance by the contractor with its obligations and to exempt the sponsoring State from liability.

The scope and extent of these laws and regulations and administrative measures depends on the legal system of the sponsoring State.

Such laws and regulations and administrative measures may include the establishment of enforcement mechanisms for active supervision of the activities of the sponsored contractor and for co-ordination between the activities of the sponsoring State and those of the Authority.

Laws and regulations and administrative measures should be in force at all times that a contract with the Authority is in force. The existence of such laws and regulations, and administrative measures is not a condition for concluding the contract with the Authority; it is, however, a necessary requirement for carrying out the obligation of due diligence of the sponsoring State and for seeking exemption from liability.

These national measures should also cover the obligations of the contractor after the completion of the exploration phase, as provided for in regulation 30 of the Nodules Regulations and regulation 32 of the Sulphides Regulations.

In light of the requirement that measures by the sponsoring States must consist of laws and regulations and administrative measures, the sponsoring State cannot be considered as complying with its obligations only by entering into a contractual arrangement with the contractor.

The sponsoring State does not have absolute discretion with respect to the adoption of laws and regulations and the taking of administrative

measures. It must act in good faith, taking the various options into account in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole.

As regards the protection of the marine environment, the laws and regulations and administrative measures of the sponsoring State cannot be less stringent than those adopted by the Authority, or less effective than international rules, regulations and procedures.

The provisions that the sponsoring State may find necessary to include in its national laws may concern, *inter alia*, financial viability and technical capacity of sponsored contractors, conditions for issuing a certificate of sponsorship and penalties for non-compliance by such contractors.

It is inherent in the "due diligence" obligation of the sponsoring State to ensure that the obligations of a sponsored contractor are made enforceable.

Specific indications as to the contents of the domestic measures to be taken by the sponsoring State are given in various provisions of the Convention and related instruments. This applies, in particular, to the provision in article 39 of the Statute prescribing that decisions of the Chamber shall be enforceable in the territories of the States Parties, in the same manner as judgments and orders of the highest court of the State Party in whose territory the enforcement is sought.

Done in English and French, both texts being authoritative, in the Free and Hanseatic City of Hamburg, this first day of February, two thousand and eleven, in three copies, one of which will be placed in the archives of the Tribunal and the others will be sent to the Secretary-General of the International Seabed Authority and to the Secretary-General of the United Nations.

(signed) Tullio Treves
President

(signed) Philippe Gautier
Registrar

Annex 19

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE À DES USINES DE PÂTE À PAPIER SUR LE FLEUVE URUGUAY

(ARGENTINE c. URUGUAY)

ARRÊT DU 20 AVRIL 2010

2010

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING PULP MILLS ON THE RIVER URUGUAY

(ARGENTINA *v.* URUGUAY)

JUDGMENT OF 20 APRIL 2010

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PULP MILLS ON THE RIVER URUGUAY
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20 APRIL 2010

JUDGMENT

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ABBREVIATIONS AND ACRONYMS

AAP	"Autorización Ambiental Previa" (initial environmental authorization)
ADCP	Acoustic Doppler Current Profiler
AOX	Adsorbable Organic Halogens
BAT	Best Available Techniques (or Technology)
Botnia	"Botnia S.A." and "Botnia Fray Bentos S.A." (two companies formed under Uruguayan law by the Finnish company Oy Metsä-Botnia AB)
CARU	"Comisión Administradora del Río Uruguay" (Administrative Commission of the River Uruguay)
CIS	Cumulative Impact Study (prepared in September 2006 at the request of the International Finance Corporation)
CMB	Celulosas de M'Bopicuá S.A." (a company formed under Uruguayan law by the Spanish company ENCE)
CMB (ENCE)	Pulp mill planned at Fray Bentos by the Spanish company ENCE, which formed the Uruguayan company CMB for that purpose
DINAMA	"Dirección Nacional de Medio Ambiente" (National Directorate for the Environment of the Uruguayan Government)
ECF	Elemental Chlorine-Free
EIA	Environmental Impact Assessment
ENCE	"Empresa Nacional de Celulosas de España" (Spanish company which formed the company CMB under Uruguayan law)
ESAP	Environmental and Social Action Plan
GTAN	"Grupo Técnico de Alto Nivel" (High-Level Technical Group established in 2005 by Argentina and Uruguay to resolve their dispute over the CMB (ENCE) and Orion (Botnia) mills)
IFC	International Finance Corporation
IPPC-BAT	Integrated Pollution Prevention and Control Reference Document on Best Available Techniques in the Pulp and Paper Industry
MVOTMA	"Ministerio de Vivienda, Ordenamiento Territorial y Medio Ambiente" (Uruguayan Ministry of Housing, Land Use Planning and Environmental Affairs)
Orion (Botnia)	Pulp mill built at Fray Bentos by the Finnish company Oy Metsä-Botnia AB, which formed the Uruguayan companies Botnia S.A. and Botnia Fray Bentos S.A. for that purpose
OSE	"Obras Sanitarias del Estado" (Uruguay's State Agency for Sanitary Works)
POPs	Persistent Organic Pollutants
PROCEL	"Plan de Monitoreo de la Calidad Ambiental en el Río Uruguay en áreas de Plantas Celulósicas" (Plan for monitoring water quality in the area of the pulp mills set up under CARU)

PROCON "Programa de Calidad de Aguas y Control de la Contaminación del Río Uruguay" (Water quality and pollution control programme set up under CARU)

INTERNATIONAL COURT OF JUSTICE

YEAR 2010

2010
20 April
General List
No. 135

20 April 2010

CASE CONCERNING PULP MILLS ON THE RIVER URUGUAY

(ARGENTINA *v.* URUGUAY)

Legal framework and facts of the case.
1961 Treaty of Montevideo — 1975 Statute of the River Uruguay — Establishment of the Administrative Commission of the River Uruguay (CARU) — CMB (ENCE) pulp mill project — Orion (Botnia) pulp mill project — Port terminal at Nueva Palmira — Subject of the dispute.

*

Scope of the Court's jurisdiction.
Compromissory clause (Article 60 of the 1975 Statute) — Provisions of the 1975 Statute and jurisdiction ratione materiae *— Lack of jurisdiction for the Court to consider allegations concerning noise and visual pollution or bad odours (Article 36 of the 1975 Statute) — Air pollution and impact on the quality of the waters of the river addressed under substantive obligations.*

Article 1 of the 1975 Statute — Definition of the purpose of the 1975 Statute — Joint machinery necessary for the optimum and rational utilization of the river — Significance of the reference to the "rights and obligations arising from treaties and other international agreements in force for each of the parties" — Original Spanish text — Statute adopted by the parties in observance of their respective international commitments.
Article 41 (a) *of the 1975 Statute — Original Spanish text — Absence of a "referral clause" having the effect of incorporating within the ambit of the Statute the obligations of the parties under international agreements and other norms envisaged in the Statute — Obligation for the parties to exercise their regulatory powers, in conformity with applicable international agreements, for the protection and preservation of the aquatic environment of the River Uruguay — Rules for interpreting the 1975 Statute — Article 31 of the Vienna*

Convention on the Law of Treaties — Distinction between taking account of other international rules in the interpretation of the 1975 Statute and the scope of the jurisdiction of the Court under Article 60 of the latter.

*

Alleged breach of procedural obligations.

Question of links between the procedural obligations and the substantive obligations — Object and purpose of the 1975 Statute — Optimum and rational utilization of the River Uruguay — Sustainable development — Co-operation between the parties in jointly managing the risks of damage to the environment — Existence of a functional link, in regard to prevention, between the procedural obligations and the substantive obligations — Responsibility in the event of breaches of either category.

Interrelation of the various procedural obligations laid down by Articles 7 to 12 of the 1975 Statute — Original Spanish text of Article 7 — Obligation to inform, notify and negotiate as an appropriate means of achieving the objective of optimum and rational utilization of the river as a shared resource — Legal personality of CARU — Central role of CARU in the joint management of the river and obligation of the parties to co-operate.

Obligation to inform CARU (Article 7, first paragraph, of the 1975 Statute) — Works subject to this obligation — Link between the obligation to inform CARU, co-operation between the parties and the obligation of prevention — Determination by CARU on a preliminary basis of whether there is a risk of significant damage to the other party — Content of the information to be transmitted to CARU — Obligation to inform CARU before issuing of the initial environmental authorization — Provision of information to CARU by private operators cannot substitute for the obligation to inform laid down by the 1975 Statute — Breach by Uruguay of the obligation to inform CARU.

Obligation to notify the plans to the other party (Article 7, second and third paragraphs, of the 1975 Statute) — Need for a full environmental impact assessment (EIA) — Notification of the EIA to the other party, through CARU, before any decision on the environmental viability of the plan — Breach by Uruguay of the obligation to notify the plans to Argentina.

Question of whether the Parties agreed to derogate from the procedural obligations — "Understanding" of 2 March 2004 — Content and scope — Since Uruguay did not comply with it, the "understanding" cannot be regarded as having had the effect of exempting Uruguay from compliance with the procedural obligations — Agreement setting up the High-Level Technical Group (GTAN) — Referral to the Court on the basis of Article 12 or Article 60 of the 1975 Statute: no practical distinction — The agreement to set up the GTAN had the aim of enabling the negotiations provided for in Article 12 of the 1975 Statute to take place, but did not derogate from other procedural obligations — In accepting the creation of the GTAN, Argentina did not give up the procedural rights belonging to it by virtue of the Statute, nor the possibility of invoking Uruguay's responsibility; nor did Argentina consent to suspending the operation of the procedural provisions of the Statute (Article 57 of the Vienna Convention on the Law of Treaties) — Obligation to negotiate in good faith — "No construction obligation" during the negotiation period — Preliminary work approved by Uruguay — Breach by Uruguay of the obligation to negotiate laid down by Article 12 of the 1975 Statute.

Obligations of Uruguay following the end of the negotiation period — Scope of Article 12 of the 1975 Statute — Absence of a "no construction obligation" following the end of the negotiation period and during the judicial settlement phase.

*

Alleged breaches of substantive obligations.

Burden of proof — Precautionary approach without reversal of the burden of proof — Expert evidence — Reports commissioned by the Parties — Independence of experts — Consideration of the facts by the Court — Experts appearing as counsel at the hearings — Question of witnesses, experts and expert witnesses.

Optimum and rational utilization of the River Uruguay — Article 1 of the 1975 Statute sets out the purpose of the instrument and does not lay down specific rights and obligations — Obligation to comply with the obligations prescribed by the Statute for the protection of the environment and the joint management of the river — Regulatory function of CARU — Interconnectedness between equitable and reasonable utilization of the river as a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development (Article 27 of the 1975 Statute).

Obligation to ensure that the management of the soil and woodland does not impair the régime of the river or the quality of its waters (Article 35 of the 1975 Statute) — Contentions of Argentina not established.

Obligation to co-ordinate measures to avoid changes to the ecological balance (Article 36 of the 1975 Statute) — Requirement of individual action by each party and co-ordination through CARU — Obligation of due diligence — Argentina has not convincingly demonstrated that Uruguay has refused to engage in the co-ordination envisaged by Article 36 of the 1975 Statute.

Obligation to prevent pollution and preserve the aquatic environment — Normative content of Article 41 of the 1975 Statute — Obligation for each party to adopt rules and measures to protect and preserve the aquatic environment and, in particular, to prevent pollution — The rules and measures prescribed by each party must be in accordance with applicable international agreements and in keeping, where relevant, with the guidelines and recommendations of international technical bodies — Due diligence obligation to prescribe rules and measures and to apply them — Definition of pollution given in Article 40 of the 1975 Statute — Regulatory action of CARU (Article 56 of the 1975 Statute), complementing that of each party — CARU Digest — Rules by which the existence of any harmful effects is to be determined: 1975 Statute, CARU Digest, domestic law of each party within the limits prescribed by the 1975 Statute.

Environmental impact assessment (EIA) — Obligation to conduct an EIA — Scope and content of the EIA — Referral to domestic law — Question of the choice of mill site as part of the EIA — The Court is not convinced by Argentina's argument that an assessment of possible sites was not carried out — Receiving capacity of the river at Fray Bentos and reverse flows — The CARU water quality standards take account of the geomorphological and hydrological characteristics of the river and the receiving capacity of its waters — Question

of consultation of the affected populations as part of the EIA — No legal obligation to consult the affected populations arises from the instruments invoked by Argentina — Consultation by Uruguay of the affected populations did indeed take place.

Production technology used in the Orion (Botnia) mill — No evidence to support Argentina's claim that the Orion (Botnia) mill is not BAT-compliant in terms of the discharges of effluent for each tonne of pulp produced — From the data collected after the start-up of the Orion (Botnia) mill, it does not appear that the discharges from it have exceeded the prescribed limits.

Impact of the discharges on the quality of the waters of the river — Post-operational monitoring — Dissolved oxygen — Phosphorus — Algal blooms — Phenolic substances — Presence of nonylphenols in the river environment — Dioxins and furans — Alleged breaches not established.

Effects on biodiversity — Insufficient evidence to conclude that Uruguay breached the obligation to protect the aquatic environment, including its fauna and flora.

Air pollution — Indirect pollution from deposits into the aquatic environment — Insufficient evidence.

On the basis of the evidence submitted, no breach by Uruguay of Article 41 of the 1975 Statute.

Continuing obligations: monitoring — Obligation of the Parties to enable CARU to exercise on a continuous basis the powers conferred on it by the 1975 Statute — Obligation of Uruguay to continue monitoring the operation of the Orion (Botnia) plant — Obligation of the Parties to continue their co-operation through CARU.

*

Claims made by the Parties in their final submissions.

Claims of Argentina — Breach of procedural obligations — Finding of wrongful conduct and satisfaction — Forms of reparation other than compensation not excluded by the 1975 Statute — Restitution as a form of reparation for injury — Definition — Limits — Form of reparation appropriate to the injury suffered, taking into account the nature of the wrongful act — Restitution in the form of the dismantling of the Orion (Botnia) mill not appropriate where only breaches of procedural obligations have occurred — No breach of substantive obligations and rejection of Argentina's other claims — No special circumstances requiring the ordering of assurances and guarantees of non-repetition.

Uruguay's request for confirmation of its right to continue operating the Orion (Botnia) plant — No practical significance.

*

Obligation of the Parties to co-operate with each other, on the terms set out in the 1975 Statute, to ensure the achievement of its object and purpose — Joint action of the Parties through CARU and establishment of a real community of interests and rights in the management of the River Uruguay and in the protection of its environment.

JUDGMENT

Present: *Vice-President* TOMKA, *Acting President*; *Judges* KOROMA, AL-KHASAWNEH, SIMMA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD; *Judges* ad hoc TORRES BERNÁRDEZ, VINUESA; *Registrar* COUVREUR.

In the case concerning pulp mills on the River Uruguay,

between

the Argentine Republic,

represented by

H.E. Ms Susana Ruiz Cerutti, Ambassador, Legal Adviser to the Ministry of Foreign Affairs, International Trade and Worship,

as Agent;

H.E. Mr. Horacio A. Basabe, Ambassador, Director of the Argentine Institute for Foreign Service, former Legal Adviser to the Ministry of Foreign Affairs, International Trade and Worship, Member of the Permanent Court of Arbitration,

H.E. Mr. Santos Goñi Marenco, Ambassador of the Argentine Republic to the Kingdom of the Netherlands,

as Co-Agents;

Mr. Alain Pellet, Professor at the University of Paris Ouest, Nanterre-La Défense, member and former Chairman of the International Law Commission, associate member of the Institut de droit international,

Mr. Philippe Sands, Q.C., Professor of International Law at University College London, Barrister at Matrix Chambers, London,

Mr. Marcelo Kohen, Professor of International Law at the Graduate Institute of International and Development Studies, Geneva, associate member of the Institut de droit international,

Ms Laurence Boisson de Chazournes, Professor of International Law at the University of Geneva,

Mr. Alan Béraud, Minister at the Embassy of the Argentine Republic to the European Union, former Legal Adviser to the Ministry of Foreign Affairs, International Trade and Worship,

Mr. Daniel Müller, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,

as Counsel and Advocates;

Mr. Homero Bibiloni, Federal Secretary for the Environment and Sustainable Development,

as Governmental Authority;

Mr. Esteban Lyons, National Director of Environmental Control, Secretariat of the Environment and Sustainable Development,

Mr. Howard Wheater, Ph.D. in Hydrology from Bristol University, Professor of Hydrology at Imperial College and Director of the Imperial College Environment Forum,

Mr. Juan Carlos Colombo, Ph.D. in Oceanography from the University of Quebec, Professor at the Faculty of Sciences and Museum of the National University of La Plata, Director of the Laboratory of Environmental Chemistry and Biogeochemistry at the National University of La Plata,
Mr. Neil McIntyre, Ph.D. in Environmental Engineering, Senior Lecturer in Hydrology at Imperial College London,
Ms Inés Camilloni, Ph.D. in Atmospheric Sciences, Professor of Atmospheric Sciences in the Faculty of Sciences of the University of Buenos Aires, Senior Researcher at the National Research Council (CONICET),

Mr. Gabriel Raggio, Doctor in Technical Sciences of the Swiss Federal Institute of Technology Zurich (ETHZ) (Switzerland), Independent Consultant,

as Scientific Advisers and Experts;

Mr. Holger Martinsen, Minister at the Office of the Legal Adviser, Ministry of Foreign Affairs, International Trade and Worship,
Mr. Mario Oyarzábal, Embassy Counsellor, member of the Office of the Legal Adviser, Ministry of Foreign Affairs, International Trade and Worship,
Mr. Fernando Marani, Second Secretary, Embassy of the Argentine Republic in the Kingdom of the Netherlands,
Mr. Gabriel Herrera, Embassy Secretary, member of the Office of the Legal Adviser, Ministry of Foreign Affairs, International Trade and Worship,

Ms Cynthia Mulville, Embassy Secretary, member of the Office of the Legal Adviser, Ministry of Foreign Affairs, International Trade and Worship,

Ms Kate Cook, Barrister at Matrix Chambers, London, specializing in environmental law and law relating to development,
Ms Mara Tignino, Ph.D. in Law, Researcher at the University of Geneva,
Mr. Magnus Jesko Langer, teaching and research assistant, Graduate Institute of International and Development Studies, Geneva,

as Legal Advisers,

and

the Eastern Republic of Uruguay,

represented by

H.E. Mr. Carlos Gianelli, Ambassador of the Eastern Republic of Uruguay to the United States of America,

as Agent;

H.E. Mr. Carlos Mora Medero, Ambassador of the Eastern Republic of Uruguay to the Kingdom of the Netherlands,

as Co-Agent;

Mr. Alan Boyle, Professor of International Law at the University of Edinburgh, Member of the English Bar,
Mr. Luigi Condorelli, Professor at the Faculty of Law, University of Florence,

Mr. Lawrence H. Martin, Foley Hoag LLP, Member of the Bars of the United States Supreme Court, the District of Columbia and the Commonwealth of Massachusetts,
Mr. Stephen C. McCaffrey, Professor at the McGeorge School of Law, University of the Pacific, California, former Chairman of the International Law Commission and Special Rapporteur for the Commission's work on the law of non-navigational uses of international watercourses,

Mr. Alberto Pérez Pérez, Professor in the Faculty of Law, University of the Republic, Montevideo,
Mr. Paul S. Reichler, Foley Hoag LLP, Member of the Bars of the United States Supreme Court and the District of Columbia,

as Counsel and Advocates;

Mr. Marcelo Cousillas, Legal Counsel at the National Directorate for the Environment, Ministry of Housing, Land Use Planning and Environmental Affairs,
Mr. César Rodriguez Zavalla, Chief of Cabinet, Ministry of Foreign Affairs,

Mr. Carlos Mata, Deputy Director of Legal Affairs, Ministry of Foreign Affairs,
Mr. Marcelo Gerona, Counsellor at the Embassy of the Eastern Republic of Uruguay in the Kingdom of the Netherlands,
Mr. Eduardo Jiménez de Aréchaga, Attorney at Law, admitted to the Bar of the Eastern Republic of Uruguay and Member of the Bar of New York,
Mr. Adam Kahn, Foley Hoag LLP, Member of the Bar of the Commonwealth of Massachusetts,
Mr. Andrew Loewenstein, Foley Hoag LLP, Member of the Bar of the Commonwealth of Massachusetts,
Ms Analia Gonzalez, LL.M., Foley Hoag LLP, admitted to the Bar of the Eastern Republic of Uruguay,
Ms Clara E. Brillembourg, Foley Hoag LLP, Member of the Bars of the District of Columbia and New York,
Ms Cicely Parseghian, Foley Hoag LLP, Member of the Bar of the Commonwealth of Massachusetts,
Mr. Pierre Harcourt, Ph.D. candidate, University of Edinburgh,
Mr. Paolo Palchetti, Associate Professor at the School of Law, University of Macerata,
Ms Maria E. Milanes-Murcia, M.A., LL.M., J.S.D. Candidate at the McGeorge School of Law, University of the Pacific, California, Ph.D. Candidate, University of Murcia, admitted to the Bar of Spain,

as Assistant Counsel;

Ms Alicia Torres, National Director for the Environment at the Ministry of Housing, Land Use Planning and Environmental Affairs,
Mr. Eugenio Lorenzo, Technical Consultant for the National Directorate for the Environment, Ministry of Housing, Land Use Planning and Environmental Affairs,
Mr. Cyro Croce, Technical Consultant for the National Directorate for the Environment, Ministry of Housing, Land Use Planning and Environmental Affairs,

Ms Raquel Piaggio, State Agency for Sanitary Works (OSE), Technical Consultant for the National Directorate for the Environment, Ministry of Housing, Land Use Planning and Environmental Affairs,

Mr. Charles A. Menzie, Ph.D., Principal Scientist and Director of the Eco-Sciences Practice at Exponent, Inc., Alexandria, Virginia,
Mr. Neil McCubbin, Eng., B.Sc. (Eng.), 1st Class Honours, Glasgow, Associate of the Royal College of Science and Technology, Glasgow,

as Scientific Advisers and Experts,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 4 May 2006, the Argentine Republic (hereinafter "Argentina") filed in the Registry of the Court an Application instituting proceedings against the Eastern Republic of Uruguay (hereinafter "Uruguay") in respect of a dispute concerning the breach, allegedly committed by Uruguay, of obligations under the Statute of the River Uruguay (United Nations, *Treaty Series (UNTS)*, Vol. 1295, No. I-21425, p. 340), a treaty signed by Argentina and Uruguay at Salto (Uruguay) on 26 February 1975 and having entered into force on 18 September 1976 (hereinafter the "1975 Statute"); in the Application, Argentina stated that this breach arose out of "the authorization, construction and future commissioning of two pulp mills on the River Uruguay", with reference in particular to "the effects of such activities on the quality of the waters of the River Uruguay and on the areas affected by the river".

In its Application, Argentina, referring to Article 36, paragraph 1, of the Statute of the Court, seeks to found the jurisdiction of the Court on Article 60, paragraph 1, of the 1975 Statute.

2. Pursuant to Article 40, paragraph 2, of the Statute of the Court, the Registrar communicated the Application forthwith to the Government of Uruguay. In accordance with paragraph 3 of that Article, the Secretary-General of the United Nations was notified of the filing of the Application.

3. On 4 May 2006, immediately after the filing of the Application, Argentina also submitted a request for the indication of provisional measures based on Article 41 of the Statute and Article 73 of the Rules of Court. In accordance with Article 73, paragraph 2, of the Rules of Court, the Registrar transmitted a certified copy of this request forthwith to the Government of Uruguay.

4. On 2 June 2006, Uruguay transmitted to the Court a CD-ROM containing the electronic version of two volumes of documents relating to the Argentine request for the indication of provisional measures, entitled "Observations of Uruguay" (of which paper copies were subsequently received); a copy of these documents was immediately sent to Argentina.

5. On 2 June 2006, Argentina transmitted to the Court various documents, including a video recording, and, on 6 June 2006, it transmitted further documents; copies of each series of documents were immediately sent to Uruguay.

6. On 6 and 7 June 2006, various communications were received from the

Parties, whereby each Party presented the Court with certain observations on the documents submitted by the other Party. Uruguay objected to the production of the video recording submitted by Argentina. The Court decided not to authorize the production of that recording at the hearings.

7. Since the Court included upon the Bench no judge of the nationality of the Parties, each of them exercised its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Argentina chose Mr. Raúl Emilio Vinuesa, and Uruguay chose Mr. Santiago Torres Bernárdez.

8. By an Order of 13 July 2006, the Court, having heard the Parties, found "that the circumstances, as they [then] present[ed] themselves to [it], [we]re not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures".

9. By another Order of the same date, the Court, taking account of the views of the Parties, fixed 15 January 2007 and 20 July 2007, respectively, as the time-limits for the filing of a Memorial by Argentina and a Counter-Memorial by Uruguay; those pleadings were duly filed within the time-limits so prescribed.

10. On 29 November 2006, Uruguay, invoking Article 41 of the Statute and Article 73 of the Rules of Court, in turn submitted a request for the indication of provisional measures. In accordance with Article 73, paragraph 2, of the Rules of Court, the Registrar transmitted a certified copy of this request forthwith to the Argentine Government.

11. On 14 December 2006, Uruguay transmitted to the Court a volume of documents concerning the request for the indication of provisional measures, entitled "Observations of Uruguay"; a copy of these documents was immediately sent to Argentina.

12. On 18 December 2006, before the opening of the oral proceedings, Argentina transmitted to the Court a volume of documents concerning Uruguay's request for the indication of provisional measures; the Registrar immediately sent a copy of these documents to the Government of Uruguay.

13. By an Order of 23 January 2007, the Court, having heard the Parties, found "that the circumstances, as they [then] present[ed] themselves to [it], [we]re not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures".

14. By an Order of 14 September 2007, the Court, taking account of the agreement of the Parties and of the circumstances of the case, authorized the submission of a Reply by Argentina and a Rejoinder by Uruguay, and fixed 29 January 2008 and 29 July 2008 as the respective time-limits for the filing of those pleadings. The Reply of Argentina and the Rejoinder of Uruguay were duly filed within the time-limits so prescribed.

15. By letters dated 16 June 2009 and 17 June 2009 respectively, the Governments of Uruguay and Argentina notified the Court that they had come to an agreement for the purpose of producing new documents pursuant to Article 56 of the Rules of Court. By letters of 23 June 2009, the Registrar informed the Parties that the Court had decided to authorize them to proceed as they had agreed. The new documents were duly filed within the agreed time-limit.

16. On 15 July 2009, each of the Parties, as provided for in the agreement between them and with the authorization of the Court, submitted comments on the new documents produced by the other Party. Each Party also filed documents in support of these comments.

17. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court decided, after ascertaining the views of the Parties, that copies of the pleadings and documents annexed would be made available to the public as from the opening of the oral proceedings.

18. By letter of 15 September 2009, Uruguay, referring to Article 56, paragraph 4, of the Rules of Court and to Practice Direction IX*bis*, communicated documents to the Court, forming part of publications readily available, on which it intended to rely during the oral proceedings. Argentina made no objection with regard to these documents.

19. By letter of 25 September 2009, the Argentine Government, referring to Article 56 of the Rules of Court and to Practice Direction IX, paragraph 2, sent new documents to the Registry which it wished to produce. By letter of 28 September 2009, the Government of Uruguay informed the Court that it was opposed to the production of these documents. It further indicated that if, nevertheless, the Court decided to admit the documents in question into the record of the case, it would present comments on them and submit documents in support of those comments. By letters dated 28 September 2009, the Registrar informed the Parties that the Court did not consider the production of the new documents submitted by the Argentine Government to be necessary within the meaning of Article 56, paragraph 2, of the Rules of Court, and that it had not moreover identified any exceptional circumstance (Practice Direction IX, paragraph 3) which justified their production at that stage of the proceedings.

20. Public hearings were held between 14 September 2009 and 2 October 2009, at which the Court heard the oral arguments and replies of:

For Argentina: H.E. Ms Susana Ruiz Cerutti,
Mr. Alain Pellet,
Mr. Philippe Sands,
Mr. Howard Wheater,
Ms Laurence Boisson de Chazournes,
Mr. Marcelo Kohen,
Mr. Alan Béraud,
Mr. Juan Carlos Colombo,
Mr. Daniel Müller.

For Uruguay: H.E. Mr. Carlos Gianelli,
Mr. Alan Boyle,
Mr. Paul S. Reichler,
Mr. Neil McCubbin,
Mr. Stephen C. McCaffrey,
Mr. Lawrence H. Martin,
Mr. Luigi Condorelli.

21. At the hearings, Members of the Court put questions to the Parties, to which replies were given orally and in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. Pursuant to Article 72 of the Rules of Court, one of the Parties submitted written comments on a written reply provided by the other and received after the closure of the oral proceedings.

*

22. In its Application, the following claims were made by Argentina:

"On the basis of the foregoing statement of facts and law, Argentina, while reserving the right to supplement, amend or modify the present Application in the course of the subsequent procedure, requests the Court to adjudge and declare:

1. that Uruguay has breached the obligations incumbent upon it under the 1975 Statute and the other rules of international law to which that instrument refers, including but not limited to:
   (a) the obligation to take all necessary measures for the optimum and rational utilization of the River Uruguay;
   (b) the obligation of prior notification to CARU and to Argentina;
   (c) the obligation to comply with the procedures prescribed in Chapter II of the 1975 Statute;
   (d) the obligation to take all necessary measures to preserve the aquatic environment and prevent pollution and the obligation to protect biodiversity and fisheries, including the obligation to prepare a full and objective environmental impact study;
   (e) the obligation to co-operate in the prevention of pollution and the protection of biodiversity and of fisheries; and
2. that, by its conduct, Uruguay has engaged its international responsibility to Argentina;
3. that Uruguay shall cease its wrongful conduct and comply scrupulously in future with the obligations incumbent upon it; and
4. that Uruguay shall make full reparation for the injury caused by its breach of the obligations incumbent upon it.

Argentina reserves the right to amplify or amend these requests at a subsequent stage of the proceedings."

23. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Argentina,

in the Memorial:

"For all the reasons described in this Memorial, the Argentine Republic requests the International Court of Justice:

1. to find that by unilaterally authorizing the construction of the CMB and Orion pulp mills and the facilities associated with the latter on the left bank of the River Uruguay, in breach of the obligations resulting from the Statute of 26 February 1975, the Eastern Republic of Uruguay has committed the internationally wrongful acts set out in Chapters IV and V of this Memorial, which entail its international responsibility;
2. to adjudge and declare that, as a result, the Eastern Republic of Uruguay must:
   (i) cease immediately the internationally wrongful acts referred to above;
   (ii) resume strict compliance with its obligations under the Statute of the River Uruguay of 1975;

(iii) re-establish on the ground and in legal terms the situation that existed before the internationally wrongful acts referred to above were committed;

(iv) pay compensation to the Argentine Republic for the damage caused by these internationally wrongful acts that would not be remedied by that situation being restored, of an amount to be determined by the Court at a subsequent stage of these proceedings;

(v) provide adequate guarantees that it will refrain in future from preventing the Statute of the River Uruguay of 1975 from being applied, in particular the consultation procedure established by Chapter II of that Treaty.

The Argentine Republic reserves the right to supplement or amend these submissions should the need arise, in the light of the development of the situation. This would in particular apply if Uruguay were to aggravate the dispute[1], for example if the Orion mill were to be commissioned before the end of these proceedings.

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[1] See the Order of the Court of 13 July 2006 on Argentina's request for the indication of provisional measures, para. 82."

in the Reply:

"For all the reasons described in its Memorial, which it fully stands by, and in the present Reply, the Argentine Republic requests the International Court of Justice:

1. to find that by authorizing

   — the construction of the CMB mill;
   — the construction and commissioning of the Orion mill and its associated facilities on the left bank of the River Uruguay,

   the Eastern Republic of Uruguay has violated the obligations incumbent on it under the Statute of the River Uruguay of 26 February 1975 and has engaged its international responsibility;

2. to adjudge and declare that, as a result, the Eastern Republic of Uruguay must:

   (i) resume strict compliance with its obligations under the Statute of the River Uruguay of 1975;

   (ii) cease immediately the internationally wrongful acts by which it has engaged its responsibility;

   (iii) re-establish on the ground and in legal terms the situation that existed before these internationally wrongful acts were committed;

   (iv) pay compensation to the Argentine Republic for the damage caused by these internationally wrongful acts that would not be remedied by that situation being restored, of an amount to be determined by the Court at a subsequent stage of these proceedings;

   (v) provide adequate guarantees that it will refrain in future from preventing the Statute of the River Uruguay of 1975 from being applied, in particular the consultation procedure established by Chapter II of that Treaty.

The Argentine Republic reserves the right to supplement or amend these submissions should the need arise, in the light of subsequent developments in the case."

On behalf of the Government of Uruguay,

in the Counter-Memorial:

"On the basis of the facts and arguments set out above, and reserving its right to supplement or amend these Submissions, Uruguay requests that the Court adjudge and declare that the claims of Argentina are rejected."

In the Rejoinder:

"Based on all the above, it can be concluded that:

(a) Argentina has not demonstrated any harm, or risk of harm, to the river or its ecosystem resulting from Uruguay's alleged violations of its substantive obligations under the 1975 Statute that would be sufficient to warrant the dismantling of the Botnia plant;

(b) the harm to the Uruguayan economy in terms of lost jobs and revenue would be substantial;

(c) in light of points *(a)* and *(b)*, the remedy of tearing the plant down would therefore be disproportionately onerous, and should not be granted;

(d) if the Court finds, notwithstanding all the evidence to the contrary, that Uruguay has violated its procedural obligations to Argentina, it can issue a declaratory judgment to that effect, which would constitute an adequate form of satisfaction;

(e) if the Court finds, notwithstanding all the evidence to the contrary, that the plant is not in complete compliance with Uruguay's obligation to protect the river or its aquatic environment, the Court can order Uruguay to take whatever additional protective measures are necessary to ensure that the plant conforms to the Statute's substantive requirements;

(f) if the Court finds, notwithstanding all the evidence to the contrary, that Uruguay has actually caused damage to the river or to Argentina, it can order Uruguay to pay Argentina monetary compensation under Articles 42 and 43 of the Statute; and

(g) the Court should issue a declaration making clear the Parties are obligated to ensure full respect for all the rights in dispute in this case, including Uruguay's right to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute.

Submissions

On the basis of the facts and arguments set out above, and reserving its right to supplement or amend these Submissions, Uruguay requests that the Court adjudge and declare that the claims of Argentina are rejected, and Uruguay's right to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute is affirmed."

24. At the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Government of Argentina,

at the hearing of 29 September 2009:

"For all the reasons described in its Memorial, in its Reply and in the oral proceedings, which it fully stands by, the Argentine Republic requests the International Court of Justice:

1. to find that by authorizing
   — the construction of the ENCE mill;
   — the construction and commissioning of the Botnia mill and its associated facilities on the left bank of the River Uruguay,

   the Eastern Republic of Uruguay has violated the obligations incumbent on it under the Statute of the River Uruguay of 26 February 1975 and has engaged its international responsibility;
2. to adjudge and declare that, as a result, the Eastern Republic of Uruguay must:
   (i) resume strict compliance with its obligations under the Statute of the River Uruguay of 1975;
   (ii) cease immediately the internationally wrongful acts by which it has engaged its responsibility;
   (iii) re-establish on the ground and in legal terms the situation that existed before these internationally wrongful acts were committed;
   (iv) pay compensation to the Argentine Republic for the damage caused by these internationally wrongful acts that would not be remedied by that situation being restored, of an amount to be determined by the Court at a subsequent stage of these proceedings;
   (v) provide adequate guarantees that it will refrain in future from preventing the Statute of the River Uruguay of 1975 from being applied, in particular the consultation procedure established by Chapter II of that Treaty."

On behalf of the Government of Uruguay,

at the hearing of 2 October 2009:

"On the basis of the facts and arguments set out in Uruguay's Counter-Memorial, Rejoinder and during the oral proceedings, Uruguay requests that the Court adjudge and declare that the claims of Argentina are rejected, and Uruguay's right to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute is affirmed."

* * *

I. Legal Framework and Facts of the Case

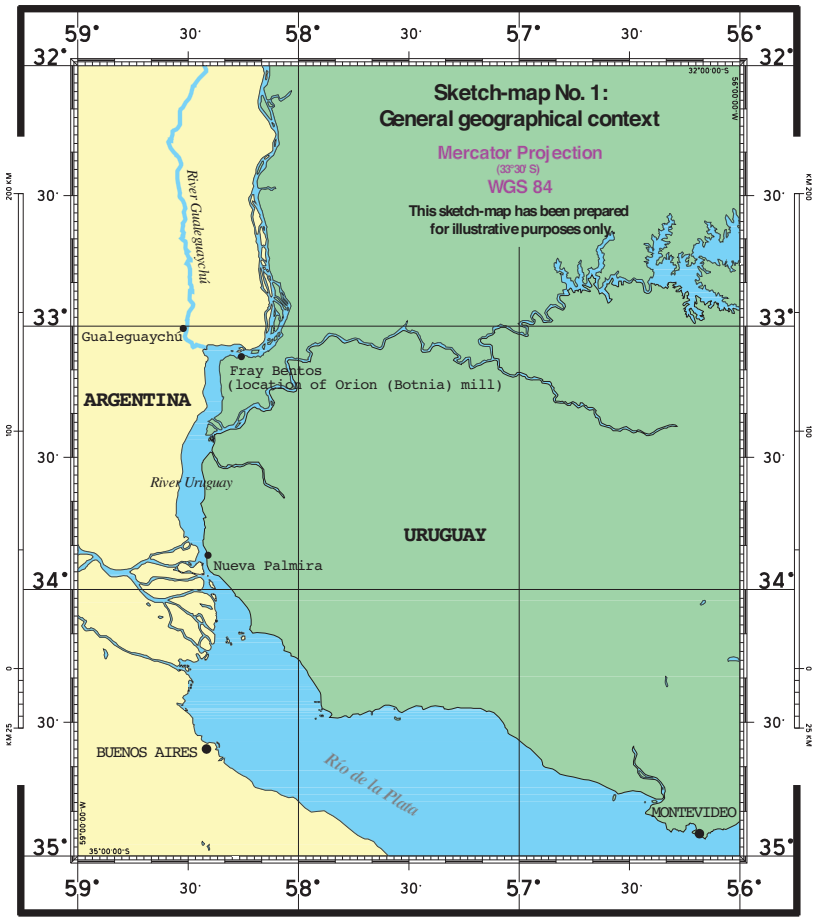
25. The dispute before the Court has arisen in connection with the planned construction authorized by Uruguay of one pulp mill and the construction and commissioning of another, also authorized by Uruguay,

on the River Uruguay (see sketch-map No. 1 on p. 33 for the general geographical context). After identifying the legal instruments concerning the River Uruguay by which the Parties are bound, the Court will set out the main facts of the case.

A. Legal Framework

26. The boundary between Argentina and Uruguay in the River Uruguay is defined by the bilateral Treaty entered into for that purpose at Montevideo on 7 April 1961 (*UNTS*, Vol. 635, No. 9074, p. 98). Articles 1 to 4 of the Treaty delimit the boundary between the Contracting States in the river and attribute certain islands and islets in it to them. Articles 5 and 6 concern the régime for navigation on the river. Article 7 provides for the establishment by the parties of a "régime for the use of the river" covering various subjects, including the conservation of living resources and the prevention of water pollution of the river. Articles 8 to 10 lay down certain obligations concerning the islands and islets and their inhabitants.

27. The "régime for the use of the river" contemplated in Article 7 of the 1961 Treaty was established through the 1975 Statute (see paragraph 1 above). Article 1 of the 1975 Statute states that the parties adopted it "in order to establish the joint machinery necessary for the optimum and rational utilization of the River Uruguay, in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the parties". After having thus defined its purpose (Article 1) and having also made clear the meaning of certain terms used therein (Article 2), the 1975 Statute lays down rules governing navigation and works on the river (Chapter II, Articles 3 to 13), pilotage (Chapter III, Articles 14 to 16), port facilities, unloading and additional loading (Chapter IV, Articles 17 to 18), the safeguarding of human life (Chapter V, Articles 19 to 23) and the salvaging of property (Chapter VI, Articles 24 to 26), use of the waters of the river (Chapter VII, Articles 27 to 29), resources of the bed and subsoil (Chapter VIII, Articles 30 to 34), the conservation, utilization and development of other natural resources (Chapter IX, Articles 35 to 39), pollution (Chapter X, Articles 40 to 43), scientific research (Chapter XI, Articles 44 to 45), and various powers of the parties over the river and vessels sailing on it (Chapter XII, Articles 46 to 48). The 1975 Statute sets up the Administrative Commission of the River Uruguay (hereinafter "CARU", from the Spanish acronym for "Comisión Administradora del Río Uruguay") (Chapter XIII, Articles 49 to 57), and then establishes procedures for conciliation (Chapter XIV, Articles 58 to 59) and judicial settlement of disputes (Chapter XV, Article 60). Lastly, the 1975 Statute contains transitional (Chapter XVI, Articles 61 to 62) and final (Chapter XVII, Article 63) provisions.

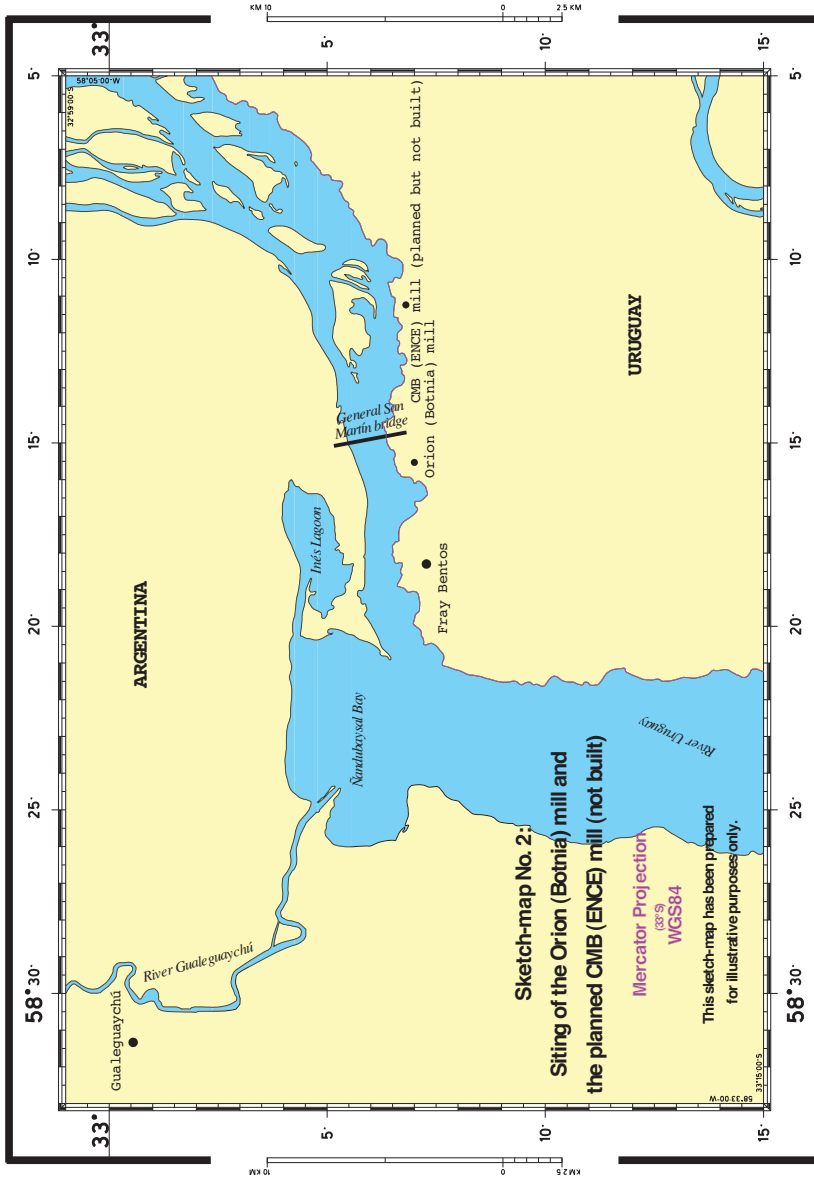

Sketch-map No. 1:
General geographical context
Mercator Projection
(33°30' S)
WGS 84
This sketch-map has been prepared
for illustrative purposes only.
River Gualeguaychú
Gualeguaychú
Fray Bentos
(location of Orion (Botnia) mill)
ARGENTINA
River Uruguay
URUGUAY
Nueva Palmira
BUENOS AIRES
Río de la Plata
MONTEVIDEO
59°
30'
58°
57°
56°
32°
33°
34°
35°

B. CMB (ENCE) Project

28. The first pulp mill at the root of the dispute was planned by "Celulosas de M'Bopicuá S.A." (hereinafter "CMB"), a company formed by the Spanish company ENCE (from the Spanish acronym for "Empresa Nacional de Celulosas de España", hereinafter "ENCE"). This mill, hereinafter referred to as the "CMB (ENCE)" mill, was to have been built on the left bank of the River Uruguay in the Uruguayan department of Río Negro opposite the Argentine region of Gualeguaychú, more specifically to the east of the city of Fray Bentos, near the "General San Martín" international bridge (see sketch-map No. 2 on p. 35).

29. On 22 July 2002, the promoters of this industrial project approached the Uruguayan authorities and submitted an environmental impact assessment ("EIA" according to the abbreviation used by the Parties) of the plan to Uruguay's National Directorate for the Environment (hereinafter "DINAMA", from the Spanish acronym for "Dirección Nacional de Medio Ambiente"). During the same period, representatives of CMB, which had been specially formed to build the CMB (ENCE) mill, informed the President of CARU of the project. The President of CARU wrote to the Uruguayan Minister of the Environment on 17 October 2002 seeking a copy of the environmental impact assessment of the CMB (ENCE) project submitted by the promoters of this industrial project. This request was reiterated on 21 April 2003. On 14 May 2003, Uruguay submitted to CARU a document entitled "Environmental Impact Study, Celulosas de M'Bopicuá. Summary for public release". One month later, the CARU Subcommittee on Water Quality and Pollution Control took notice of the document transmitted by Uruguay and suggested that a copy thereof be sent to its technical advisers for their opinions. Copies were also provided to the Parties' delegations.

30. A public hearing, attended by CARU's Legal Adviser and its technical secretary, was held on 21 July 2003 in the city of Fray Bentos concerning CMB's application for an environmental authorization. On 15 August 2003, CARU asked Uruguay for further information on various points concerning the planned CMB (ENCE) mill. This request was reiterated on 12 September 2003. On 2 October 2003, DINAMA submitted its assessment report to the Uruguayan Ministry of Housing, Land Use Planning and Environmental Affairs (hereinafter "MVOTMA", from the Spanish abbreviation for "Ministerio de Vivienda Ordenamiento Territorial y Medio Ambiente"), recommending that CMB be granted an initial environmental authorization ("AAP" according to the Spanish abbreviation for "Autorización Ambiental Previa") subject to certain conditions. On 8 October 2003, CARU was informed by the Uruguayan delegation that DINAMA would very shortly send CARU a report on the CMB (ENCE) project.


ARGENTINA
URUGUAY
Gualeguaychú
River Gualeguaychú
Ñanduboysá Bay
Inés Lagoon
General San Martín bridge
CMB (ENCE) mill (planned but not built)
Orion (Botnia) mill
Fray Bentos
River Uruguay
Sketch-map No. 2:
Siting of the Orion (Botnia) mill and
the planned CMB (ENCE) mill (not built)
Mercator Projection
(33°S)
WGS84
This sketch-map has been prepared
for illustrative purposes only.
58°30'
33°
KM 10
0
2.5 KM

31. On 9 October 2003, MVOTMA issued an initial environmental authorization to CMB for the construction of the CMB (ENCE) mill. On the same date the Presidents of Argentina and Uruguay met at Anchorena (Colonia, Uruguay). Argentina maintains that the President of Uruguay, Jorge Battle, then promised his Argentine counterpart, Néstor Kirchner, that no authorization would be issued before Argentina's environmental concerns had been addressed. Uruguay challenges this version of the facts and contends that the Parties agreed at that meeting to deal with the CMB (ENCE) project otherwise than through the procedure under Articles 7 to 12 of the 1975 Statute and that Argentina let it be known that it was not opposed to the project per se. Argentina disputes these assertions.

32. The day after the meeting between the Heads of State of Argentina and Uruguay, CARU declared its willingness to resume the technical analyses of the CMB (ENCE) project as soon as Uruguay transmitted the awaited documents. On 17 October 2003, CARU held an extraordinary plenary meeting at the request of Argentina, at which Argentina complained of Uruguay's granting on 9 October 2003 of the initial environmental authorization. Following the extraordinary meeting CARU suspended work for more than six months, as the Parties could not agree on how to implement the consultation mechanism established by the 1975 Statute.

33. On 27 October 2003, Uruguay transmitted to Argentina copies of the environmental impact assessment submitted by ENCE on 22 July 2002, of DINAMA's final assessment report dated 2 October 2003 and of the initial environmental authorization of 9 October 2003. Argentina reacted by expressing its view that Article 7 of the 1975 Statute had not been observed and that the transmitted documents did not appear adequate to allow for a technical opinion to be expressed on the environmental impact of the project. On 7 November 2003, further to a request from the Ministry of Foreign Affairs of Argentina, Uruguay provided Argentina with a copy of the Uruguayan Ministry of the Environment's entire file on the CMB (ENCE) project. On 23 February 2004, Argentina forwarded all of this documentation received from Uruguay to CARU.

34. On 2 March 2004, the Parties' Ministers for Foreign Affairs met in Buenos Aires. On 15 May 2004, CARU resumed its work at an extraordinary plenary meeting during which it took note of the ministerial "understanding" which was reached on 2 March 2004. The Parties are at odds over the content of this "understanding". The Court will return to this when it considers Argentina's claims as to Uruguay's breach of its procedural obligations under the 1975 Statute (see paragraphs 67 to 158).

35. Following up on CARU's extraordinary meeting of 15 May 2004, the CARU Subcommittee on Water Quality and Pollution Control pre-

pared a plan for monitoring water quality in the area of the pulp mills (hereinafter the "PROCEL" plan from the Spanish acronym for "Plan de Monitoreo de la Calidad Ambiental del Río Uruguay en Areas de Plantas Celulósicas"). CARU approved the plan on 12 November 2004.

36. On 28 November 2005, Uruguay authorized preparatory work to begin for the construction of the CMB (ENCE) mill (ground clearing). On 28 March 2006, the project's promoters decided to halt the work for 90 days. On 21 September 2006, they announced their intention not to build the mill at the planned site on the bank of the River Uruguay.

C. Orion (Botnia) Mill

37. The second industrial project at the root of the dispute before the Court was undertaken by "Botnia S.A." and "Botnia Fray Bentos S.A." (hereinafter "Botnia"), companies formed under Uruguayan law in 2003 specially for the purpose by Oy Metsä-Botnia AB, a Finnish company. This second pulp mill, called "Orion" (hereinafter the "Orion (Botnia)" mill), has been built on the left bank of the River Uruguay, a few kilometres downstream of the site planned for the CMB (ENCE) mill, and also near the city of Fray Bentos (see sketch-map No. 2 on p. 35). It has been operational and functioning since 9 November 2007.

38. After informing the Uruguayan authorities of this industrial project in late 2003, the project promoters submitted an application to them for an initial environmental authorization on 31 March 2004 and supplemented it on 7 April 2004. Several weeks later, on 29 and 30 April 2004, CARU members and Botnia representatives met informally. Following that meeting, CARU's Subcommittee on Water Quality and Pollution Control suggested on 18 June 2004 that Botnia expand on the information provided at the meeting. On 19 October 2004, CARU held another meeting with Botnia representatives and again expressed the need for further information on Botnia's application to DINAMA for an initial environmental authorization. On 12 November 2004, when approving the water quality monitoring plan put forward by the CARU Subcommittee on Water Quality and Pollution Control (see paragraph 35 above), CARU decided, on the proposal of that subcommittee, to ask Uruguay to provide further information on the application for an initial environmental authorization. CARU transmitted this request for further information to Uruguay by note dated 16 November 2004.

39. On 21 December 2004 DINAMA held a public hearing, attended

by a CARU adviser, on the Orion (Botnia) project in Fray Bentos. DINAMA adopted its environmental impact study of the planned Orion (Botnia) mill on 11 February 2005 and recommended that the initial environmental authorization be granted, subject to certain conditions. MVOTMA issued the initial authorization to Botnia on 14 February 2005 for the construction of the Orion (Botnia) mill and an adjacent port terminal. At a CARU meeting on 11 March 2005, Argentina questioned whether the granting of the initial environmental authorization was well-founded in view of the procedural obligations laid down in the 1975 Statute. Argentina reiterated this position at the CARU meeting on 6 May 2005. On 12 April 2005, Uruguay had in the meantime authorized the clearance of the future mill site and the associated groundworks.

40. On 31 May 2005, in pursuance of an agreement made on 5 May 2005 by the Presidents of the two Parties, their Ministers for Foreign Affairs created a High-Level Technical Group (hereinafter the "GTAN", from the Spanish abbreviation for "Grupo Técnico de Alto Nivel"), which was given responsibility for resolving the disputes over the CMB (ENCE) and Orion (Botnia) mills within 180 days. The GTAN held twelve meetings between 3 August 2005 and 30 January 2006, with the Parties exchanging various documents in the context of this bilateral process. On 31 January 2006, Uruguay determined that the negotiations undertaken within the GTAN had failed; Argentina did likewise on 3 February 2006. The Court will return later to the significance of this process agreed on by the Parties (see paragraphs 132 to 149).

41. On 26 June 2005, Argentina wrote to the President of the International Bank for Reconstruction and Development to express its concern at the possibility of the International Finance Corporation (hereinafter the "IFC") contributing to the financing of the planned pulp mills. The IFC nevertheless decided to provide financial support for the Orion (Botnia) mill, but did commission EcoMetrix, a consultancy specializing in environmental and industrial matters, to prepare various technical reports on the planned mill and an environmental impact assessment of it. EcoMetrix was also engaged by the IFC to carry out environmental monitoring on the IFC's behalf of the plant once it had been placed in service.

42. On 5 July 2005, Uruguay authorized Botnia to build a port adjacent to the Orion (Botnia) mill. This authorization was transmitted to CARU on 15 August 2005. On 22 August 2005, Uruguay authorized the construction of a chimney and concrete foundations for the Orion (Botnia) mill. Further authorizations were granted as the construction of this mill proceeded, for example in respect of the waste treatment installations. On 13 October 2005, Uruguay transmitted additional documentation to CARU concerning the port terminal adjacent to the Orion (Botnia) mill.

Argentina repeatedly asked, including at CARU meetings, that the initial work connected with the Orion (Botnia) mill and the CMB (ENCE) mill should be suspended. At a meeting between the Heads of State of the Parties at Santiago de Chile on 11 March 2006, Uruguay's President asked ENCE and Botnia to suspend construction of the mills. ENCE suspended work for 90 days (see paragraph 36 above), Botnia for ten.

43. Argentina referred the present dispute to the Court by Application dated 4 May 2006. On 24 August 2006, Uruguay authorized the commissioning of the port terminal adjacent to the Orion (Botnia) mill and gave CARU notice of this on 4 September 2006. On 12 September 2006, Uruguay authorized Botnia to extract and use water from the river for industrial purposes and formally notified CARU of its authorization on 17 October 2006. At the summit of Heads of State and Government of the Ibero-American countries held in Montevideo in November 2006, the King of Spain was asked to endeavour to reconcile the positions of the Parties; a negotiated resolution of the dispute did not however result. On 8 November 2007, Uruguay authorized the commissioning of the Orion (Botnia) mill and it began operating the next day. In December 2009, Oy Metsä-Botnia AB transferred its interest in the Orion (Botnia) mill to UPM, another Finnish company.

*

44. In addition, Uruguay authorized Ontur International S.A. to build and operate a port terminal at Nueva Palmira. The terminal was inaugurated in August 2007 and, on 16 November 2007, Uruguay transmitted to CARU a copy of the authorization for its commissioning.

45. In their written pleadings the Parties have debated whether, in light of the procedural obligations laid down in the 1975 Statute, the authorizations for the port terminal were properly issued by Uruguay. The Court deems it unnecessary to review the detailed facts leading up to the construction of the Nueva Palmira terminal, being of the view that these port facilities do not fall within the scope of the subject of the dispute before it. Indeed, nowhere in the claims asserted in its Application or in the submissions in its Memorial or Reply (see paragraphs 22 and 23 above) did Argentina explicitly refer to the port terminal at Nueva Palmira. In its final submissions presented at the hearing on 29 September 2009, Argentina again limited the subject-matter of its claims to the authorization of the construction of the CMB (ENCE) mill and the authorization of the construction and commissioning of "the Botnia mill and its associated facilities on the left bank of the River Uruguay". The Court does not consider the port terminal at Nueva Palmira, which lies some 100 km south of Fray Bentos, downstream of the Orion (Botnia)

mill (see sketch-map No. 1 on p. 33), and is used by other economic operators as well, to be a facility "associated" with the mill.

46. The dispute submitted to the Court concerns the interpretation and application of the 1975 Statute, namely, on the one hand whether Uruguay complied with its procedural obligations under the 1975 Statute in issuing authorizations for the construction of the CMB (ENCE) mill as well as for the construction and the commissioning of the Orion (Botnia) mill and its adjacent port; and on the other hand whether Uruguay has complied with its substantive obligations under the 1975 Statute since the commissioning of the Orion (Botnia) mill in November 2007.

* *

47. Having thus related the circumstances surrounding the dispute between the Parties, the Court will consider the basis and scope of its jurisdiction, including questions relating to the law applicable to the present dispute (see paragraphs 48 to 66). It will then examine Argentina's allegations of breaches by Uruguay of procedural obligations (see paragraphs 67 to 158) and substantive obligations (see paragraphs 159 to 266) laid down in the 1975 Statute. Lastly, the Court will respond to the claims presented by the Parties in their final submissions (see paragraphs 267 to 280).

* *

II. Scope of the Court's Jurisdiction

48. The Parties are in agreement that the Court's jurisdiction is based on Article 36, paragraph 1, of the Statute of the Court and Article 60, paragraph 1, of the 1975 Statute. The latter reads: "Any dispute concerning the interpretation or application of the Treaty[1] and the Statute which cannot be settled by direct negotiations may be submitted by either party to the International Court of Justice." The Parties differ as to whether all the claims advanced by Argentina fall within the ambit of the compromissory clause.

49. Uruguay acknowledges that the Court's jurisdiction under the compromissory clause extends to claims concerning any pollution or type of harm caused to the River Uruguay, or to organisms living there, in violation of the 1975 Statute. Uruguay also acknowledges that claims concerning the alleged impact of the operation of the pulp mill on the

[1] The Montevideo Treaty of 7 April 1961, concerning the boundary constituted by the River Uruguay (*UNTS*, Vol. 635, No. 9074, p. 98; footnote added).

quality of the waters of the river fall within the compromissory clause. On the other hand, Uruguay takes the position that Argentina cannot rely on the compromissory clause to submit claims regarding every type of environmental damage. Uruguay further argues that Argentina's contentions concerning air pollution, noise, visual and general nuisance, as well as the specific impact on the tourism sector, allegedly caused by the Orion (Botnia) mill, do not concern the interpretation or the application of the 1975 Statute, and the Court therefore lacks jurisdiction over them.

Uruguay nevertheless does concede that air pollution which has harmful effects on the quality of the waters of the river or on the aquatic environment would fall within the jurisdiction of the Court.

50. Argentina maintains that Uruguay's position on the scope of the Court's jurisdiction is too narrow. It contends that the 1975 Statute was entered into with a view to protect not only the quality of the waters of the river but more generally its "régime" and the areas affected by it. Relying on Article 36 of the 1975 Statute, which lays out the obligation of the parties to co-ordinate measures to avoid any change in the ecological balance and to control harmful factors in the river and the areas affected by it, Argentina asserts that the Court has jurisdiction also with respect to claims concerning air pollution and even noise and "visual" pollution. Moreover, Argentina contends that bad odours caused by the Orion (Botnia) mill negatively affect the use of the river for recreational purposes, particularly in the Gualeguaychú resort on its bank of the river. This claim, according to Argentina, also falls within the Court's jurisdiction.

51. The Court, when addressing various allegations or claims advanced by Argentina, will have to determine whether they concern "the interpretation or application" of the 1975 Statute, as its jurisdiction under Article 60 thereof covers "[a]ny dispute concerning the interpretation or application of the [1961] Treaty and the [1975] Statute". Argentina has made no claim to the effect that Uruguay violated obligations under the 1961 Treaty.

52. In order to determine whether Uruguay has breached its obligations under the 1975 Statute, as alleged by Argentina, the Court will have to interpret its provisions and to determine their scope *ratione materiae*.

Only those claims advanced by Argentina which are based on the provisions of the 1975 Statute fall within the Court's jurisdiction *ratione materiae* under the compromissory clause contained in Article 60. Although Argentina, when making claims concerning noise and "visual" pollution allegedly caused by the pulp mill, invokes the provision of Article 36 of the 1975 Statute, the Court sees no basis in it for such claims. The plain language of Article 36, which provides that "[t]he parties shall co-ordinate, through the Commission, the necessary measures to avoid any change in the ecological balance and to control pests and other harmful factors in the river and the areas affected by it", leaves no doubt

that it does not address the alleged noise and visual pollution as claimed by Argentina. Nor does the Court see any other basis in the 1975 Statute for such claims; therefore, the claims relating to noise and visual pollution are manifestly outside the jurisdiction of the Court conferred upon it under Article 60.

Similarly, no provision of the 1975 Statute addresses the issue of "bad odours" complained of by Argentina. Consequently, for the same reason, the claim regarding the impact of bad odours on tourism in Argentina also falls outside the Court's jurisdiction. Even if bad odours were to be subsumed under the issue of air pollution, which will be addressed in paragraphs 263 and 264 below, the Court notes that Argentina has submitted no evidence as to any relationship between the alleged bad odours and the aquatic environment of the river.

53. Characterizing the provisions of Articles 1 and 41 of the 1975 Statute as "referral clauses", Argentina ascribes to them the effect of incorporating into the Statute the obligations of the Parties under general international law and a number of multilateral conventions pertaining to the protection of the environment. Consequently, in the view of Argentina, the Court has jurisdiction to determine whether Uruguay has complied with its obligations under certain international conventions.

54. The Court now therefore turns its attention to the issue whether its jurisdiction under Article 60 of the 1975 Statute also encompasses obligations of the Parties under international agreements and general international law invoked by Argentina and to the role of such agreements and general international law in the context of the present case.

55. Argentina asserts that the 1975 Statute constitutes the law applicable to the dispute before the Court, as supplemented so far as its application and interpretation are concerned, by various customary principles and treaties in force between the Parties and referred to in the Statute. Relying on the rule of treaty interpretation set out in Article 31, paragraph 3 *(c)* of the Vienna Convention on the Law of Treaties, Argentina contends notably that the 1975 Statute must be interpreted in the light of principles governing the law of international watercourses and principles of international law ensuring protection of the environment. It asserts that the 1975 Statute must be interpreted so as to take account of all "relevant rules" of international law applicable in the relations between the Parties, so that the Statute's interpretation remains current and evolves in accordance with changes in environmental standards. In this connection Argentina refers to the principles of equitable, reasonable and non-injurious use of international watercourses, the principles of sustainable development, prevention, precaution and the need to carry out an environmental impact assessment. It contends that these rules and principles

are applicable in giving the 1975 Statute a dynamic interpretation, although they neither replace it nor restrict its scope.

56. Argentina further considers that the Court must require compliance with the Parties' treaty obligations referred to in Articles 1 and 41 *(a)* of the 1975 Statute. Argentina maintains that the "referral clauses" contained in these articles make it possible to incorporate and apply obligations arising from other treaties and international agreements binding on the Parties. To this end, Argentina refers to the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereinafter the "CITES Convention"), the 1971 Ramsar Convention on Wetlands of International Importance (hereinafter the "Ramsar Convention"), the 1992 United Nations Convention on Biological Diversity (hereinafter the "Biodiversity Convention"), and the 2001 Stockholm Convention on Persistent Organic Pollutants (hereinafter the "POPs Convention"). It asserts that these conventional obligations are in addition to the obligations arising under the 1975 Statute, and observance of them should be ensured when application of the Statute is being considered. Argentina maintains that it is only where "more specific rules of the [1975] Statute *(lex specialis)*" derogate from them that the instruments to which the Statute refers should not be applied.

57. Uruguay likewise considers that the 1975 Statute must be interpreted in the light of general international law and it observes that the Parties concur on this point. It maintains however that its interpretation of the 1975 Statute accords with the various general principles of the law of international watercourses and of international environmental law, even if its understanding of these principles does not entirely correspond to that of Argentina. Uruguay considers that whether Articles 1 and 41 *(a)* of the 1975 Statute can be read as a referral to other treaties in force between the Parties has no bearing in the present case, because conventions relied on by Argentina are either irrelevant, or Uruguay cannot be found to have violated any other conventional obligations. In any event, the Court would lack jurisdiction to rule on alleged breaches of international obligations which are not contained in the 1975 Statute.

58. The Court will first address the issue whether Articles 1 and 41 *(a)* can be read as incorporating into the 1975 Statute the obligations of the Parties under the various multilateral conventions relied upon by Argentina.

59. Article 1 of the 1975 Statute reads as follows:

> "The parties agree on this Statute, in implementation of the provisions of Article 7 of the Treaty concerning the Boundary Constituted by the River Uruguay of 7 April 1961, in order to establish the joint machinery necessary for the optimum and rational utilization

> of the River Uruguay, in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the parties." (*UNTS*, Vol. 1295, No. I-21425, p. 340; footnote omitted.)

Article 1 sets out the purpose of the 1975 Statute. The Parties concluded it in order to establish the joint machinery necessary for the rational and optimum utilization of the River Uruguay. It is true that this article contains a reference to "the rights and obligations arising from treaties and other international agreements in force for each of the parties". This reference, however, does not suggest that the Parties sought to make compliance with their obligations under other treaties one of their duties under the 1975 Statute; rather, the reference to other treaties emphasizes that the agreement of the Parties on the Statute is reached in implementation of the provisions of Article 7 of the 1961 Treaty *and* "*in strict observance* of the rights and obligations arising from treaties and other international agreements in force for each of the parties" (emphasis added). While the conjunction "and" is missing from the English and French translations of the 1975 Statute, as published in the *United Nations Treaty Series* (*ibid.*, p. 340 and p. 348), it is contained in the Spanish text of the Statute, which is the authentic text and reads as follows:

> "Las partes acuerdan el presente Estatuto, en cumplimiento de lo dispuesto en el Artículo 7 del Tratado de Límites en el Río Uruguay, de 7 de Abril de 1961 con el fin de establecer los mecanismos comunes necesarios para el óptimo y racional aprovechamiento del Río Uruguay, *y* en estricta observancia de los derechos y obligaciones emergentes de los tratados y demás compromisos internacionales vigentes para cualquiera de las partes." (*Ibid.*, p. 332; emphasis added.)

The presence of the conjunction in the Spanish text suggests that the clause "in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the parties" is linked to and is to be read with the first part of Article 1, i.e., "[t]he parties agree on this Statute, in implementation of the provisions of Article 7 of the Treaty concerning the Boundary Constituted by the River Uruguay".

60. There is one additional element in the language of Article 1 of the 1975 Statute which should be noted. It mentions "treaties and other international agreements in force for *each* of the parties" (in Spanish original "tratados y demás compromisos internacionales vigentes para *cualquiera* de las partes"; emphasis added). In the French translation, this part of Article 1 reads "traités et autres engagements internationaux en vigueur à l'égard de *l'une ou l'autre* des parties" (emphasis added).

The fact that Article 1 does not require that the "treaties and other

international agreements" should be in force between the *two* parties thus clearly indicates that the 1975 Statute takes account of the prior commitments of each of the parties which have a bearing on it.

61. Article 41 of the 1975 Statute, paragraph *(a)* of which Argentina considers as constituting another "referral clause" incorporating the obligations under international agreements into the Statute, reads as follows:

> "Without prejudice to the functions assigned to the Commission in this respect, the parties undertake:
>
> *(a)* to protect and preserve the aquatic environment and, in particular, to prevent its pollution, *by prescribing appropriate rules and [adopting appropriate] measures in accordance* with applicable international agreements and in keeping, where relevant, with the guidelines and recommendations of international technical bodies;
>
> *(b)* not to reduce in their respective legal systems:
>
> 1) the technical requirements in force for preventing water pollution, and
> 2) the severity of the penalties established for violations;
>
> *(c)* to inform one another of any rules which they plan to prescribe with regard to water pollution in order to establish equivalent rules in their respective legal systems." (Emphasis added.)

62. The Court observes that the words "adopting appropriate" do not appear in the English translation while they appear in the original Spanish text ("dictando las normas y adoptando las medidas apropiadas"). Basing itself on the original Spanish text, it is difficult for the Court to see how this provision could be construed as a "referral clause" having the effect of incorporating the obligations of the parties under international agreements and other norms envisaged within the ambit of the 1975 Statute.

The purpose of the provision in Article 41 *(a)* is to protect and preserve the aquatic environment by requiring each of the parties to enact rules and to adopt appropriate measures. Article 41 *(a)* distinguishes between applicable international agreements and the guidelines and recommendations of international technical bodies. While the former are legally binding and therefore the domestic rules and regulations enacted and the measures adopted by the State have to comply with them, the latter, not being formally binding, are, to the extent they are relevant, to be taken into account by the State so that the domestic rules and regulations and the measures it adopts are compatible ("con adecuación") with those guidelines and recommendations. However, Article 41 does not incorporate international agreements as such into the 1975 Statute but rather sets obligations for the parties to exercise their regulatory powers, in conformity with applicable international agreements, for the protection and

preservation of the aquatic environment of the River Uruguay. Under Article 41 *(b)* the existing requirements for preventing water pollution and the severity of the penalties are not to be reduced. Finally, paragraph *(c)* of Article 41 concerns the obligation to inform the other party of plans to prescribe rules on water pollution.

63. The Court concludes that there is no basis in the text of Article 41 of the 1975 Statute for the contention that it constitutes a "referral clause". Consequently, the various multilateral conventions relied on by Argentina are not, as such, incorporated in the 1975 Statute. For that reason, they do not fall within the scope of the compromissory clause and therefore the Court has no jurisdiction to rule whether Uruguay has complied with its obligations thereunder.

64. The Court next briefly turns to the issue of how the 1975 Statute is to be interpreted. The Parties concur as to the 1975 Statute's origin and historical context, although they differ as to the nature and general tenor of the Statute and the procedural and substantive obligations therein.

The Parties nevertheless are in agreement that the 1975 Statute is to be interpreted in accordance with rules of customary international law on treaty interpretation, as codified in Article 31 of the Vienna Convention on the Law of Treaties.

65. The Court has had recourse to these rules when it has had to interpret the provisions of treaties and international agreements concluded before the entry into force of the Vienna Convention on the Law of Treaties in 1980 (see, e.g., *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 21, para. 41; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1059, para. 18).

The 1975 Statute is also a treaty which predates the entry into force of the Vienna Convention on the Law of Treaties. In interpreting the terms of the 1975 Statute, the Court will have recourse to the customary rules on treaty interpretation as reflected in Article 31 of the Vienna Convention. Accordingly the 1975 Statute is to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the [Statute] in their context and in light of its object and purpose". That interpretation will also take into account, together with the context, "any relevant rules of international law applicable in the relations between the parties".

66. In the interpretation of the 1975 Statute, taking account of relevant rules of international law applicable in the relations between the Parties, whether these are rules of general international law or contained in multilateral conventions to which the two States are parties, nevertheless has no bearing on the scope of the jurisdiction conferred on the

Court under Article 60 of the 1975 Statute, which remains confined to disputes concerning the interpretation or application of the Statute.

* *

III. The Alleged Breach of Procedural Obligations

67. The Application filed by Argentina on 4 May 2006 concerns the alleged breach by Uruguay of both procedural and substantive obligations laid down in the 1975 Statute. The Court will start by considering the alleged breach of procedural obligations under Articles 7 to 12 of the 1975 Statute, in relation to the (CMB) ENCE and Orion (Botnia) mill projects and the facilities associated with the latter, on the left bank of the River Uruguay near the city of Fray Bentos.

68. Argentina takes the view that the procedural obligations were intrinsically linked to the substantive obligations laid down by the 1975 Statute, and that a breach of the former entailed a breach of the latter.

With regard to the procedural obligations, these are said by Argentina to constitute an integrated and indivisible whole in which CARU, as an organization, plays an essential role.

Consequently, according to Argentina, Uruguay could not invoke other procedural arrangements so as to derogate from the procedural obligations laid down by the 1975 Statute, except by mutual consent.

69. Argentina argues that, at the end of the procedural mechanism provided for by the 1975 Statute, and in the absence of agreement between the Parties, the latter have no choice but to submit the matter to the Court under the terms of Articles 12 and 60 of the Statute, with Uruguay being unable to proceed with the construction of the planned mills until the Court has delivered its Judgment.

70. Following the lines of the argument put forward by the Applicant, the Court will examine in turn the following four points: the links between the procedural obligations and the substantive obligations (A); the procedural obligations and their interrelation with each other (B); whether the Parties agreed to derogate from the procedural obligations set out in the 1975 Statute (C); and Uruguay's obligations at the end of the negotiation period (D).

A. The Links between the Procedural Obligations and the Substantive Obligations

71. Argentina maintains that the procedural provisions laid down in Articles 7 to 12 of the 1975 Statute are aimed at ensuring "the optimum

and rational utilization of the [r]iver" (Article 1), just as are the provisions concerning use of water, the conservation, utilization and development of other natural resources, pollution and research. The aim is also said to be to prevent the Parties from acting unilaterally and without regard for earlier or current uses of the river. According to Argentina, any disregarding of this machinery would therefore undermine the object and purpose of the 1975 Statute; indeed the "optimum and rational utilization of the [r]iver" would not be ensured, as this could only be achieved in accordance with the procedures laid down under the Statute.

72. It follows, according to Argentina, that a breach of the procedural obligations automatically entails a breach of the substantive obligations, since the two categories of obligations are indivisible. Such a position is said to be supported by the Order of the Court of 13 July 2006, according to which the 1975 Statute created "a comprehensive régime".

73. Uruguay similarly takes the view that the procedural obligations are intended to facilitate the performance of the substantive obligations, the former being a means rather than an end. It too points out that Article 1 of the 1975 Statute defines its object and purpose.

74. However, Uruguay rejects Argentina's argument as artificial, since it appears to mix procedural and substantive questions with the aim of creating the belief that the breach of procedural obligations necessarily entails the breach of substantive ones. According to Uruguay, it is for the Court to determine the breach, in itself, of each of these categories of obligations, and to draw the necessary conclusions in each case in terms of responsibility and reparation.

75. The Court notes that the object and purpose of the 1975 Statute, set forth in Article 1, is for the Parties to achieve "the optimum and rational utilization of the River Uruguay" by means of the "joint machinery" for co-operation, which consists of both CARU and the procedural provisions contained in Articles 7 to 12 of the Statute.

The Court has observed in this respect, in its Order of 13 July 2006, that such use should allow for sustainable development which takes account of "the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 133, para. 80).

76. In the *Gabčikovo-Nagymaros* case, the Court, after recalling that "[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development", added that "[i]t is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty" (*Gabčíkovo-*

Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, p. 78, paras. 140-141).

77. The Court observes that it is by co-operating that the States concerned can jointly manage the risks of damage to the environment that might be created by the plans initiated by one or other of them, so as to prevent the damage in question, through the performance of both the procedural and the substantive obligations laid down by the 1975 Statute. However, whereas the substantive obligations are frequently worded in broad terms, the procedural obligations are narrower and more specific, so as to facilitate the implementation of the 1975 Statute through a process of continuous consultation between the parties concerned. The Court has described the régime put in place by the 1975 Statute as a "comprehensive and progressive régime" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 133, para. 81), since the two categories of obligations mentioned above complement one another perfectly, enabling the parties to achieve the object of the Statute which they set themselves in Article 1.

78. The Court notes that the 1975 Statute created CARU and established procedures in connection with that institution, so as to enable the parties to fulfil their substantive obligations. However, nowhere does the 1975 Statute indicate that a party may fulfil its substantive obligations by complying solely with its procedural obligations, nor that a breach of procedural obligations automatically entails the breach of substantive ones.

Likewise, the fact that the parties have complied with their substantive obligations does not mean that they are deemed to have complied *ipso facto* with their procedural obligations, or are excused from doing so. Moreover, the link between these two categories of obligations can also be broken, in fact, when a party which has not complied with its procedural obligations subsequently abandons the implementation of its planned activity.

79. The Court considers, as a result of the above, that there is indeed a functional link, in regard to prevention, between the two categories of obligations laid down by the 1975 Statute, but that link does not prevent the States parties from being required to answer for those obligations separately, according to their specific content, and to assume, if necessary, the responsibility resulting from the breach of them, according to the circumstances.

B. The Procedural Obligations and Their Interrelation

80. The 1975 Statute imposes on a party which is planning certain activities, set out in Article 7, first paragraph, procedural obligations whose content, interrelation and time-limits are specified as follows in Articles 7 to 12:

"*Article 7*

If one party plans to construct new channels, substantially modify or alter existing ones or carry out any other works which are liable to affect navigation, the régime of the river or the quality of its waters, it shall notify the Commission, which shall determine on a preliminary basis and within a maximum period of 30 days whether the plan might cause significant damage to the other party.

If the Commission finds this to be the case or if a decision cannot be reached in that regard, the party concerned shall notify the other party of the plan through the said Commission.

Such notification shall describe the main aspects of the work and, where appropriate, how it is to be carried out and shall include any other technical data that will enable the notified party to assess the probable impact of such works on navigation, the régime of the river or the quality of its waters.

Article 8

The notified party shall have a period of 180 days in which to respond in connection with the plan, starting from the date on which its delegation to the Commission receives the notification.

Should the documentation referred to in Article 7 be incomplete, the notified party shall have 30 days in which to so inform, through the Commission, the party which plans to carry out the work.

The period of 180 days mentioned above shall begin on the date on which the delegation of the notified party receives the full documentation.

This period may be extended at the discretion of the Commission if the complexity of the plan so requires.

Article 9

If the notified party raises no objections or does not respond within the period established in Article 8, the other party may carry out or authorize the work planned.

Article 10

The notified party shall have the right to inspect the works being carried out in order to determine whether they conform to the plan submitted.

Article 11

Should the notified party come to the conclusion that the execution of the work or the programme of operations might significantly impair navigation, the régime of the river or the quality of its waters, it shall so notify the other party, through the Commission, within the period of 180 days established in Article 8.

Such notification shall specify which aspects of the work or the

programme of operations might significantly impair navigation, the régime of the river or the quality of its waters, the technical reasons on which this conclusion is based and the changes suggested to the plan or programme of operations.

Article 12

Should the parties fail to reach agreement within 180 days following the notification referred to in Article 11, the procedure indicated in Chapter XV shall be followed."

81. The original Spanish text of Article 7 of the 1975 Statute reads as follows:

"La parte que proyecte la construcción de nuevos canales, la modificación o alteración significativa de los ya existentes o la realización de cualesquiera otras obras de entidad suficiente para afectar la navegación, el régimen del Río o la calidad de sus aguas, deberá comunicarlo a la Comisión, la cual determinará sumariamente, y en un plazo máximo de treinta días, si el proyecto puede producir perjuicio sensible a la otra parte.

Si así se resolviere o no se llegare a una decisión al respecto, la parte interesada deberá notificar el proyecto a la otra parte a través de la misma Comisión.

En la notificación deberán figurar los aspectos esenciales de la obra y, si fuere el caso, el modo de su operación y los demás datos técnicos que permitan a la parte notificada hacer una evaluación del efecto probable que la obra ocasionará a la navegación, al régimen del Río o a la calidad de sus aguas."

The Court notes that, just as the original Spanish text, the French translation of this Article (see paragraph 80 above) distinguishes between the obligation to inform ("comunicar") CARU of any plan falling within its purview (first paragraph) and the obligation to notify ("notificar") the other party (second paragraph). By contrast, the English translation uses the same verb "notify" in respect of both obligations. In order to conform to the original Spanish text, the Court will use in both linguistic versions of this Judgment the verb "inform" for the obligation set out in the first paragraph of Article 7 and the verb "notify" for the obligation set out in the second and third paragraphs.

The Court considers that the procedural obligations of informing, notifying and negotiating constitute an appropriate means, accepted by the Parties, of achieving the objective which they set themselves in Article 1 of the 1975 Statute. These obligations are all the more vital when a shared resource is at issue, as in the case of the River Uruguay, which can only be protected through close and continuous co-operation between the riparian States.

82. According to Argentina, by failing to comply with the initial obligation (Article 7, first paragraph, of the 1975 Statute) to refer the matter

to CARU, Uruguay frustrated all the procedures laid down in Articles 7 to 12 of the Statute. In addition, by failing to notify Argentina of the plans for the CMB (ENCE) and Orion (Botnia) mills, through CARU, with all the necessary documentation, Uruguay is said not to have complied with Article 7, second and third paragraphs. Argentina adds that informal contacts which it or CARU may have had with the companies in question cannot serve as a substitute for Uruguay referring the matter to CARU and notifying Argentina of the projects through the Commission. Argentina concludes that Uruguay has breached all of its procedural obligations under the terms of Articles 7 to 12 of the 1975 Statute.

Uruguay, for its part, considers that referring the matter to CARU does not impose so great a constraint as Argentina contends and that the parties may agree, by mutual consent, to use different channels by employing other procedural arrangements in order to engage in co-operation. It concludes from this that it has not breached the procedural obligations laid down by the 1975 Statute, even if it has performed them without following to the letter the formal process set out therein.

83. The Court will first examine the nature and role of CARU, and then consider whether Uruguay has complied with its obligations to inform CARU and to notify Argentina of its plans.

1. The nature and role of CARU

84. Uruguay takes the view that CARU, like other river commissions, is not a body with autonomous powers, but rather a mechanism established to facilitate co-operation between the Parties. It adds that the States which have created these river commissions are free to go outside the joint mechanism when it suits their purposes, and that they often do so. According to Uruguay, since CARU is not empowered to act outside the will of the Parties, the latter are free to do directly what they have decided to do through the Commission, and in particular may agree not to inform it in the manner provided for in Article 7 of the 1975 Statute. Uruguay maintains that that is precisely what happened in the present case: the two States agreed to dispense with the preliminary review by CARU and to proceed immediately to direct negotiations.

85. For Argentina, on the other hand, the 1975 Statute is not merely a bilateral treaty imposing reciprocal obligations on the parties; it establishes an institutional framework for close and ongoing co-operation, the core and essence of which is CARU. For Argentina, CARU is the key body for co-ordination between the Parties in virtually all areas covered by the 1975 Statute. By failing to fulfil its obligations in this respect, Uruguay is said to be calling the 1975 Statute fundamentally into question.

86. The Court recalls that it has already described CARU as

> "a joint mechanism with regulatory, executive, administrative, technical and conciliatory functions, entrusted with the proper implementation of the rules contained in the 1975 Statute governing the management of the shared river resource; . . . [a] mechanism [which] constitutes a very important part of that treaty régime" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, pp. 133-134, para. 81).

87. The Court notes, first, that CARU, in accordance with Article 50 of the 1975 Statute, was endowed with legal personality "in order to perform its functions" and that the parties to the 1975 Statute undertook to provide it with "the necessary resources and all the information and facilities essential to its operations". Consequently, far from being merely a transmission mechanism between the parties, CARU has a permanent existence of its own; it exercises rights and also bears duties in carrying out the functions attributed to it by the 1975 Statute.

88. While the decisions of the Commission must be adopted by common accord between the riparian States (Article 55), these are prepared and implemented by a secretariat whose staff enjoy privileges and immunities. Moreover, CARU is able to decentralize its various functions by setting up whatever subsidiary bodies it deems necessary (Article 52).

89. The Court observes that, like any international organization with legal personality, CARU is entitled to exercise the powers assigned to it by the 1975 Statute and which are necessary to achieve the object and purpose of the latter, namely, "the optimum and rational utilization of the River Uruguay" (Article 1). As the Court has pointed out,

> "[i]nternational organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them" (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 78, para. 25).

This also applies of course to organizations, which like CARU, only have two member States.

90. Since CARU serves as a framework for consultation between the parties, particularly in the case of the planned works contemplated in Article 7, first paragraph, of the 1975 Statute, neither of them may depart from that framework unilaterally, as they see fit, and put other channels of communication in its place. By creating CARU and investing it with all the resources necessary for its operation, the parties have sought to provide the best possible guarantees of stability, continuity and effective-

ness for their desire to co-operate in ensuring "the optimum and rational utilization of the River Uruguay".

91. That is why CARU plays a central role in the 1975 Statute and cannot be reduced to merely an optional mechanism available to the parties which each may use or not, as it pleases. CARU operates at all levels of utilization of the river, whether concerning the prevention of transboundary harm that may result from planned activities; the use of water, on which it receives reports from the parties and verifies whether the developments taken together are liable to cause significant damage (Articles 27 and 28); the avoidance of any change in the ecological balance (Article 36); scientific studies and research carried out by one party within the jurisdiction of the other (Article 44); the exercise of the right of law enforcement (Article 46); or the right of navigation (Article 48).

92. Furthermore, CARU has been given the function of drawing up rules in many areas associated with the joint management of the river and listed in Article 56 of the 1975 Statute. Lastly, at the proposal of either party, the Commission can act as a conciliation body in any dispute which may arise between the parties (Article 58).

93. Consequently, the Court considers that, because of the scale and diversity of the functions they have assigned to CARU, the Parties intended to make that international organization a central component in the fulfilment of their obligations to co-operate as laid down by the 1975 Statute.

2. Uruguay's obligation to inform CARU

94. The Court notes that the obligation of the State initiating the planned activity to inform CARU constitutes the first stage in the procedural mechanism as a whole which allows the two parties to achieve the object of the 1975 Statute, namely, the optimum and rational utilization of the River Uruguay". This stage, provided for in Article 7, first paragraph, involves the State which is initiating the planned activity informing CARU thereof, so that the latter can determine "on a preliminary basis" and within a maximum period of 30 days whether the plan might cause significant damage to the other party.

95. To enable the remainder of the procedure to take its course, the parties have included alternative conditions in the 1975 Statute: either that the activity planned by one party should be liable, in CARU's opinion, to cause significant damage to the other, creating an obligation of prevention for the first party to eliminate or minimize the risk, in consultation with the other party; or that CARU, having been duly informed, should not have reached a decision in that regard within the prescribed period.

96. The Court notes that the Parties are agreed in considering that the two planned mills were works of sufficient importance to fall within the scope of Article 7 of the 1975 Statute, and thus for CARU to have been

informed of them. The same applies to the plan to construct a port terminal at Fray Bentos for the exclusive use of the Orion (Botnia) mill, which included dredging work and use of the river bed.

97. However, the Court observes that the Parties disagree on whether there is an obligation to inform CARU in respect of the extraction and use of water from the river for industrial purposes by the Orion (Botnia) mill. Argentina takes the view that the authorization granted by the Uruguayan Ministry of Transport and Public Works on 12 September 2006 concerns an activity of sufficient importance ("entidad suficiente") to affect the régime of the river or the quality of its waters and that, in this matter, Uruguay should have followed the procedure laid down in Articles 7 to 12 of the 1975 Statute. For its part, Uruguay maintains that this activity forms an integral part of the Orion (Botnia) mill project as a whole, and that the 1975 Statute does not require CARU to be informed of each step in furtherance of the planned works.

98. The Court points out that while the Parties are agreed in recognizing that CARU should have been informed of the two planned mills and the plan to construct the port terminal at Fray Bentos, they nonetheless differ as regards the content of the information which should be provided to CARU and as to when this should take place.

99. Argentina has argued that the content of the obligation to inform must be determined in the light of its objective, which is to prevent threats to navigation, the régime of the river or the quality of the waters. According to Argentina, the plan which CARU must be informed of may be at a very early stage, since it is simply a matter of allowing the Commission to "determine on a preliminary basis", within a very short period of 30 days, whether the plan "might cause significant damage to the other party". It is only in the following phase of the procedure that the substance of the obligation to inform is said to become more extensive. In Argentina's view, however, CARU must be informed prior to the authorization or implementation of a project on the River Uruguay.

100. Citing the terms of Article 7, first paragraph, of the 1975 Statute, Uruguay gives a different interpretation of it, taking the view that the requirement to inform CARU specified by this provision cannot occur in the very early stages of planning, because there could not be sufficient information available to the Commission for it to determine whether or not the plan might cause significant damage to the other State. For that, according to Uruguay, the project would have to have reached a stage where all the technical data on it are available. As the Court will consider further below, Uruguay seeks to link the content of the information to the time when it should be provided, which may even be after the State concerned has granted an initial environmental authorization.

101. The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" (*Corfu*

Channel (United Kingdom v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22). A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation "is now part of the corpus of international law relating to the environment" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 242, para. 29).

102. In the view of the Court, the obligation to inform CARU allows for the initiation of co-operation between the Parties which is necessary in order to fulfil the obligation of prevention. This first procedural stage results in the 1975 Statute not being applied to activities which would appear to cause damage only to the State in whose territory they are carried out.

103. The Court observes that with regard to the River Uruguay, which constitutes a shared resource, "significant damage to the other party" (Article 7, first paragraph, of the 1975 Statute) may result from impairment of navigation, the régime of the river or the quality of its waters. Moreover, Article 27 of the 1975 Statute stipulates that:

> "[t]he right of each party to use the waters of the river, within its jurisdiction, for domestic, sanitary, industrial and agricultural purposes shall be exercised without prejudice to the application of the procedure laid down in Articles 7 to 12 when the use is liable to affect the régime of the river or the quality of its waters".

104. The Court notes that, in accordance with the terms of Article 7, first paragraph, the information which must be provided to CARU, at this initial stage of the procedure, has to enable it to determine swiftly and on a preliminary basis whether the plan might cause significant damage to the other party. For CARU, at this stage, it is a question of deciding whether or not the plan falls under the co-operation procedure laid down by the 1975 Statute, and not of pronouncing on its actual impact on the river and the quality of its waters. This explains, in the opinion of the Court, the difference between the terminology of the first paragraph of Article 7, concerning the requirement to inform CARU, and that of the third paragraph, concerning the content of the notification to be addressed to the other party at a later stage, enabling it "to assess the probable impact of such works on navigation, the régime of the river or the quality of its waters".

105. The Court considers that the State planning activities referred to in Article 7 of the Statute is required to inform CARU as soon as it is in possession of a plan which is sufficiently developed to enable CARU to make the preliminary assessment (required by paragraph 1 of that provision) of whether the proposed works might cause significant damage to the other party. At that stage, the information provided will not neces-

sarily consist of a full assessment of the environmental impact of the project, which will often require further time and resources, although, where more complete information is available, this should, of course, be transmitted to CARU to give it the best possible basis on which to make its preliminary assessment. In any event, the duty to inform CARU will become applicable at the stage when the relevant authority has had the project referred to it with the aim of obtaining initial environmental authorization and before the granting of that authorization.

106. The Court observes that, in the present case, Uruguay did not transmit to CARU the information required by Article 7, first paragraph, in respect of the CMB (ENCE) and Orion (Botnia) mills, despite the requests made to it by the Commission to that effect on several occasions, in particular on 17 October 2002 and 21 April 2003 with regard to the CMB (ENCE) mill, and on 16 November 2004 with regard to the Orion (Botnia) mill. Uruguay merely sent CARU, on 14 May 2003, a summary for public release of the environmental impact assessment for the CMB (ENCE) mill. CARU considered this document to be inadequate and again requested further information from Uruguay on 15 August 2003 and 12 September 2003. Moreover, Uruguay did not transmit any document to CARU regarding the Orion (Botnia) mill. Consequently, Uruguay issued the initial environmental authorizations to CMB on 9 October 2003 and to Botnia on 14 February 2005 without complying with the procedure laid down in Article 7, first paragraph. Uruguay therefore came to a decision on the environmental impact of the projects without involving CARU, thereby simply giving effect to Article 17, third paragraph, of Uruguayan Decree No. 435/994 of 21 September 1994, Environmental Impact Assessment Regulation, according to which the Ministry of Housing, Land Use Planning and Environmental Affairs may grant the initial environmental authorization provided that the adverse environmental impacts of the project remain within acceptable limits.

107. The Court further notes that on 12 April 2005 Uruguay granted an authorization to Botnia for the first phase of the construction of the Orion (Botnia) mill and, on 5 July 2005, an authorization to construct a port terminal for its exclusive use and to utilize the river bed for industrial purposes, without informing CARU of these projects in advance.

108. With regard to the extraction and use of water from the river, of which CARU should have first been informed, according to Argentina, the Court takes the view that this is an activity which forms an integral part of the commissioning of the Orion (Botnia) mill and therefore did not require a separate referral to CARU.

109. However, Uruguay maintains that CARU was made aware of the plans for the mills by representatives of ENCE on 8 July 2002, and no later than 29 April 2004 by representatives of Botnia, before the initial environmental authorizations were issued. Argentina, for its part, considers that these so-called private dealings, whatever form they may have

taken, do not constitute performance of the obligation imposed on the Parties by Article 7, first paragraph.

110. The Court considers that the information on the plans for the mills which reached CARU via the companies concerned or from other non-governmental sources cannot substitute for the obligation to inform laid down in Article 7, first paragraph, of the 1975 Statute, which is borne by the party planning to construct the works referred to in that provision. Similarly, in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*, the Court observed that

> "[i]f the information eventually came to Djibouti through the press, the information disseminated in this way could not be taken into account for the purposes of the application of Article 17 [of the Convention on Mutual Assistance in Criminal Matters between the two countries, providing that '[r]easons shall be given for any refusal of mutual assistance']" (*Judgment, I.C.J. Reports 2008*, p. 231, para. 150).

111. Consequently, the Court concludes from the above that Uruguay, by not informing CARU of the planned works before the issuing of the initial environmental authorizations for each of the mills and for the port terminal adjacent to the Orion (Botnia) mill, has failed to comply with the obligation imposed on it by Article 7, first paragraph, of the 1975 Statute.

3. Uruguay's obligation to notify the plans to the other party

112. The Court notes that, under the terms of Article 7, second paragraph, of the 1975 Statute, if CARU decides that the plan might cause significant damage to the other party or if a decision cannot be reached in that regard, "the party concerned shall notify the other party of this plan through the said Commission".

Article 7, third paragraph, of the 1975 Statute sets out in detail the content of this notification, which

> "shall describe the main aspects of the work and . . . any other technical data that will enable the notified party to assess the probable impact of such works on navigation, the régime of the river or the quality of its waters".

113. In the opinion of the Court, the obligation to notify is intended to create the conditions for successful co-operation between the parties, enabling them to assess the plan's impact on the river on the basis of the fullest possible information and, if necessary, to negotiate the adjustments needed to avoid the potential damage that it might cause.

114. Article 8 stipulates a period of 180 days, which may be extended by the Commission, for the notified party to respond in connection with

the plan, subject to it requesting the other party, through the Commission, to supplement as necessary the documentation it has provided.

If the notified party raises no objections, the other party may carry out or authorize the work (Article 9). Otherwise, the former must notify the latter of those aspects of the work which may cause it damage and of the suggested changes (Article 11), thereby opening a further 180-day period of negotiation in which to reach an agreement (Article 12).

115. The obligation to notify is therefore an essential part of the process leading the parties to consult in order to assess the risks of the plan and to negotiate possible changes which may eliminate those risks or minimize their effects.

116. The Parties agree on the need for a full environmental impact assessment in order to assess any significant damage which might be caused by a plan.

117. Uruguay takes the view that such assessments were carried out in accordance with its legislation (Decree No. 435/994 of 21 September 1994, Environmental Impact Assessment Regulation), submitted to DINAMA for consideration and transmitted to Argentina on 7 November 2003 in the case of the CMB (ENCE) project and on 19 August 2005 for the Orion (Botnia) project. According to Uruguay, DINAMA asked the companies concerned for all the additional information that was required to supplement the original environmental impact assessments submitted to it, and only when it was satisfied did it propose to the Ministry of the Environment that the initial environmental authorizations requested should be issued, which they were to CMB on 9 October 2003 and to Botnia on 14 February 2005.

Uruguay maintains that it was not required to transmit the environmental impact assessments to Argentina before issuing the initial environmental authorizations to the companies, these authorizations having been adopted on the basis of its legislation on the subject.

118. Argentina, for its part, first points out that the environmental impact assessments transmitted to it by Uruguay were incomplete, particularly in that they made no provision for alternative sites for the mills and failed to include any consultation of the affected populations. The Court will return later in the Judgment to the substantive conditions which must be met by environmental impact assessments (see paragraphs 203 to 219).

Furthermore, in procedural terms, Argentina considers that the initial environmental authorizations should not have been granted to the companies before it had received the complete environmental impact assessments, and that it was unable to exercise its rights in this context under Articles 7 to 11 of the 1975 Statute.

119. The Court notes that the environmental impact assessments which are necessary to reach a decision on any plan that is liable to cause sig-

nificant transboundary harm to another State must be notified by the party concerned to the other party, through CARU, pursuant to Article 7, second and third paragraphs, of the 1975 Statute. This notification is intended to enable the notified party to participate in the process of ensuring that the assessment is complete, so that it can then consider the plan and its effects with a full knowledge of the facts (Article 8 of the 1975 Statute).

120. The Court observes that this notification must take place before the State concerned decides on the environmental viability of the plan, taking due account of the environmental impact assessment submitted to it.

121. In the present case, the Court observes that the notification to Argentina of the environmental impact assessments for the CMB (ENCE) and Orion (Botnia) mills did not take place through CARU, and that Uruguay only transmitted those assessments to Argentina after having issued the initial environmental authorizations for the two mills in question. Thus in the case of CMB (ENCE), the matter was notified to Argentina on 27 October and 7 November 2003, whereas the initial environmental authorization had already been issued on 9 October 2003. In the case of Orion (Botnia), the file was transmitted to Argentina between August 2005 and January 2006, whereas the initial environmental authorization had been granted on 14 February 2005. Uruguay ought not, prior to notification, to have issued the initial environmental authorizations and the authorizations for construction on the basis of the environmental impact assessments submitted to DINAMA. Indeed by doing so, Uruguay gave priority to its own legislation over its procedural obligations under the 1975 Statute and disregarded the well-established customary rule reflected in Article 27 of the Vienna Convention on the Law of Treaties, according to which "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

122. The Court concludes from the above that Uruguay failed to comply with its obligation to notify the plans to Argentina through CARU under Article 7, second and third paragraphs, of the 1975 Statute.

C. Whether the Parties Agreed to Derogate from the Procedural Obligations Set Out in the 1975 Statute

123. Having thus examined the procedural obligations laid down by the 1975 Statute, the Court now turns to the question of whether the Parties agreed, by mutual consent, to derogate from them, as alleged by Uruguay.

124. In this respect the Parties refer to two "agreements" reached on 2 March 2004 and 5 May 2005; however, they hold divergent views regarding their scope and content.

1. The "understanding" of 2 March 2004 between Argentina and Uruguay

125. The Court recalls that, after the issuing of the initial environmental authorization to CMB by Uruguay, without CARU having been able to carry out the functions assigned to it in this context by the 1975 Statute, the Foreign Ministers of the Parties agreed on 2 March 2004 on the procedure to be followed, as described in the minutes of the extraordinary meeting of CARU of 15 May 2004. The relevant extract from those minutes reads as follows in Spanish:

> "II) En fecha 2 de marzo de 2004 los Cancilleres de Argentina y Uruguay llegaron a un entendimiento con relación al curso de acción que se dará al tema, esto es, facilitar por parte del gobierno uruguayo, la información relativa a la construcción de la planta y, en relación a la fase operativa, proceder a realizar el monitoreo, por parte de CARU, de la calidad de las aguas conforme a su Estatuto.
>
> . . . . . .
>
> I) Ambas delegaciones reafirmaron el compromiso de los Ministros de Relaciones Exteriores de la República Argentina y de la República Oriental del Uruguay de fecha 2 de marzo de 2004 por el cual el Uruguay comunicará la información relativa a la construcción de la planta incluyendo el Plan de Gestión Ambiental. En tal sentido, *la CARU recibirá* los Planes de Gestión Ambiental para la construcción y operación de la planta que presente la empresa al gobierno uruguayo una vez que le sean remitidos por la delegación uruguaya." (Emphasis in the original.)

Argentina and Uruguay have provided the Court, respectively, with French and English translations of these minutes. In view of the discrepancies between those two translations, the Court will use the following translation:

> "(II) On 2 March 2004, the Foreign Ministers of Argentina and Uruguay reached an understanding on how to proceed in the matter, namely, that the Uruguayan Government would provide information on the construction of the mill and that, in terms of the operational phase, CARU would carry out monitoring of water quality in accordance with its Statute.
>
> . . . . . .
>
> (I) Both delegations reaffirmed the arrangement which had been come to by the Foreign Ministers of the Republic of Argentina and the Eastern Republic of Uruguay on 2 March 2004, whereby Uruguay would communicate information on the construction of the mill, including the environmental management plan. As a result, *CARU would receive* the environmental management plans for the

construction and operation of the mill provided by the company to the Uruguayan Government, when these were forwarded to it by the Uruguayan delegation." (Emphasis in the original.) *[Translation by the Court.]*

126. Uruguay considers that, under the terms of this "understanding", the Parties agreed on the approach to be followed in respect of the CMB (ENCE) project, outside CARU, and that there was no reason in law or logic to prevent them derogating from the procedures outlined in the 1975 Statute pursuant to an appropriate bilateral agreement.

The said "understanding", according to Uruguay, only covered the transmission to CARU of the Environmental Management Plans for the construction and operation of the (CMB) ENCE mill. It supposedly thereby puts an end to any dispute with Argentina regarding the procedure laid down in Article 7 of the 1975 Statute. Lastly, Uruguay maintains that the "understanding" of 2 March 2004 on the (CMB) ENCE project was later extended to include the Orion (Botnia) project, since the PROCEL water quality monitoring plan put in place by CARU's Subcommittee on Water Quality to implement that "understanding" related to the activity of "both plants", the CMB (ENCE) and Orion (Botnia) mills, the plural having been used in the title and text of the Subcommittee's report.

127. Argentina, for its part, maintains that the "understanding" between the two Ministers of 2 March 2004 was intended to ensure compliance with the procedure laid down by the 1975 Statute and thus to reintroduce the CMB (ENCE) project within CARU, ending the dispute on CARU's jurisdiction to deal with the project. Argentina claims that it reiterated to the organs within CARU that it had not given up its rights under Article 7, although it accepted that the dispute between itself and Uruguay in this respect could have been resolved if the procedure contemplated in the "understanding" of 2 March 2004 had been brought to a conclusion.

According to Argentina, however, Uruguay never transmitted the required information to CARU as it undertook to do in the "understanding" of 2 March 2004. Argentina also denies that the "understanding" of 2 March 2004 was extended to the Orion (Botnia) mill; the reference to both future plants in the PROCEL plan does not in any way signify, in its view, the renunciation of the procedure laid down by the 1975 Statute.

128. The Court first notes that while the existence of the "understanding" of 2 March 2004, as minuted by CARU, has not been contested by the Parties, they differ as to its content and scope. Whatever its specific designation and in whatever instrument it may have been recorded (the CARU minutes), this "understanding" is binding on the Parties, to the extent that they have consented to it and must be observed by them in good faith. They are entitled to depart from the procedures laid down by the 1975 Statute, in respect of a given project pursuant to an appropriate bilateral agreement. The Court recalls that the Parties disagree on whether

the procedure for communicating information provided for by the "understanding" would, if applied, replace that provided for by the 1975 Statute. Be that as it may, such replacement was dependent on Uruguay complying with the procedure laid down in the "understanding".

129. The Court finds that the information which Uruguay agreed to transmit to CARU in the "understanding" of 2 March 2004 was never transmitted. Consequently, the Court cannot accept Uruguay's contention that the "understanding" put an end to its dispute with Argentina in respect of the CMB (ENCE) mill, concerning implementation of the procedure laid down by Article 7 of the 1975 Statute.

130. Further, the Court observes that, when this "understanding" was reached, only the CMB (ENCE) project was in question, and that it therefore cannot be extended to the Orion (Botnia) project, as Uruguay claims. The reference to both mills is made only as from July 2004, in the context of the PROCEL plan. However, this plan only concerns the measures to monitor and control the environmental quality of the river waters in the areas of the pulp mills, and not the procedures under Article 7 of the 1975 Statute.

131. The Court concludes that the "understanding" of 2 March 2004 would have had the effect of relieving Uruguay of its obligations under Article 7 of the 1975 Statute, if that was the purpose of the "understanding", only if Uruguay had complied with the terms of the "understanding". In the view of the Court, it did not do so. Therefore the "understanding" cannot be regarded as having had the effect of exempting Uruguay from compliance with the procedural obligations laid down by the 1975 Statute.

2. The agreement setting up the High-Level Technical Group (the GTAN)

132. The Court notes that, in furtherance of the agreement reached on 5 May 2005 between the Presidents of Argentina and Uruguay (see paragraph 40 above), the Foreign Ministries of the two States issued a press release on 31 May 2005 announcing the creation of the High-Level Technical Group, referred to by the Parties as the GTAN. According to this communiqué:

> "In conformity with what was agreed to by the Presidents of Argentina and Uruguay, the Foreign Ministries of both of our countries constitute, under their supervision, a Group of Technical Experts for complementary studies and analysis, exchange of information and follow-up on the effects that the operation of the cellulose plants that are being constructed in the Eastern Republic of Uruguay will have on the ecosystem of the shared Uruguay River.

This Group . . . is to produce an initial report within a period of 180 days."

133. Uruguay regards this press release as an agreement that binds the two States, whereby they decided to make the GTAN the body within which the direct negotiations between the Parties provided for by Article 12 of the 1975 Statute would take place, since its purpose was to analyse the effects on the environment of the "operation of the cellulose plants that are being constructed in the Eastern Republic of Uruguay". Uruguay infers from this that the Parties were agreed on the construction of the mills and that they had limited the extent of the dispute between them to the environmental risks caused by their operation. Uruguay sees proof of this in the referral to the Court on the basis of Article 12 of the 1975 Statute, which allows either Party to apply to the Court in the event of the negotiations failing to produce an agreement within the period of 180 days.

According to Uruguay, therefore, the agreement contained in the press release of 31 May 2005, by paving the way for the direct negotiations provided for in Article 12, covered any possible procedural irregularities in relation to Articles 7 *et seq.* of the 1975 Statute. Uruguay points out that it communicated all the necessary information to Argentina during the 12 meetings held by the GTAN and that it transmitted the Orion (Botnia) port project to CARU, as agreed by the Parties at the first meeting of the GTAN.

134. Uruguay further notes that the 1975 Statute is silent as to whether the notifying State may or may not implement a project while negotiations are ongoing. It acknowledges that, under international law, the initiating State must refrain from doing so during the period of negotiation, but takes the view that this does not apply to all work and, in particular, that preparatory work is permitted. Uruguay acknowledges that it carried out such work, for example construction of the foundations for the Orion (Botnia) mill, but in its view this did not involve faits accomplis which prevented the negotiations from reaching a conclusion. Uruguay also considers that it had no legal obligation to suspend any and all work on the port.

135. Argentina considers that no acceptance on its part of the construction of the disputed mills can be inferred from the terms of the press release of 31 May 2005. It submits that in creating the GTAN, the Parties did not decide to substitute it for CARU, but regarded it as a means of negotiation that would co-exist with the latter.

Contrary to Uruguay, Argentina takes the view that this matter has been submitted to the Court on the basis of Article 60 of the 1975 Statute and not of Article 12, since Uruguay, by its conduct, has prevented the latter from being used as a basis, having allegedly disregarded the entire procedure laid down in Chapter II of the Statute. Argentina therefore

sees it as for the Court to pronounce on all the breaches of the 1975 Statute, including and not limited to the authorization for the construction of the disputed mills.

136. Argentina submits that Uruguay, by its conduct, frustrated the procedures laid down in Articles 7 to 9 of the 1975 Statute and that, during the period of negotiation within the GTAN, Uruguay continued the construction work on the Orion (Botnia) mill and began building the port terminal. During that same period, Argentina reiterated, within CARU, the need for Uruguay to comply with its procedural obligations under Articles 7 to 12 of the 1975 Statute and to suspend the works.

Lastly, Argentina rejects Uruguay's claim that the work on the foundations of the Orion (Botnia) mill, its chimney and the port was merely preliminary in nature and cannot be regarded as the beginning of construction work as such. For Argentina, such a distinction is groundless and cannot be justified by the nature of the work carried out.

137. The Court first points out that there is no reason to distinguish, as Uruguay and Argentina have both done for the purpose of their respective cases, between referral on the basis of Article 12 and of Article 60 of the 1975 Statute. While it is true that Article 12 provides for recourse to the procedure indicated in Chapter XV, should the negotiations fail to produce an agreement within the 180-day period, its purpose ends there. Article 60 then takes over, in particular its first paragraph, which enables either Party to submit to the Court any dispute concerning the interpretation or application of the Statute which cannot be settled by direct negotiations. This wording also covers a dispute relating to the interpretation or application of Article 12, like any other provision of the 1975 Statute.

138. The Court notes that the press release of 31 May 2005 sets out an agreement between the two States to create a negotiating framework, the GTAN, in order to study, analyse and exchange information on the effects that the operation of the cellulose plants that were being constructed in the Eastern Republic of Uruguay could have on the ecosystem of the shared Uruguay River, with "the group [having] to produce an initial report within a period of 180 days".

139. The Court recognizes that the GTAN was created with the aim of enabling the negotiations provided for in Article 12 of the 1975 Statute, also for a 180-day period, to take place. Under Article 11, these negotiations between the parties with a view to reaching an agreement are to be held once the notified party has sent a communication to the other party, through the Commission, specifying

> "which aspects of the work or the programme of operations might significantly impair navigation, the régime of the river or the quality

of its waters, the technical reasons on which this conclusion is based and the changes suggested to the plan or programme of operations".

The Court is aware that the negotiation provided for in Article 12 of the 1975 Statute forms part of the overall procedure laid down in Articles 7 to 12, which is structured in such a way that the parties, in association with CARU, are able, at the end of the process, to fulfil their obligation to prevent any significant transboundary harm which might be caused by potentially harmful activities planned by either one of them.

140. The Court therefore considers that the agreement to set up the GTAN, while indeed creating a negotiating body capable of enabling the Parties to pursue the same objective as that laid down in Article 12 of the 1975 Statute, cannot be interpreted as expressing the agreement of the Parties to derogate from other procedural obligations laid down by the Statute.

141. Consequently, the Court finds that Argentina, in accepting the creation of the GTAN, did not give up, as Uruguay claims, the other procedural rights belonging to it by virtue of the 1975 Statute, nor the possibility of invoking Uruguay's responsibility for any breach of those rights. Argentina did not, in the agreement to set up the GTAN, "effect a clear and unequivocal waiver" of its rights under the 1975 Statute (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 247, para. 13). Nor did it consent to suspending the operation of the procedural provisions of the 1975 Statute. Indeed, under Article 57 of the Vienna Convention on the Law of Treaties of 23 May 1969, concerning "[s]uspension of the operation of a treaty", including, according to the International Law Commission's commentary, suspension of "the operation of . . . some of its provisions" (*Yearbook of the International Law Commission*, 1966, Vol. II, p. 251), suspension is only possible "in conformity with the provisions of the treaty" or "by consent of all the parties".

142. The Court further observes that the agreement to set up the GTAN, in referring to "the cellulose plants that are being constructed in the Eastern Republic of Uruguay", is stating a simple fact and cannot be interpreted, as Uruguay claims, as an acceptance of their construction by Argentina.

143. The Court finds that Uruguay was not entitled, for the duration of the period of consultation and negotiation provided for in Articles 7 to 12 of the 1975 Statute, either to construct or to authorize the construction of the planned mills and the port terminal. It would be contrary to the object and purpose of the 1975 Statute to embark on disputed activities before having applied the procedures laid down by the "joint machinery necessary for the optimum and rational utilization of the [r]iver" (Article 1). However, Article 9 provides that: "[i]f the notified party raises no objections or does not respond within the period established in Arti-

cle 8 [180 days], the other party may carry out or authorize the work planned".

144. Consequently, in the opinion of the Court, as long as the procedural mechanism for co-operation between the parties to prevent significant damage to one of them is taking its course, the State initiating the planned activity is obliged not to authorize such work and, *a fortiori*, not to carry it out.

145. The Court notes, moreover, that the 1975 Statute is perfectly in keeping with the requirements of international law on the subject, since the mechanism for co-operation between States is governed by the principle of good faith. Indeed, according to customary international law, as reflected in Article 26 of the 1969 Vienna Convention on the Law of Treaties, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith". That applies to all obligations established by a treaty, including procedural obligations which are essential to co-operation between States. The Court recalled in the cases concerning *Nuclear Tests (Australia* v. *France) (New Zealand* v. *France)*:

> "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation . . ." (*Judgments, I.C.J. Reports 1974*, p. 268, para. 46, and p. 473, para. 49; see also *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 105, para. 94.)

146. The Court has also had occasion to draw attention to the characteristics of the obligation to negotiate and to the conduct which this imposes on the States concerned: "[the Parties] are under an obligation so to conduct themselves that the negotiations are meaningful" (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 47, para. 85).

147. In the view of the Court, there would be no point to the co-operation mechanism provided for by Articles 7 to 12 of the 1975 Statute if the party initiating the planned activity were to authorize or implement it without waiting for that mechanism to be brought to a conclusion. Indeed, if that were the case, the negotiations between the parties would no longer have any purpose.

148. In this respect, contrary to what Uruguay claims, the preliminary work on the pulp mills on sites approved by Uruguay alone does not constitute an exception. This work does in fact form an integral part of the construction of the planned mills (see paragraphs 39 and 42 above).

149. The Court concludes from the above that the agreement to set up the GTAN did not permit Uruguay to derogate from its obligations of information and notification under Article 7 of the 1975 Statute, and that by authorizing the construction of the mills and the port terminal at

Fray Bentos before the expiration of the period of negotiation, Uruguay failed to comply with the obligation to negotiate laid down by Article 12 of the Statute. Consequently, Uruguay disregarded the whole of the co-operation mechanism provided for in Articles 7 to 12 of the 1975 Statute.

150. Given that "an obligation to negotiate does not imply an obligation to reach an agreement" (*Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 42*, p. 116), it remains for the Court to examine whether the State initiating the plan is under certain obligations following the end of the negotiation period provided for in Article 12.

D. Uruguay's Obligations Following the End of the Negotiation Period

151. Article 12 refers the Parties, should they fail to reach an agreement within 180 days, to the procedure indicated in Chapter XV.

Chapter XV contains a single article, Article 60, according to which:

> "Any dispute concerning the interpretation or application of the Treaty and the Statute which cannot be settled by direct negotiations may be submitted by either party to the International Court of Justice.
>
> In the cases referred to in Articles 58 and 59, either party may submit any dispute concerning the interpretation or application of the Treaty and the Statute to the International Court of Justice, when it has not been possible to settle the dispute within 180 days following the notification referred to in Article 59."

152. According to Uruguay, the 1975 Statute does not give one party a "right of veto" over the projects initiated by the other. It does not consider there to be a "no construction obligation" borne by the State initiating the projects until such time as the Court has ruled on the dispute. Uruguay points out that the existence of such an obligation would enable one party to block a project that was essential for the sustainable development of the other, something that would be incompatible with the "optimum and rational utilization of the [r]iver". On the contrary, for Uruguay, in the absence of any specific provision in the 1975 Statute, reference should be made to general international law, as reflected in the 2001 draft Articles of the International Law Commission on Prevention of Transboundary Harm from Hazardous Activities (*Yearbook of the International Law Commission*, 2001, Vol. II, Part Two); in particular, draft Article 9, paragraph 3, concerning "Consultations on preventive measures", states that "[i]f the consultations . . . fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of the State likely to be affected in case it decides to authorize the activity to be pursued . . .".

153. Argentina, on the other hand, maintains that Article 12 of the 1975 Statute makes the Court the final decision-maker where the parties have failed to reach agreement within 180 days following the notification referred to in Article 11. It is said to follow from Article 9 of the Statute, interpreted in the light of Articles 11 and 12 and taking account of its object and purpose, that if the notified party raises an objection, the other party may neither carry out nor authorize the work in question until the procedure laid down in Articles 7 to 12 has been completed and the Court has ruled on the project. Argentina therefore considers that, during the dispute settlement proceedings before the Court, the State which is envisaging carrying out the work cannot confront the other Party with the fait accompli of having carried it out.

Argentina argues that the question of the "veto" raised by Uruguay is inappropriate, since neither of the parties can impose its position in respect of the construction works and it will ultimately be for the Court to settle the dispute, if the parties disagree, by a decision that will have the force of *res judicata*. It could be said, according to Argentina, that Uruguay has no choice but to come to an agreement with it or to await the settlement of the dispute. Argentina contends that, by pursuing the construction and commissioning of the Orion (Botnia) mill and port, Uruguay has committed a continuing violation of the procedural obligations under Chapter II of the 1975 Statute.

154. The Court observes that the "no construction obligation", said to be borne by Uruguay between the end of the negotiation period and the decision of the Court, is not expressly laid down by the 1975 Statute and does not follow from its provisions. Article 9 only provides for such an obligation during the performance of the procedure laid down in Articles 7 to 12 of the Statute.

Furthermore, in the event of disagreement between the parties on the planned activity persisting at the end of the negotiation period, the Statute does not provide for the Court, to which the matter would be submitted by the State concerned, according to Argentina, to decide whether or not to authorize the activity in question. The Court points out that, while the 1975 Statute gives it jurisdiction to settle any dispute concerning its interpretation or application, it does not however confer on it the role of deciding in the last resort whether or not to authorize the planned activities. Consequently, the State initiating the plan may, at the end of the negotiation period, proceed with construction at its own risk.

The Court cannot uphold the interpretation of Article 9 according to which any construction is prohibited until the Court has given its ruling pursuant to Articles 12 and 60.

155. Article 12 does not impose an obligation on the parties to submit a matter to the Court, but gives them the possibility of doing so, following the end of the negotiation period. Consequently, Article 12 can do nothing to alter the rights and obligations of the party concerned as long as the Court has not ruled finally on them. The Court considers that

those rights include that of implementing the project, on the sole responsibility of that party, since the period for negotiation has expired.

156. In its Order of 13 July 2006, the Court took the view that the "construction [of the mills] at the current site cannot be deemed to create a fait accompli" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 133, para. 78). Thus, in pronouncing on the merits in the dispute between the Parties, the Court is the ultimate guarantor of their compliance with the 1975 Statute.

157. The Court concludes from the above that Uruguay did not bear any "no construction obligation" after the negotiation period provided for in Article 12 expired on 3 February 2006, the Parties having determined at that date that the negotiations undertaken within the GTAN had failed (see paragraph 40). Consequently the wrongful conduct of Uruguay (established in paragraph 149 above) could not extend beyond that period.

158. Having established that Uruguay breached its procedural obligations to inform, notify and negotiate to the extent and for the reasons given above, the Court will now turn to the question of the compliance of that State with the substantive obligations laid down by the 1975 Statute.

* *

IV. Substantive Obligations

159. Before taking up the examination of the alleged violations of substantive obligations under the 1975 Statute, the Court will address two preliminary issues, namely, the burden of proof and expert evidence.

A. Burden of Proof and Expert Evidence

160. Argentina contends that the 1975 Statute adopts an approach in terms of precaution whereby "the burden of proof will be placed on Uruguay for it to establish that the Orion (Botnia) mill will not cause significant damage to the environment". It also argues that the burden of proof should not be placed on Argentina alone as the Applicant, because, in its view, the 1975 Statute imposes an equal onus to persuade — for the one that the plant is innocuous and for the other that it is harmful.

161. Uruguay, on the other hand, asserts that the burden of proof is on Argentina, as the Applicant, in accordance with the Court's long-standing case law, although it considers that, even if the Argentine position about transferring the burden of proof to Uruguay were correct, it would make no difference given the manifest weakness of Argentina's

case and the extensive independent evidence put before the Court by Uruguay. Uruguay also strongly contests Argentina's argument that the precautionary approach of the 1975 Statute would imply a reversal of the burden of proof, in the absence of an explicit treaty provision prescribing it as well as Argentina's proposition that the Statute places the burden of proof equally on both Parties.

162. To begin with, the Court considers that, in accordance with the well-established principle of *onus probandi incumbit actori*, it is the duty of the party which asserts certain facts to establish the existence of such facts. This principle which has been consistently upheld by the Court (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 86, para. 68; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 31, para. 45; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 128, para. 204; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101) applies to the assertions of fact both by the Applicant and the Respondent.

163. It is of course to be expected that the Applicant should, in the first instance, submit the relevant evidence to substantiate its claims. This does not, however, mean that the Respondent should not co-operate in the provision of such evidence as may be in its possession that could assist the Court in resolving the dispute submitted to it.

164. Regarding the arguments put forward by Argentina on the reversal of the burden of proof and on the existence, vis-à-vis each Party, of an equal onus to prove under the 1975 Statute, the Court considers that while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that it operates as a reversal of the burden of proof. The Court is also of the view that there is nothing in the 1975 Statute itself to indicate that it places the burden of proof equally on both Parties.

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165. The Court now turns to the issue of expert evidence. Both Argentina and Uruguay have placed before the Court a vast amount of factual and scientific material in support of their respective claims. They have also submitted reports and studies prepared by the experts and consultants commissioned by each of them, as well as others commissioned by the International Finance Corporation in its quality as lender to the project. Some of these experts have also appeared

before the Court as counsel for one or the other of the Parties to provide evidence.

166. The Parties, however, disagree on the authority and reliability of the studies and reports submitted as part of the record and prepared, on the one hand, by their respective experts and consultants, and on the other, by the experts of the IFC, which contain, in many instances, conflicting claims and conclusions. In reply to a question put by a judge, Argentina stated that the weight to be given to such documents should be determined by reference not only to the "independence" of the author, who must have no personal interest in the outcome of the dispute and must not be an employee of the government, but also by reference to the characteristics of the report itself, in particular the care with which its analysis was conducted, its completeness, the accuracy of the data used, and the clarity and coherence of the conclusions drawn from such data. In its reply to the same question, Uruguay suggested that reports prepared by retained experts for the purposes of the proceedings and submitted as part of the record should not be regarded as independent and should be treated with caution; while expert statements and evaluations issued by a competent international organization, such as the IFC, or those issued by the consultants engaged by that organization should be regarded as independent and given "special weight".

167. The Court has given most careful attention to the material submitted to it by the Parties, as will be shown in its consideration of the evidence below with respect to alleged violations of substantive obligations. Regarding those experts who appeared before it as counsel at the hearings, the Court would have found it more useful had they been presented by the Parties as expert witnesses under Articles 57 and 64 of the Rules of Court, instead of being included as counsel in their respective delegations. The Court indeed considers that those persons who provide evidence before the Court based on their scientific or technical knowledge and on their personal experience should testify before the Court as experts, witnesses or in some cases in both capacities, rather than counsel, so that they may be submitted to questioning by the other party as well as by the Court.

168. As for the independence of such experts, the Court does not find it necessary in order to adjudicate the present case to enter into a general discussion on the relative merits, reliability and authority of the documents and studies prepared by the experts and consultants of the Parties. It needs only to be mindful of the fact that, despite the volume and complexity of the factual information submitted to it, it is the responsibility of the Court, after having given careful consideration to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate. Thus, in keeping with its practice, the Court will make its own determination of the facts, on the basis of the evidence

presented to it, and then it will apply the relevant rules of international law to those facts which it has found to have existed.

B. Alleged Violations of Substantive Obligations

169. The Court now turns to the examination of the alleged violations by Uruguay of its substantive obligations under the 1975 Statute by authorizing the construction and operation of the Orion (Botnia) mill. In particular, Argentina contends that Uruguay has breached its obligations under Articles 1, 27, 35, 36 and 41 *(a)* of the 1975 Statute and "other obligations deriving from . . . general, conventional and customary international law which are necessary for the application of the 1975 Statute". Uruguay rejects these allegations. Uruguay considers furthermore that Article 27 of the 1975 Statute allows the parties to use the waters of the river for domestic, sanitary, industrial and agricultural purposes.

1. The obligation to contribute to the optimum and rational utilization of the river (Article 1)

170. According to Argentina, Uruguay has breached its obligation to contribute to the "optimum and rational utilization of the river" by failing to co-ordinate with Argentina on measures necessary to avoid ecological change, and by failing to take the measures necessary to prevent pollution. Argentina also maintains that, in interpreting the 1975 Statute (in particular Articles 27, 35, and 36 thereof) according to the principle of equitable and reasonable use, account must be taken of all pre-existing legitimate uses of the river, including in particular its use for recreational and tourist purposes.

171. For Uruguay, the object and purpose of the 1975 Statute is to establish a structure for co-operation between the Parties through CARU in pursuit of the shared goal of equitable and sustainable use of the water and biological resources of the river. Uruguay contends that it has in no way breached the principle of equitable and reasonable use of the river and that this principle provides no basis for favouring pre-existing uses of the river, such as tourism or fishing, over other, new uses.

172. The Parties also disagree on the scope and implications of Article 27 of the 1975 Statute on the right of each Party to use the waters of the river, within its jurisdiction, for domestic, sanitary, industrial and agricultural purposes.

173. The Court observes that Article 1, as stated in the title to Chapter I of the 1975 Statute, sets out the purpose of the Statute. As such, it informs the interpretation of the substantive obligations, but does not by itself lay down specific rights and obligations for the parties. Optimum and rational utilization is to be achieved through compliance with the obligations prescribed by the 1975 Statute for the protection of the envi-

ronment and the joint management of this shared resource. This objective must also be ensured through CARU, which constitutes "the joint machinery" necessary for its achievement, and through the regulations adopted by it as well as the regulations and measures adopted by the Parties.

174. The Court recalls that the Parties concluded the treaty embodying the 1975 Statute, in implementation of Article 7 of the 1961 Treaty, requiring the Parties jointly to establish a régime for the use of the river covering, *inter alia*, provisions for preventing pollution and protecting and preserving the aquatic environment. Thus, optimum and rational utilization may be viewed as the cornerstone of the system of co-operation established in the 1975 Statute and the joint machinery set up to implement this co-operation.

175. The Court considers that the attainment of optimum and rational utilization requires a balance between the Parties' rights and needs to use the river for economic and commercial activities on the one hand, and the obligation to protect it from any damage to the environment that may be caused by such activities, on the other. The need for this balance is reflected in various provisions of the 1975 Statute establishing rights and obligations for the Parties, such as Articles 27, 36, and 41. The Court will therefore assess the conduct of Uruguay in authorizing the construction and operation of the Orion (Botnia) mill in the light of those provisions of the 1975 Statute, and the rights and obligations prescribed therein.

176. The Court has already addressed in paragraphs 84 to 93 above the role of CARU with respect to the procedural obligations laid down in the 1975 Statute. In addition to its role in that context, the functions of CARU relate to almost all aspects of the implementation of the substantive provisions of the 1975 Statute. Of particular relevance in the present case are its functions relating to rule-making in respect of conservation and preservation of living resources, the prevention of pollution and its monitoring, and the co-ordination of actions of the Parties. These functions will be examined by the Court in its analysis of the positions of the Parties with respect to the interpretation and application of Articles 36 and 41 of the 1975 Statute.

177. Regarding Article 27, it is the view of the Court that its formulation reflects not only the need to reconcile the varied interests of riparian States in a transboundary context and in particular in the use of a shared natural resource, but also the need to strike a balance between the use of the waters and the protection of the river consistent with the objective of sustainable development. The Court has already dealt with the obligations arising from Articles 7 to 12 of the 1975 Statute which have to be observed, according to Article 27, by any party wishing to exercise its right to use the waters of the river for any of the purposes mentioned therein insofar as such use may be liable to affect the régime of the river

or the quality of its waters. The Court wishes to add that such utilization could not be considered to be equitable and reasonable if the interests of the other riparian State in the shared resource and the environmental protection of the latter were not taken into account. Consequently, it is the opinion of the Court that Article 27 embodies this interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development.

2. The obligation to ensure that the management of the soil and woodland does not impair the régime of the river or the quality of its waters (Article 35)

178. Article 35 of the 1975 Statute provides that the parties:

> "undertake to adopt the necessary measures to ensure that the management of the soil and woodland and the use of groundwater and the waters of the tributaries of the river do not cause changes which may significantly impair the régime of the river or the quality of its waters".

179. Argentina contends that Uruguay's decision to carry out major eucalyptus planting operations to supply the raw material for the Orion (Botnia) mill has an impact on management of the soil and Uruguayan woodland, but also on the quality of the waters of the river. For its part, Uruguay states that Argentina does not make any arguments that are based on Uruguay's management of soil or woodland — "nor has it made any allegations concerning the waters of tributaries".

180. The Court observes that Argentina has not provided any evidence to support its contention. Moreover, Article 35 concerns the management of the soil and woodland as well as the use of groundwater and the water of tributaries, and there is nothing to suggest, in the evidentiary material submitted by Argentina, a direct relationship between Uruguay's management of the soil and woodland, or its use of ground water and water of tributaries and the alleged changes in the quality of the waters of the River Uruguay which had been attributed by Argentina to the Orion (Botnia) mill. Indeed, while Argentina made lengthy arguments about the effects of the pulp mill discharges on the quality of the waters of the river, no similar arguments have been presented to the Court regarding a deleterious relationship between the quality of the waters of the river and the eucalyptus-planting operations by Uruguay. The Court concludes that Argentina has not established its contention on this matter.

3. The obligation to co-ordinate measures to avoid changes in the ecological balance (Article 36)

181. Argentina contends that Uruguay has breached Article 36 of the

1975 Statute, which places the Parties under an obligation to co-ordinate through CARU the necessary measures to avoid changing the ecological balance of the river. Argentina asserts that the discharges from the Orion (Botnia) mill altered the ecological balance of the river, and cites as examples the 4 February 2009 algal bloom, which, according to it, provides graphic evidence of a change in the ecological balance, as well as the discharge of toxins, which gave rise, in its view, to the malformed rotifers whose pictures were shown to the Court.

182. Uruguay considers that any assessment of the Parties' conduct in relation to Article 36 of the 1975 Statute must take account of the rules adopted by CARU, because this Article, creating an obligation of co-operation, refers to such rules and does not by itself prohibit any specific conduct. Uruguay takes the position that the mill fully meets CARU requirements concerning the ecological balance of the river, and concludes that it has not acted in breach of Article 36 of the 1975 Statute.

183. It is recalled that Article 36 provides that "[t]he parties shall co-ordinate, through the Commission, the necessary measures to avoid any change in the ecological balance and to control pests and other harmful factors in the river and the areas affected by it".

184. It is the opinion of the Court that compliance with this obligation cannot be expected to come through the individual action of either Party, acting on its own. Its implementation requires co-ordination through the Commission. It reflects the common interest dimension of the 1975 Statute and expresses one of the purposes for the establishment of the joint machinery which is to co-ordinate the actions and measures taken by the Parties for the sustainable management and environmental protection of the river. The Parties have indeed adopted such measures through the promulgation of standards by CARU. These standards are to be found in Sections E3 and E4 of the CARU Digest. One of the purposes of Section E3 is "[t]o protect and preserve the water and its ecological balance". Similarly, it is stated in Section E4 that the section was developed "in accordance with . . . Articles 36, 37, 38, and 39".

185. In the view of the Court, the purpose of Article 36 of the 1975 Statute is to prevent any transboundary pollution liable to change the ecological balance of the river by co-ordinating, through CARU, the adoption of the necessary measures. It thus imposes an obligation on both States to take positive steps to avoid changes in the ecological balance. These steps consist not only in the adoption of a regulatory framework, as has been done by the Parties through CARU, but also in the observance as well as enforcement by both Parties of the measures adopted. As the Court emphasized in the *Gabčíkovo-Nagymaros* case:

> "in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage

to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage" (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78, para. 140).

186. The Parties also disagree with respect to the nature of the obligation laid down in Article 36, and in particular whether it is an obligation of conduct or of result. Argentina submits that, on a plain meaning, both Articles 36 and 41 of the 1975 Statute establish an obligation of result.

187. The Court considers that the obligation laid down in Article 36 is addressed to both Parties and prescribes the specific conduct of co-ordinating the necessary measures through the Commission to avoid changes to the ecological balance. An obligation to adopt regulatory or administrative measures either individually or jointly and to enforce them is an obligation of conduct. Both Parties are therefore called upon, under Article 36, to exercise due diligence in acting through the Commission for the necessary measures to preserve the ecological balance of the river.

188. This vigilance and prevention is all the more important in the preservation of the ecological balance, since the negative impact of human activities on the waters of the river may affect other components of the ecosystem of the watercourse such as its flora, fauna, and soil. The obligation to co-ordinate, through the Commission, the adoption of the necessary measures, as well as their enforcement and observance, assumes, in this context, a central role in the overall system of protection of the River Uruguay established by the 1975 Statute. It is therefore of crucial importance that the Parties respect this obligation.

189. In light of the above, the Court is of the view that Argentina has not convincingly demonstrated that Uruguay has refused to engage in such co-ordination as envisaged by Article 36, in breach of that provision.

4. The obligation to prevent pollution and preserve the aquatic environment (Article 41)

190. Article 41 provides that:

"Without prejudice to the functions assigned to the Commission in this respect, the parties undertake:

(a) to protect and preserve the aquatic environment and, in particular, to prevent its pollution, by prescribing appropriate rules and [adopting appropriate] measures in accordance with applicable international agreements and in keeping, where rele-

vant, with the guidelines and recommendations of international technical bodies;

(b) not to reduce in their respective legal systems:

1. the technical requirements in force for preventing water pollution, and
2. the severity of the penalties established for violations;

(c) to inform one another of any rules which they plan to prescribe with regard to water pollution in order to establish equivalent rules in their respective legal systems."

191. Argentina claims that by allowing the discharge of additional nutrients into a river that is eutrophic and suffers from reverse flow and stagnation, Uruguay violated the obligation to prevent pollution, as it failed to prescribe appropriate measures in relation to the Orion (Botnia) mill, and failed to meet applicable international environmental agreements, including the Biodiversity Convention and the Ramsar Convention. It maintains that the 1975 Statute prohibits any pollution which is prejudicial to the protection and preservation of the aquatic environment or which alters the ecological balance of the river. Argentina further argues that the obligation to prevent pollution of the river is an obligation of result and extends not only to protecting the aquatic environment proper, but also to any reasonable and legitimate use of the river, including tourism and other recreational uses.

192. Uruguay contends that the obligation laid down in Article 41 *(a)* of the 1975 Statute to "prevent . . . pollution" does not involve a prohibition on all discharges into the river. It is only those that exceed the standards jointly agreed by the Parties within CARU in accordance with their international obligations, and that therefore have harmful effects, which can be characterized as "pollution" under Article 40 of the 1975 Statute. Uruguay also maintains that Article 41 creates an obligation of conduct, and not of result, but that it actually matters little since Uruguay has complied with its duty to prevent pollution by requiring the plant to meet best available technology ("BAT") standards.

193. Before turning to the analysis of Article 41, the Court recalls that:

> "The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29.)

194. The Court moreover had occasion to stress, in the *Gabčíkovo-Nagymaros Project* case, that "the Parties together should look afresh at

the effects on the environment of the operation of the Gabčíkovo power plant" (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78, para. 140). The Court is mindful of these statements in taking up now the examination of Article 41 of the 1975 Statute.

195. In view of the central role of this provision in the dispute between the Parties in the present case and their profound differences as to its interpretation and application, the Court will make a few remarks of a general character on the normative content of Article 41 before addressing the specific arguments of the Parties. First, in the view of the Court, Article 41 makes a clear distinction between regulatory functions entrusted to CARU under the 1975 Statute, which are dealt with in Article 56 of the Statute, and the obligation it imposes on the Parties to adopt rules and measures individually to "protect and preserve the aquatic environment and, in particular, to prevent its pollution". Thus, the obligation assumed by the Parties under Article 41, which is distinct from those under Articles 36 and 56 of the 1975 Statute, is to adopt appropriate rules and measures within the framework of their respective domestic legal systems to protect and preserve the aquatic environment and to prevent pollution. This conclusion is supported by the wording of paragraphs *(b)* and *(c)* of Article 41, which refer to the need not to reduce the technical requirements and severity of the penalties already in force in the respective legislation of the Parties as well as the need to inform each other of the rules to be promulgated so as to establish equivalent rules in their legal systems.

196. Secondly, it is the opinion of the Court that a simple reading of the text of Article 41 indicates that it is the rules and measures that are to be prescribed by the Parties in their respective legal systems which must be "in accordance with applicable international agreements" and "in keeping, where relevant, with the guidelines and recommendations of international technical bodies".

197. Thirdly, the obligation to "preserve the aquatic environment, and in particular to prevent pollution by prescribing appropriate rules and measures" is an obligation to act with due diligence in respect of all activities which take place under the jurisdiction and control of each party. It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party. The responsibility of a party to the 1975 Statute would therefore be engaged if it was shown that it had failed to act diligently and thus take all appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction. The obligation of due diligence under Article 41 *(a)* in the adoption and enforcement of appropriate

rules and measures is further reinforced by the requirement that such rules and measures must be "in accordance with applicable international agreements" and "in keeping, where relevant, with the guidelines and recommendations of international technical bodies". This requirement has the advantage of ensuring that the rules and measures adopted by the parties both have to conform to applicable international agreements and to take account of internationally agreed technical standards.

198. Finally, the scope of the obligation to prevent pollution must be determined in light of the definition of pollution given in Article 40 of the 1975 Statute. Article 40 provides that: "For the purposes of this Statute, pollution shall mean the direct or indirect introduction by man into the aquatic environment of substances or energy which have harmful effects." The term "harmful effects" is defined in the CARU Digest as:

> "any alteration of the water quality that prevents or hinders any legitimate use of the water, that causes deleterious effects or harm to living resources, risks to human health, or a threat to water activities including fishing or reduction of recreational activities" (Title I, Chapter 1, Section 2, Article 1 *(c)* of the Digest (E3)).

199. The Digest expresses the will of the Parties and their interpretation of the provisions of the 1975 Statute. Article 41, not unlike many other provisions of the 1975 Statute, lays down broad obligations agreed to by the Parties to regulate and limit their use of the river and to protect its environment. These broad obligations are given more specific content through the co-ordinated rule-making action of CARU as established under Article 56 of the 1975 Statute or through the regulatory action of each of the parties, or by both means. The two regulatory actions are meant to complement each other. As discussed below (see paragraphs 201 to 202, and 214), CARU standards concern mainly water quality. The CARU Digest sets only general limits on certain discharges or effluents from industrial plants such as: "hydrocarbons", "sedimentable solids", and "oils and greases". As the Digest makes explicit, those matters are left to each party to regulate. The Digest provides that, as regards effluents within its jurisdiction, each party shall take the appropriate "corrective measures" in order to assure compliance with water quality standards (CARU Digest, Sec. E3: Pollution, Title 2, Chapter 5, Section 1, Article 3). Uruguay has taken that action in its Regulation on Water Quality (Decree No. 253/79) and in relation to the Orion (Botnia) mill in the conditions stipulated in the authorization issued by MVOTMA. In Argentina, the Entre Ríos Province, which borders the river opposite the plant, has regulated industrial discharges in a decree that also recognizes the binding effect of the

CARU Digest (Regulatory Decree No. 5837, Government of Entre Ríos, 26 December 1991, and Regulatory Decree No. 5394, Government of Entre Ríos, 7 April 1997).

200. The Court considers it appropriate to now address the question of the rules by which any allegations of breach are to be measured and, more specifically, by which the existence of "harmful effects" is to be determined. It is the view of the Court that these rules are to be found in the 1975 Statute, in the co-ordinated position of the Parties established through CARU (as the introductory phrases to Article 41 and Article 56 of the Statute contemplate) and in the regulations adopted by each Party within the limits prescribed by the 1975 Statute (as paragraphs *(a)*, *(b)* and *(c)* of Article 41 contemplate).

201. The functions of CARU under Article 56 *(a)* include making rules governing the prevention of pollution and the conservation and preservation of living resources. In the exercise of its rule-making power, the Commission adopted in 1984 the Digest on the uses of the waters of the River Uruguay and has amended it since. In 1990, when Section E3 of the Digest was adopted, the Parties recognized that it was drawn up under Article 7 *(f)* of the 1961 Treaty and Articles 35, 36, 41 to 45 and 56 *(a)* (4) of the 1975 Statute. As stated in the Digest, the "basic purposes" of Section E3 of the Digest are to be as follows:

"*(a)* to protect and preserve the water and its ecological balance;

(b) to ensure any legitimate use of the water considering long term needs and particularly human consumption needs;

(c) to prevent all new forms of pollution and to achieve its reduction in case the standard values adopted for the different legitimate uses of the River's water are exceeded;

(d) to promote scientific research on pollution." (Title I, Chapter 2, Section 1, Article 1.)

202. The standards laid down in the Digest are not, however, exhaustive. As pointed out earlier, they are to be complemented by the rules and measures to be adopted by each of the Parties within their domestic laws.

The Court will apply, in addition to the 1975 Statute, these two sets of rules to determine whether the obligations undertaken by the Parties have been breached in terms of the discharge of effluent by the mill as well as in respect of the impact of those discharges on the quality of the waters of the river, on its ecological balance and on its biodiversity.

(a) *Environmental Impact Assessment*

203. The Court will now turn to the relationship between the need for an environmental impact assessment, where the planned activity is liable to cause harm to a shared resource and transboundary harm, and the obligations of the Parties under Article 41 *(a)* and *(b)* of the 1975 Statute. The Parties agree on the necessity of conducting an environmental impact assessment. Argentina maintains that the obligations under the 1975 Statute viewed together impose an obligation to conduct an environmental impact assessment prior to authorizing Botnia to construct the plant. Uruguay also accepts that it is under such an obligation. The Parties disagree, however, with regard to the scope and content of the environmental impact assessment that Uruguay should have carried out with respect to the Orion (Botnia) mill project. Argentina maintains in the first place that Uruguay failed to ensure that "full environmental assessments [had been] produced, prior to its decision to authorize the construction . . ."; and in the second place that "Uruguay's decisions [were] . . . based on unsatisfactory environmental assessments", in particular because Uruguay failed to take account of all potential impacts from the mill, even though international law and practice require it, and refers in this context to the 1991 Convention on Environmental Impact Assessment in a Transboundary Context of the United Nations Economic Commission for Europe (hereinafter the "Espoo Convention") (*UNTS*, Vol. 1989, p. 309), and the 1987 Goals and Principles of Environmental Impact Assessment of the United Nations Environment Programme (hereinafter the "UNEP Goals and Principles") (*UNEP/WG.152/4 Annex (1987)*, document adopted by UNEP Governing Council at its 14th Session (Dec. 14/25 (1987)). Uruguay accepts that, in accordance with international practice, an environmental impact assessment of the Orion (Botnia) mill was necessary, but argues that international law does not impose any conditions upon the content of such an assessment, the preparation of which being a national, not international, procedure, at least where the project in question is not one common to several States. According to Uruguay, the only requirements international law imposes on it are that there must be assessments of the project's potential harmful transboundary effects on people, property and the environment of other States, as required by State practice and the International Law Commission 2001 draft Articles on Prevention of Transboundary Harm from Hazardous Activities, without there being any need to assess remote or purely speculative risks.

204. It is the opinion of the Court that in order for the Parties properly to comply with their obligations under Article 41 *(a)* and *(b)* of the 1975 Statute, they must, for the purposes of protecting and preserving the

aquatic environment with respect to activities which may be liable to cause transboundary harm, carry out an environmental impact assessment. As the Court has observed in the case concerning the *Dispute Regarding Navigational and Related Rights*,

> "there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law" (*Dispute Regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 242, para. 64).

In this sense, the obligation to protect and preserve, under Article 41 *(a)* of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.

205. The Court observes that neither the 1975 Statute nor general international law specify the scope and content of an environmental impact assessment. It points out moreover that Argentina and Uruguay are not parties to the Espoo Convention. Finally, the Court notes that the other instrument to which Argentina refers in support of its arguments, namely, the UNEP Goals and Principles, is not binding on the Parties, but, as guidelines issued by an international technical body, has to be taken into account by each Party in accordance with Article 41 *(a)* in adopting measures within its domestic regulatory framework. Moreover, this instrument provides only that the "environmental effects in an EIA should be assessed with a degree of detail commensurate with their likely environmental significance" (Principle 5) without giving any indication of minimum core components of the assessment. Consequently, it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment. The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once

operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.

206. The Court has already considered the role of the environmental impact assessment in the context of the procedural obligations of the Parties under the 1975 Statute (paragraphs 119 and 120). It will now deal with the specific points in dispute with regard to the role of this type of assessment in the fulfilment of the substantive obligations of the Parties, that is to say, first, whether such an assessment should have, as a matter of method, necessarily considered possible alternative sites, taking into account the receiving capacity of the river in the area where the plant was to be built and, secondly, whether the populations likely to be affected, in this case both the Uruguayan and Argentine riparian populations, should have, or have in fact, been consulted in the context of the environmental impact assessment.

(i) *The siting of the Orion (Botnia) mill at Fray Bentos*

207. According to Argentina, one reason why Uruguay's environmental impact assessment is inadequate is that it contains no analysis of alternatives for the choice of the mill site, whereas the study of alternative sites is required under international law (UNEP Goals and Principles, Espoo Convention, IFC Operational Policy 4.01). Argentina contends that the chosen site is particularly sensitive from an ecological point of view and unconducive to the dispersion of pollutants "[b]ecause of the nature of the waters which will receive the pollution, the propensity of the site to sedimentation and eutrophication, the phenomenon of reverse flow and the proximity of the largest settlement on the River Uruguay".

208. Uruguay counters that the Fray Bentos site was initially chosen because of the particularly large volume of water in the river at that location, which would serve to promote effluent dilution. Uruguay adds that the site is moreover easily accessible for river navigation, which facilitates delivery of raw materials, and local manpower is available there. Uruguay considers that, if there is an obligation to consider alternative sites, the instruments invoked for that purpose by Argentina do not require alternative locations to be considered as part of an environmental impact assessment unless it is necessary in the circumstances to do so. Finally, Uruguay affirms that in any case it did so and that the suitability of the Orion (Botnia) site was comprehensively assessed.

209. The Court will now consider, first, whether Uruguay failed to exercise due diligence in conducting the environmental impact assessment, particularly with respect to the choice of the location of the plant

and, secondly, whether the particular location chosen for the siting of the plant, in this case Fray Bentos, was unsuitable for the construction of a plant discharging industrial effluent of this nature and on this scale, or could have a harmful impact on the river.

210. Regarding the first point, the Court has already indicated that the Espoo Convention is not applicable to the present case (see paragraph 205 above); while with respect to the UNEP Goals and Principles to which Argentina has referred, whose legal character has been described in paragraph 205 above, the Court recalls that Principle 4 *(c)* simply provides that an environmental impact assessment should include, at a minimum, "[a] description of practical alternatives, as appropriate". It is also to be recalled that Uruguay has repeatedly indicated that the suitability of the Fray Bentos location was comprehensively assessed and that other possible sites were considered. The Court further notes that the IFC's Final Cumulative Impact Study of September 2006 (hereinafter "CIS") shows that in 2003 Botnia evaluated four locations in total at La Paloma, at Paso de los Toros, at Nueva Palmira, and at Fray Bentos, before choosing Fray Bentos. The evaluations concluded that the limited amount of fresh water in La Paloma and its importance as a habitat for birds rendered it unsuitable, while for Nueva Palmira its consideration was discouraged by its proximity to residential, recreational, and culturally important areas, and with respect to Paso de los Toros insufficient flow of water during the dry season and potential conflict with competing water uses, as well as a lack of infrastructure, led to its exclusion. Consequently, the Court is not convinced by Argentina's argument that an assessment of possible sites was not carried out prior to the determination of the final site.

211. Regarding the second point, the Court cannot fail to note that any decision on the actual location of such a plant along the River Uruguay should take into account the capacity of the waters of the river to receive, dilute and disperse discharges of effluent from a plant of this nature and scale.

212. The Court notes, with regard to the receiving capacity of the river at the location of the mill, that the Parties disagree on the geomorphological and hydrodynamic characteristics of the river in the relevant area, particularly as they relate to river flow, and how the flow of the river, including its direction and its velocity, in turn determines the dispersal and dilution of pollutants. The differing views put forward by the Parties with regard to the river flow may be due to the different modelling systems which each has employed to analyse the hydrodynamic features of the River Uruguay at the Fray Bentos location. Argentina implemented a three-dimensional modelling that measured speed and direction at ten different depths of the river and used a sonar — an Acoustic Doppler Current Profiler (hereafter

"ADCP") — to record water flow velocities for a range of depths for about a year. The three-dimensional system generated a large number of data later introduced in a numerical hydrodynamic model. On the other hand, Botnia based its environmental impact assessment on a bi-dimensional modelling — the RMA2. The EcoMetrix CIS implemented both three-dimensional and bi-dimensional models. However, it is not mentioned whether an ADCP sonar was used at different depths.

213. The Court sees no need to go into a detailed examination of the scientific and technical validity of the different kinds of modelling, calibration and validation undertaken by the Parties to characterize the rate and direction of flow of the waters of the river in the relevant area. The Court notes however that both Parties agree that reverse flows occur frequently and that phenomena of low flow and stagnation may be observed in the concerned area, but that they disagree on the implications of this for the discharges from the Orion (Botnia) mill into this area of the river.

214. The Court considers that in establishing its water quality standards in accordance with Articles 36 and 56 of the 1975 Statute, CARU must have taken into account the receiving capacity and sensitivity of the waters of the river, including in the areas of the river adjacent to Fray Bentos. Consequently, in so far as it is not established that the discharges of effluent of the Orion (Botnia) mill have exceeded the limits set by those standards, in terms of the level of concentrations, the Court finds itself unable to conclude that Uruguay has violated its obligations under the 1975 Statute. Moreover, neither of the Parties has argued before the Court that the water quality standards established by CARU have not adequately taken into consideration the geomorphological and hydrological characteristics of the river and the capacity of its waters to disperse and dilute different types of discharges. The Court is of the opinion that, should such inadequacy be detected, particularly with respect to certain areas of the river such as at Fray Bentos, the Parties should initiate a review of the water quality standards set by CARU and ensure that such standards clearly reflect the characteristics of the river and are capable of protecting its waters and its ecosystem.

(ii) *Consultation of the affected populations*

215. The Parties disagree on the extent to which the populations likely to be affected by the construction of the Orion (Botnia) mill, particularly on the Argentine side of the river, were consulted in the course of the environmental impact assessment. While both Parties agree that consultation of the affected populations should form part of an environmental impact assessment, Argentina asserts that international law imposes specific obligations on States in this regard. In support of this argument, Argentina points to Articles 2.6 and 3.8 of

the Espoo Convention, Article 13 of the 2001 International Law Commission draft Articles on Prevention of Transboundary Harm from Hazardous Activities, and Principles 7 and 8 of the UNEP Goals and Principles. Uruguay considers that the provisions invoked by Argentina cannot serve as a legal basis for an obligation to consult the affected populations and adds that in any event the affected populations had indeed been consulted.

216. The Court is of the view that no legal obligation to consult the affected populations arises for the Parties from the instruments invoked by Argentina.

217. Regarding the facts, the Court notes that both before and after the granting of the initial environmental authorization, Uruguay did undertake activities aimed at consulting the affected populations, both on the Argentine and the Uruguayan sides of the river. These activities included meetings on 2 December 2003 in Río Negro, and on 26 May 2004 in Fray Bentos, with participation of Argentine non-governmental organizations. In addition, on 21 December 2004, a public hearing was convened in Fray Bentos which, according to Uruguay, addressed among other subjects, the

> "handling of chemical products in the plant and in the port; the appearance of acid rain, dioxins, furans and other polychlorates of high toxicity that could affect the environment; compliance with the Stockholm Convention; atmospheric emissions of the plant; electromagnetic and electrostatic emissions; [and] liquid discharges into the river".

Inhabitants of Fray Bentos and nearby regions of Uruguay and Argentina participated in the meeting and submitted 138 documents containing questions or concerns.

218. Further, the Court notes that between June and November 2005 more than 80 interviews were conducted by the Consensus Building Institute, a non-profit organization specializing in facilitated dialogues, mediation, and negotiation, contracted by the IFC. Such interviews were conducted *inter alia* in Fray Bentos, Gualeguaychú, Montevideo, and Buenos Aires, with interviewees including civil society groups, non-governmental organizations, business associations, public officials, tourism operators, local business owners, fishermen, farmers and plantation owners on both sides of the river. In December 2005, the draft CIS and the report prepared by the Consensus Building Institute were released, and the IFC opened a period of consultation to receive additional feedback from stakeholders in Argentina and Uruguay.

219. In the light of the above, the Court finds that consultation by Uruguay of the affected populations did indeed take place.

(b) *Question of the production technology used in the Orion (Botnia) mill*

220. Argentina maintains that Uruguay has failed to take all measures to prevent pollution by not requiring the mill to employ the "best available techniques", even though this is required under Article 5 *(d)* of the POPs Convention, the provisions of which are incorporated by virtue of the "referral clause" in Article 41 *(a)* of the 1975 Statute. According to Argentina, the experts' reports it cites establish that the mill does not use best available techniques and that its performance is not up to international standards, in the light of the various techniques available for producing pulp. Uruguay contests these claims. Relying on the CIS, the second Hatfield report and the audit conducted by AMEC at the IFC's request, Uruguay asserts that the Orion (Botnia) mill is, by virtue of the technology employed there, one of the best pulp mills in the world, applying best available techniques and complying with European Union standards, among others, in the area.

221. Argentina, however, specifically criticizes the absence of any "tertiary treatment of effluent" (i.e., a third round of processing production waste before discharge into the natural environment), which is necessary to reduce the quantity of nutrients, including phosphorus, since the effluent is discharged into a highly sensitive environment. The mill also lacks, according to Argentina, an empty emergency basin, designed to contain effluent spills. Answering a question asked by a judge, Argentina considers that a tertiary treatment would be possible, but that Uruguay failed to conduct an adequate assessment of tertiary treatment options for the Orion (Botnia) mill.

222. Uruguay observes that "the experts did not consider it necessary to equip the mill with a tertiary treatment phase". Answering the same question, Uruguay argued that, though feasible, the addition of a tertiary treatment facility would not be environmentally advantageous overall, as it would significantly increase the energy consumption of the plant, its carbon emissions, together with sludge generation and chemical use. Uruguay has consistently maintained that the bleaching technology used is acceptable, that the emergency basins in place are adequate, that the mill's production of synthetic chemical compounds meets technological requirements and that the potential risk from this production was indeed assessed.

223. To begin with, the Court observes that the obligation to prevent pollution and protect and preserve the aquatic environment of the River Uruguay, laid down in Article 41 *(a)*, and the exercise of due diligence implied in it, entail a careful consideration of the technology to be used

by the industrial plant to be established, particularly in a sector such as pulp manufacturing, which often involves the use or production of substances which have an impact on the environment. This is all the more important in view of the fact that Article 41 *(a)* provides that the regulatory framework to be adopted by the Parties has to be in keeping with the guidelines and recommendations of international technical bodies.

224. The Court notes that the Orion (Botnia) mill uses the bleached Kraft pulping process. According to the December 2001 Integrated Pollution Prevention and Control Reference Document on Best Available Techniques in the Pulp and Paper Industry of the European Commission (hereinafter "IPPC-BAT"), which the Parties referred to as the industry standard in this sector, the Kraft process already accounted at that time for about 80 per cent of the world's pulp production and is therefore the most applied production method of chemical pulping processes. The plant employs an ECF-light (Elemental chlorine-free) bleaching process and a primary and secondary wastewater treatment involving activated sludge treatment.

225. The Court finds that, from the point of view of the technology employed, and based on the documents submitted to it by the Parties, particularly the IPPC-BAT, there is no evidence to support the claim of Argentina that the Orion (Botnia) mill is not BAT-compliant in terms of the discharges of effluent for each tonne of pulp produced. This finding is supported by the fact that, as shown below, no clear evidence has been presented by Argentina establishing that the Orion (Botnia) mill is not in compliance with the 1975 Statute, the CARU Digest and applicable regulations of the Parties in terms of the concentration of effluents per litre of wastewater discharged from the plant and the absolute amount of effluents that can be discharged in a day.

226. The Court recalls that Uruguay has submitted extensive data regarding the monitoring of effluent from the Orion (Botnia) mill, as contained in the various reports by EcoMetrix and DINAMA (EcoMetrix, Independent Performance Monitoring as required by the IFC Phase 2: Six Month Environmental Performance Review (July 2008); EcoMetrix, Independent Performance Monitoring as required by the IFC, Phase 3: Environmental Performance Review (2008 Monitoring Year) (hereinafter "EcoMetrix Third Monitoring Report"); DINAMA, Performance Report for the First Year of Operation of the Botnia Plant and the Environmental Quality of the Area of Influence, May 2009; DINAMA, Six Month Report on the Botnia Emission Control and Environmental Performance Plan), and that Argentina expressed the view, in this regard, that Uruguay had on this matter, much greater, if not exclusive, access to the factual evidence. However, the Court notes that Argentina has itself generated much factual information and that the materials which Uruguay produced have

been available to Argentina at various stages of the proceedings or have been available in the public domain. Therefore the Court does not consider that Argentina has been at a disadvantage with regard to the production of evidence relating to the discharges of effluent of the mill.

227. To determine whether the concentrations of pollutants discharged by the Orion (Botnia) mill are within the regulatory limits, the Court will have to assess them against the effluent discharge limits — both in terms of the concentration of effluents in each litre of wastewater discharged and the absolute amount of effluents that can be discharged in a day — prescribed by the applicable regulatory standards of the Parties, as characterized by the Court in paragraph 200 above, and the permits issued for the plant by the Uruguayan authorities, since the Digest only sets general limits on "hydrocarbons", "sedimentable solids", and "oils and greases", but does not establish specific ones for the substances in contention between the Parties. Argentina did not allege any non-compliance of the Orion (Botnia) mill with CARU's effluent standards (CARU Digest, Sec. E3 (1984, as amended)).

228. Taking into account the data collected after the start-up of the mill as contained in the various reports by DINAMA and EcoMetrix, it does not appear that the discharges from the Orion (Botnia) mill have exceeded the limits set by the effluent standards prescribed by the relevant Uruguayan regulation as characterized by the Court in paragraph 200 above, or the initial environmental authorization issued by MVOTMA (MVOTMA, Initial Environmental Authorization for the Botnia Plant (14 February 2005)), except for a few instances in which the concentrations have exceeded the limits. The only parameters for which a recorded measurement exceeded the standards set by Decree No. 253/79 or the initial environmental authorization by MVOTMA are: nitrogen, nitrates, and AOX (Adsorbable Organic Halogens). In those cases, measurements taken on one day exceeded the threshold. However, the initial environmental authorization of 14 February 2005 specifically allows yearly averaging for the parameters. The most notable of these cases in which the limits were exceeded is the one relating to AOX, which is the parameter used internationally to monitor pulp mill effluent, sometimes including persistent organic pollutants (POPs). According to the IPPC-BAT reference document submitted by the Parties, and considered by them as the industry standard in this sector, "the environmental control authorities in many countries have set severe restrictions on the discharges of chlorinated organics measured as AOX into the aquatic environment". Concentrations of AOX reached at one point on 9 January 2008, after the mill began operations, as high a level as 13 mg/L, whereas the maximum limit used in the environ-

mental impact assessment and subsequently prescribed by MVOTMA was 6 mg/L. However, in the absence of convincing evidence that this is not an isolated episode but rather a more enduring problem, the Court is not in a position to conclude that Uruguay has breached the provisions of the 1975 Statute.

(c) *Impact of the discharges on the quality of the waters of the river*

229. As pointed out earlier (see paragraph 165), the Parties have over the last three years presented to the Court a vast amount of factual and scientific material containing data and analysis of the baseline levels of contaminants already present in the river prior to the commissioning of the plant and the results of measurements of its water and air emissions after the plant started its production activities and, in some cases, until mid-2009.

230. Regarding the baseline data, the studies and reports submitted by the Parties contained data and analysis relating, *inter alia*, to water quality, air quality, phytoplankton and zooplankton of the river, health indicators and biomarkers of pollution in fish from the river, monitoring of fish fauna in the area around the Orion (Botnia) mill, fish community and species diversity in the river, concentrations of resin acids, chlorinated phenols and plant sterols in fish from the river, survey of species belonging to the genus Tillandsia, the Orion (Botnia) mill pre-start-up audit, and analysis of mercury and lead in fish muscle.

231. Argentina contends that Uruguay's baseline data were both inadequate and incomplete in many aspects. Uruguay rejects this allegation, and argues that Argentina has actually relied on Uruguay's baseline data to give its own assessment of water quality. According to Uruguay, contrary to Argentina's assertions, collection of baseline data by Uruguay started in August 2006, when DINAMA started to conduct for a period of 15 months pre-operational water quality monitoring prior to the commissioning of the plant in November 2007, which served to complement almost 15 years of more general monitoring that had been carried out within CARU under the PROCON programme (River Uruguay Water Quality and Pollution Control Programme, from the Spanish acronym for "Programa de Calidad de Aguas y Control de la Contaminación del Río Uruguay"). Argentina did not challenge counsel for Uruguay's statement during the oral proceedings that it used Uruguay's baseline data for the assessment of water quality.

232. The data presented by the Parties on the post-operation monitor-

ing of the actual performance of the plant in terms of the impact of its emissions on the river includes data obtained through different testing programmes conducted, *inter alia*, by an Argentine scientific team from two national universities, contracted by the National Secretariat of Environment and Sustainable Development of Argentina (ten sites), the OSE (Uruguay's State Agency for Sanitary Works, from the Spanish acronym for "Obras Sanitarias del Estado"), DINAMA, independently of Botnia (16 sites), and Botnia, reporting to DINAMA and the IFC (four sites; and testing the effluent).

233. The monitoring sites maintained by Argentina are located on the Argentine side of the river; with the most upstream position located 10 km from the plant and the furthest downstream one at about 16 km from the plant. Nevertheless, three of the sites (U0, U2 and U3) are near the plant; while another three are in Nandubaysal Bay and Inés Lagoon, the data from which, according to Argentina's counsel, "enabled the scientists to clearly set the bay apart, as it acts as an ecosystem that is relatively detached from the Uruguay river" (Scientific and Technical Report, Chapter 3, appendix: "Background Biogeochemical Studies", para. 4.1.2; see also *ibid.*, para. 4.3.1.2).

234. The monitoring sites maintained by Uruguay (DINAMA) and by Botnia are located on the Uruguayan side. The OSE monitoring point is located at the drinking water supply intake pipe for Fray Bentos, at or near DINAMA station 11.

235. Argentina's team gathered data from November 2007 until April 2009 with many of the results being obtained from October 2008. Uruguay, through DINAMA, has been carrying out its monitoring of the site since March 2006. Its most recent data cover the period up to June 2009. The OSE, in terms of its overall responsibility for Uruguayan water quality, has been gathering relevant data which has been used in the periodic reports on the operation of the plant.

236. The Court also has before it interpretations of the data provided by experts appointed by the Parties, and provided by the Parties themselves and their counsel. However, in assessing the probative value of the evidence placed before it, the Court will principally weigh and evaluate the data, rather than the conflicting interpretations given to it by the Parties or their experts and consultants, in order to determine whether Uruguay breached its obligations under Articles 36 and 41 of the 1975 Statute in authorizing the construction and operation of the Orion (Botnia) mill.

237. The particular parameters and substances that are subject to controversy between the Parties in terms of the impact of the discharges of effluent from the Orion (Botnia) mill on the quality of the waters of the

river are: dissolved oxygen; total phosphorus (and the related matter of eutrophication due to phosphate); phenolic substances; nonylphenols and nonylphenolethoxylates; and dioxins and furans. The Court now turns to the assessment of the evidence presented to it by the Parties with respect to these parameters and substances.

(i) *Dissolved oxygen*

238. Argentina raised for the first time during the oral proceedings the alleged negative impact of the Orion (Botnia) mill on dissolved oxygen in the river referring to data contained in the report of the Uruguayan OSE. According to Argentina, since dissolved oxygen is environmentally beneficial and there is a CARU standard which sets a minimum level of dissolved oxygen for the river waters (5.6 mg/L), the introduction by the Orion (Botnia) mill into the aquatic environment of substances or energy which caused the dissolved oxygen level to fall below that minimum constitutes a breach of the obligation to prevent pollution and to preserve the aquatic environment. Uruguay argues that Argentina's figures taken from the measurements of the OSE were for "oxidabilidad", which refers to the "demand for oxygen" and not for "oxígeno disuelto" — i.e., dissolved oxygen. Uruguay also claims that a drop in the level of demand for oxygen shows an improvement in the quality of the water, since the level of demand should be kept as low as possible.

239. The Court observes that a post-operational average value of 3.8 mg/L for dissolved oxygen would indeed, if proven, constitute a violation of CARU standards, since it is below the minimum value of 5.6 mg of dissolved oxygen per litre required according to the CARU Digest (E3, Title 2, Chapter 4, Section 2). However, the Court finds that the allegation made by Argentina remains unproven. First, the figures on which Argentina bases itself do not correspond to the ones for dissolved oxygen that appear in the EcoMetrix Third Monitoring Report, where the samples taken between February and October 2008 were all above the CARU minimum standard for dissolved oxygen. Secondly, DINAMA's Surface Water and Sediment Quality Data Report of July 2009 (Six Month Report: January-June) (hereinafter "DINAMA's Water Quality Report") (see p. 7, fig. 4.5: average of 9.4 mg/L) displays concentrations of dissolved oxygen that are well above the minimum level required under the CARU Digest. Thirdly, Argentina's 30 June 2009 report says in its summary that the records of water quality parameters over the period were "normal for the river with typical seasonal patterns of temperature and associated dissolved oxygen". The hundreds of measurements presented in the figures in that chapter of the "Colombo Report" support that conclusion even taking account of some slightly lower figures. Fourthly, the figures relating to dissolved oxygen contained in DINAMA's Water Quality Report have essentially the same characteristics as those gathered by Argentina — they

are above the CARU minimum and are the same upstream and downstream. Thus, the Court concludes that there appears to be no significant difference between the sets of data over time and that there is no evidence to support the contention that the reference to "oxidabilidad" in the OSE report referred to by Argentina should be interpreted to mean "dissolved oxygen".

(ii) *Phosphorus*

240. There is agreement between the Parties that total phosphorus levels in the River Uruguay are high. According to Uruguay, the total amount of (natural and anthropogenic) phosphorus emitted into the river per year is approximately 19,000 tonnes, of which the Orion (Botnia) mill has a share of some 15 tonnes (in 2008) or even less, as was expected for 2009. These figures have not been disputed by Argentina during the proceedings. Uruguay contends further that no violation of the provisions of the 1975 Statute can be alleged since the high concentration cannot be clearly attributed to the Orion (Botnia) mill as the source, and since no standard is set by CARU for phosphorus. Uruguay maintains also that based on data provided by DINAMA as compared to baseline data also compiled by DINAMA, it can be demonstrated that "[t]otal phosphorus levels were generally lower post-start-up as compared to the 2005-2006 baseline" (EcoMetrix Third Monitoring Report, March 2009).

241. A major disagreement between the Parties relates to the relationship between the higher concentration of phosphorus in the waters of the river and the algal bloom of February 2009 and whether operation of the Orion (Botnia) mill has caused the eutrophication of the river. Argentina claims that the Orion (Botnia) mill is the cause of the eutrophication and higher concentration of phosphates, while Uruguay denies the attributability of these concentrations as well as the eutrophication to the operation of the plant in Fray Bentos.

242. The Court notes that CARU has not adopted a water quality standard relating to levels of total phosphorus and phosphates in the river. Similarly, Argentina has no water quality standards for total phosphorus. The Court will therefore have to use the water quality and effluent limits for total phosphorus enacted by Uruguay under its domestic legislation, as characterized by the Court in paragraph 200 above, to assess whether the concentration levels of total phosphorus have exceeded the limits laid down in the regulations of the Parties adopted in accordance with Article 41 *(a)* of the 1975 Statute. The water quality standard for total phosphorus under the Uruguayan Regulation is 0.025 mg/L for certain purposes such as drinking water, irrigation of crops for human consumption and water used for recreational purposes which involve direct human contact with the water (Decree No. 253/79, Regulation of

Water Quality). The Uruguayan Decree also establishes a total phosphorus discharge standard of 5 mg/L (Decree No. 253/79 Regulation of Water Quality, Art. 11 (2)). The Orion (Botnia) mill must comply with both standards.

243. The Court finds that based on the evidence before it, the Orion (Botnia) mill has so far complied with the standard for total phosphorus in effluent discharge. In this context, the Court notes that, for 2008 according to the EcoMetrix Third Monitoring Report, the Uruguayan data recorded an average of 0.59 mg/L total phosphorus in effluent discharge from the plant. Moreover, according to the DINAMA 2009 Emissions Report, the effluent figures for November 2008 to May 2009 were between 0.053 mg/L and 0.41 mg/L (e.g., DINAMA, "Six Month Report on the Botnia Emission Control and Environmental Performance Plan November 11, 2008 to May 31, 2009" (22 July 2009) p. 5; see also pp. 25 and 26). Argentina does not contest these figures which clearly show values much below the standard established under the Uruguayan Decree.

244. The Court observes in this connection that as early as 11 February 2005, DINAMA, in its environmental impact assessment for the Orion (Botnia) mill, noted the heavy load of nutrients (phosphorus and nitrogen) in the river and stated that:

> "This situation has generated the frequent proliferation of algae, in some cases with an important degree of toxicity as a result of the proliferation of cyanobacteria. These proliferations, which in recent years have shown an increase in both frequency and intensity, constitute a health risk and result in important economic losses since they interfere with some uses of water, such as recreational activities and the public supply of drinking water. To this already existing situation it must be added that, in the future, the effluent in the plant will emit a total of 200 t/a of N[itrogen] and 20 t/a of P[hosphorus], values that are the approximate equivalent of the emission of the untreated sewage of a city of 65,000 people." (P. 20, para. 6.1.)

245. The DINAMA Report then continues as follows:

> "It is also understood that it is not appropriate to authorize any waste disposal that would increase any of the parameters that present critical values, even in cases in which the increase is considered insignificant by the company. Nevertheless, considering that the parameters in which the quality of water is compromised are not specific to the effluents of this project, but rather would be affected by the waste disposal of any industrial or domestic effluent under consideration, it is understood that the waste disposal proposed in the project may be accepted, as long as there is compensation for any

increase over and above the standard value for any of the critical parameters." (DINAMA Report, p. 21.)

246. The Court further notes that the initial environmental authorization, granted on 15 February 2005, required compliance by Botnia with those conditions, with CARU standards and with best available techniques as included in the December 2001 IPPC-BAT of the European Commission. It also required the completion of an implementation plan for mitigation and compensation measures. That plan was completed by the end of 2007 and the authorization to operate was granted on 8 November 2007. On 29 April 2008, Botnia and the OSE concluded an Agreement Regarding Treatment of the Municipal Wastewater of Fray Bentos, aimed at reducing total phosphorus and other contaminants.

247. The Court considers that the amount of total phosphorus discharge into the river that may be attributed to the Orion (Botnia) mill is insignificant in proportionate terms as compared to the overall total phosphorus in the river from other sources. Consequently, the Court concludes that the fact that the level of concentration of total phosphorus in the river exceeds the limits established in Uruguayan legislation in respect of water quality standards cannot be considered as a violation of Article 41 *(a)* of the 1975 Statute in view of the river's relatively high total phosphorus content prior to the commissioning of the plant, and taking into account the action being taken by Uruguay by way of compensation.

248. The Court will now turn to the consideration of the issue of the algal bloom of 4 February 2009. Argentina claims that the algal bloom of 4 February 2009 was caused by the Orion (Botnia) mill's emissions of nutrients into the river. To substantiate this claim Argentina points to the presence of effluent products in the blue-green algal bloom and to various satellite images showing the concentration of chlorophyll in the water. Such blooms, according to Argentina, are produced during the warm season by the explosive growth of algae, particularly cyanobacteria, responding to nutrient enrichment, mainly phosphate, among other compounds present in detergents and fertilizers.

249. Uruguay contends that the algal bloom of February 2009, and the high concentration of chlorophyll, was not caused by the Orion (Botnia) mill but could have originated far upstream and may have most likely been caused by the increase of people present in Gualeyguaychú during the yearly carnival held in that town, and the resulting increase in sewage, and not by the mill's effluents. Uruguay maintains that Argentine data actually prove that the Orion (Botnia) mill has not added to the concentration of phosphorus in the river at any time since it began operating.

250. The Parties are in agreement on several points regarding the algal bloom of 4 February 2009, including the fact that the concentrations of

nutrients in the River Uruguay have been at high levels both before and after the bloom episode, and the fact that the bloom disappeared shortly after it had begun. The Parties also appear to agree on the interdependence between algae growth, higher temperatures, low and reverse flows, and presence of high levels of nutrients such as nitrogen and phosphorus in the river. It has not, however, been established to the satisfaction of the Court that the algal bloom episode of 4 February 2009 was caused by the nutrient discharges from the Orion (Botnia) mill.

(iii) *Phenolic substances*

251. With regard to phenolic substances, Argentina contends that the Orion (Botnia) mill's emission of pollutants have resulted in violations of the CARU standard for phenolic substances once the plant started operating, while, according to Argentina, pre-operational baseline data did not show that standard to have been exceeded. Uruguay on the other hand argues that there have been numerous violations of the standard, throughout the river, long before the plant went into operation. Uruguay substantiates its arguments by pointing to several studies including the EcoMetrix final Cumulative Impact Study, which had concluded that phenolic substances were found to have frequently exceeded the water quality standard of 0.001 mg/L fixed by CARU.

252. The Court also notes that Uruguayan data indicate that the water quality standard was being exceeded from long before the plant began operating. The Cumulative Impact Study prepared in September 2006 by EcoMetrix for the IFC states that phenolics were found frequently to exceed the standard, with the highest values on the Argentine side of the river. The standard is still exceeded in some of the measurements in the most recent report before the Court but most are below it (DINAMA July 2009 Water Quality Report, p. 21, para. 4.1.11.2 and App. 1, showing measurements from 0.0005 to 0.012 mg/L).

253. During the oral proceedings, counsel for Argentina claimed that the standard had not previously been exceeded and that the plant has caused the limit to be exceeded. The concentrations, he said, had increased on average by three times and the highest figure was 20 times higher. Uruguay contends that the data contained in the DINAMA 2009 Report shows that the post-operational levels of phenolic substances were lower than the baseline levels throughout the river including at the OSE water intake.

254. Based on the record, and the data presented by the Parties, the Court concludes that there is insufficient evidence to attribute the alleged

increase in the level of concentrations of phenolic substances in the river to the operations of the Orion (Botnia) mill.

(iv) *Presence of nonylphenols in the river environment*

255. Argentina claims that the Orion (Botnia) mill emits, or has emitted, nonylphenols and thus has caused damage to, or at least has substantially put at risk, the river environment. According to Argentina, the most likely source of these emissions are surfactants (detergents), nonylphenolethoxylates used to clean the wood pulp as well as the installations of the plant itself. Argentina also contends that from 46 measurements performed in water samples the highest concentrations, in particular those exceeding the European Union relevant standards, were determined in front-downstream the mill and in the bloom sample collected on 4 February 2009, with lower levels upstream and downstream, indicating that the Orion (Botnia) mill effluent is the most probable source of these residues. In addition, according to Argentina, bottom sediments collected in front-downstream the mill showed a rapid increase of nonylphenols from September 2006 to February 2009, corroborating the increasing trend of these compounds in the River Uruguay. For Argentina, the spatial distribution of sub-lethal effects detected in rotifers (absence of spines), transplanted Asiatic clams (reduction of lipid reserves) and fish (estrogenic effects) coincided with the distribution area of nonylphenols suggesting that these compounds may be a significant stress factor.

256. Uruguay rejects Argentina's claim relating to nonylphenols and nonylphenolethoxylates, and categorically denies the use of nonylphenols and nonylphenolethoxylates by the Orion (Botnia) mill. In particular, it provides affidavits from Botnia officials to the effect that the mill does not use and has never used nonylphenols or nonylphenolethoxylate derivatives in any of its processes for the production of pulp, including in the pulp washing and cleaning stages, and that no cleaning agents containing nonylphenols are or have been used for cleaning the plant's equipment (Affidavit of Mr. González, 2 October 2009).

257. The Court recalls that the issue of nonylphenols was included in the record of the case before the Court only by the Report submitted by Argentina on 30 June 2009. Although testing for nonylphenols had been carried out since November 2008, Argentina has not however, in the view of the Court, adduced clear evidence which establishes a link between the nonylphenols found in the waters of the river and the Orion (Botnia) mill. Uruguay has also categorically denied before the Court the use of nonylphenolethoxylates for production or cleaning by the Orion (Botnia) mill. The Court therefore concludes that the evidence in

the record does not substantiate the claims made by Argentina on this matter.

(v) *Dioxins and furans*

258. Argentina has alleged that while the concentration of dioxins and furans in surface sediments is generally very low, data from its studies demonstrated an increasing trend compared to data compiled before the Orion (Botnia) mill commenced operations. Argentina does not claim a violation of standards, but relies on a sample of *sábalo* fish tested by its monitoring team, which showed that one fish presented elevated levels of dioxins and furans which, according to Argentina, pointed to a rise in the incidence of dioxins and furans in the river after the commissioning of the Orion (Botnia) mill. Uruguay contests this claim, arguing that such elevated levels cannot be linked to the operation of the Orion (Botnia) mill, given the presence of so many other industries operating along the River Uruguay and in neighbouring Nandubaysal Bay, and the highly migratory nature of the *sábalo* species which was tested. In addition, Uruguay advances that its testing of the effluent coming from the Orion (Botnia) mill demonstrate that no dioxins and furans could have been introduced into the mill effluent, as the levels detected in the effluent were not measurably higher than the baseline levels in the River Uruguay.

259. The Court considers that there is no clear evidence to link the increase in the presence of dioxins and furans in the river to the operation of the Orion (Botnia) mill.

(d) *Effects on biodiversity*

260. Argentina asserts that Uruguay "has failed to take all measures to protect and preserve the biological diversity of the River Uruguay and the areas affected by it". According to Argentina, the treaty obligation "to protect and preserve the aquatic environment" comprises an obligation to protect the biological diversity including "habitats as well as species of flora and fauna". By virtue of the "referral clause" in Article 41 *(a)*, Argentina argues that the 1975 Statute requires Uruguay, in respect of activities undertaken in the river and areas affected by it, to comply with the obligations deriving from the CITES Convention, the Biodiversity Convention and the Ramsar Convention. Argentina maintains that through its monitoring programme abnormal effects were detected in aquatic organisms — such as malformation of rotifers and loss of fat by clams — and the biomagnification of persistent pollutants such as dioxins and furans was detected in detritus feeding fish (such as the sábalo fish). Argentina also contends that the operation of the mill poses a threat, under conditions of reverse flow, to the Esteros de Farrapos site, situated "in the lower section of the River . . . downstream from

the Salto Grande dam and on the frontier with Argentina", a few kilometres upstream from the Orion (Botnia) mill.

261. Uruguay states that Argentina has failed to demonstrate any breach by Uruguay of the Biodiversity Convention, while the Ramsar Convention has no bearing in the present case because Esteros de Farrapos was not included in the list of Ramsar sites whose ecological character is threatened. With regard to the possibility of the effluent plume from the mill reaching Esteros de Farrapos, Uruguay in the oral proceedings acknowledged that under certain conditions that might occur. However, Uruguay added that it would be expected that the dilution of the effluent from the mill of 1:1000 would render the effluent quite harmless and below any concentration capable of constituting pollution. Uruguay contends that Argentina's claims regarding the harmful effects on fish and rotifers as a result of the effluents from the Orion (Botnia) mill are not credible. It points out that a recent comprehensive report of DINAMA on ichthyofauna concludes that compared to 2008 and 2009 there has been no change in species biodiversity. Uruguay adds that the July 2009 report of DINAMA, with results of its February 2009 monitoring of the sediments in the river where some fish species feed, stated that "the quality of the sediments at the bottom of the Uruguay River has not been altered as a consequence of the industrial activity of the Botnia plant".

262. The Court is of the opinion that as part of their obligation to preserve the aquatic environment, the Parties have a duty to protect the fauna and flora of the river. The rules and measures which they have to adopt under Article 41 should also reflect their international undertakings in respect of biodiversity and habitat protection, in addition to the other standards on water quality and discharges of effluent. The Court has not, however, found sufficient evidence to conclude that Uruguay breached its obligation to preserve the aquatic environment including the protection of its fauna and flora. The record rather shows that a clear relationship has not been established between the discharges from the Orion (Botnia) mill and the malformations of rotifers, or the dioxin found in the sábalo fish or the loss of fat by clams reported in the findings of the Argentine River Uruguay Environmental Surveillance (URES) programme.

(e) *Air pollution*

263. Argentina claims that the Orion (Botnia) mill has caused air, noise and visual pollution which negatively impact on "the aquatic environment" in violation of Article 41 of the 1975 Statute. Argentina also

argues that the 1975 Statute was concluded not only to protect the quality of the waters, but also, more generally, the "régime" of the river and "the areas affected by it, i.e., all the factors that affect, and are affected by the ecosystem of the river as a whole". Uruguay contends that the Court has no jurisdiction over those matters and that, in any event, the claims are not established on the merits.

264. With respect to noise and visual pollution, the Court has already concluded in paragraph 52 that it has no jurisdiction on such matters under the 1975 Statute. As regards air pollution, the Court is of the view that if emissions from the plant's stacks have deposited into the aquatic environment substances with harmful effects, such indirect pollution of the river would fall under the provisions of the 1975 Statute. Uruguay appears to agree with this conclusion. Nevertheless, in view of the findings of the Court with respect to water quality, it is the opinion of the Court that the record does not show any clear evidence that substances with harmful effects have been introduced into the aquatic environment of the river through the emissions of the Orion (Botnia) mill into the air.

(f) *Conclusions on Article 41*

265. It follows from the above that there is no conclusive evidence in the record to show that Uruguay has not acted with the requisite degree of due diligence or that the discharges of effluent from the Orion (Botnia) mill have had deleterious effects or caused harm to living resources or to the quality of the water or the ecological balance of the river since it started its operations in November 2007. Consequently, on the basis of the evidence submitted to it, the Court concludes that Uruguay has not breached its obligations under Article 41.

(g) *Continuing obligations: monitoring*

266. The Court is of the opinion that both Parties have the obligation to enable CARU, as the joint machinery created by the 1975 Statute, to exercise on a continuous basis the powers conferred on it by the 1975 Statute, including its function of monitoring the quality of the waters of the river and of assessing the impact of the operation of the Orion (Botnia) mill on the aquatic environment. Uruguay, for its part, has the obligation to continue monitoring the operation of the plant in accordance with Article 41 of the Statute and to ensure compliance by Botnia with Uruguayan domestic regulations as well as the standards set by CARU. The Parties have a legal obligation under the 1975 Statute to continue their co-operation through CARU and to enable it to devise the necessary means to promote the equitable utilization of the river, while protecting its environment.

* *

V. The Claims Made by the Parties in Their Final Submissions

267. Having concluded that Uruguay breached its procedural obligations under the 1975 Statute (see paragraphs 111, 122, 131, 149, 157 and 158 above), it is for the Court to draw the conclusions following from these internationally wrongful acts giving rise to Uruguay's international responsibility and to determine what that responsibility entails.

268. Argentina first requests the Court to find that Uruguay has violated the procedural obligations incumbent on it under the 1975 Statute and has thereby engaged its international responsibility. Argentina further requests the Court to order that Uruguay immediately cease these internationally wrongful acts.

269. The Court considers that its finding of wrongful conduct by Uruguay in respect of its procedural obligations per se constitutes a measure of satisfaction for Argentina. As Uruguay's breaches of the procedural obligations occurred in the past and have come to an end, there is no cause to order their cessation.

270. Argentina nevertheless argues that a finding of wrongfulness would be insufficient as reparation, even if the Court were to find that Uruguay has not breached any substantive obligation under the 1975 Statute but only some of its procedural obligations. Argentina maintains that the procedural obligations and substantive obligations laid down in the 1975 Statute are closely related and cannot be severed from one another for purposes of reparation, since undesirable effects of breaches of the former persist even after the breaches have ceased. Accordingly, Argentina contends that Uruguay is under an obligation to "re-establish on the ground and in legal terms the situation that existed before [the] internationally wrongful acts were committed". To this end, the Orion (Botnia) mill should be dismantled. According to Argentina, *restitutio in integrum* is the primary form of reparation for internationally wrongful acts. Relying on Article 35 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, Argentina maintains that restitution takes precedence over all other forms of reparation except where it is "materially impossible" or involves "a burden out of all proportion to the benefit deriving from restitution instead of compensation". It asserts that dismantling the mill is not materially impossible and would not create for the Respondent State a burden out of all proportion, since the Respondent has

> "maintained that construction of the mills would not amount to a fait accompli liable to prejudice Argentina's rights and that it was for Uruguay alone to decide whether to proceed with construction

> and thereby assume the risk of having to dismantle the mills in the event of an adverse decision by the Court",

as the Court noted in its Order on Argentina's request for the indication of provisional measures in this case (*Order of 13 July 2006, I.C.J. Reports 2006*, p. 125, para. 47). Argentina adds that whether or not restitution is disproportionate must be determined at the latest as of the filing of the Application instituting proceedings, since as from that time Uruguay, knowing of Argentina's request to have the work halted and the *status quo ante* re-established, could not have been unaware of the risk it ran in proceeding with construction of the disputed mill. Lastly, Argentina considers Articles 42 and 43 of the 1975 Statute to be inapplicable in the present case, since they establish a régime of responsibility in the absence of any wrongful act.

271. Taking the view that the procedural obligations are distinct from the substantive obligations laid down in the 1975 Statute, and that account must be taken of the purport of the rule breached in determining the form to be taken by the obligation of reparation deriving from its violation, Uruguay maintains that restitution would not be an appropriate form of reparation if Uruguay is found responsible only for breaches of procedural obligations. Uruguay argues that the dismantling of the Orion (Botnia) mill would at any rate involve a "striking disproportion between the gravity of the consequences of the wrongful act of which it is accused and those of the remedy claimed", and that whether or not a disproportionate burden would result from restitution must be determined as of when the Court rules, not, as Argentina claims, as of the date it was seised. Uruguay adds that the 1975 Statute constitutes a *lex specialis* in relation to the law of international responsibility, as Articles 42 and 43 establish compensation, not restitution, as the appropriate form of reparation for pollution of the river in contravention of the 1975 Statute.

272. The Court, not having before it a claim for reparation based on a régime of responsibility in the absence of any wrongful act, deems it unnecessary to determine whether Articles 42 and 43 of the 1975 Statute establish such a régime. But it cannot be inferred from these Articles, which specifically concern instances of pollution, that their purpose or effect is to preclude all forms of reparation other than compensation for breaches of procedural obligations under the 1975 Statute.

273. The Court recalls that customary international law provides for restitution as one form of reparation for injury, restitution being the re-establishment of the situation which existed before occurrence of the wrongful act. The Court further recalls that, where restitution is materially impossible or involves a burden out of all proportion to the benefit deriving from it, reparation takes the form of compensation or satisfaction, or even both (see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia),*

Judgment, I.C.J. Reports 1997, p. 81, para. 152; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 198, paras. 152-153; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 233, para. 460; see also Articles 34 to 37 of the International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts).

274. Like other forms of reparation, restitution must be appropriate to the injury suffered, taking into account the nature of the wrongful act having caused it. As the Court has made clear,

> "[w]hat constitutes 'reparation in an adequate form' clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury, since the question has to be examined from the viewpoint of what is the 'reparation in an adequate form' that corresponds to the injury" (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 59, para. 119).

275. As the Court has pointed out (see paragraphs 154 to 157 above), the procedural obligations under the 1975 Statute did not entail any ensuing prohibition on Uruguay's building of the Orion (Botnia) mill, failing consent by Argentina, after the expiration of the period for negotiation. The Court has however observed that construction of that mill began before negotiations had come to an end, in breach of the procedural obligations laid down in the 1975 Statute. Further, as the Court has found, on the evidence submitted to it, the operation of the Orion (Botnia) mill has not resulted in the breach of substantive obligations laid down in the 1975 Statute (paragraphs 180, 189 and 265 above). As Uruguay was not barred from proceeding with the construction and operation of the Orion (Botnia) mill after the expiration of the period for negotiation and as it breached no substantive obligation under the 1975 Statute, ordering the dismantling of the mill would not, in the view of the Court, constitute an appropriate remedy for the breach of procedural obligations.

276. As Uruguay has not breached substantive obligations arising under the 1975 Statute, the Court is likewise unable, for the same reasons, to uphold Argentina's claim in respect of compensation for alleged injuries suffered in various economic sectors, specifically tourism and agriculture.

277. Argentina further requests the Court to adjudge and declare that Uruguay must "provide adequate guarantees that it will refrain in future from preventing the Statute of the River Uruguay of 1975 from being applied, in particular the consultation procedure established by Chapter II of that Treaty".

278. The Court fails to see any special circumstances in the present case requiring the ordering of a measure such as that sought by Argentina. As the Court has recently observed:

> "[W]hile the Court may order, as it has done in the past, a State responsible for internationally wrongful conduct to provide the injured State with assurances and guarantees of non-repetition, it will only do so if the circumstances so warrant, which it is for the Court to assess.
>
> As a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed (see *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 63; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 272, para. 60; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 477, para. 63; and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). There is thus no reason, except in special circumstances . . . to order [the provision of assurances and guarantees of non-repetition]." (*Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 267, para. 150.)

279. Uruguay, for its part, requests the Court to confirm its right "to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute". Argentina contends that this claim should be rejected, in particular because it is a counter-claim first put forward in Uruguay's Rejoinder and, as such, is inadmissible by virtue of Article 80 of the Rules of Court.

280. There is no need for the Court to decide the admissibility of this claim; it is sufficient to observe that Uruguay's claim is without any practical significance, since Argentina's claims in relation to breaches by Uruguay of its substantive obligations and to the dismantling of the Orion (Botnia) mill have been rejected.

* * *

281. Lastly, the Court points out that the 1975 Statute places the Parties under a duty to co-operate with each other, on the terms therein set out, to ensure the achievement of its object and purpose. This obligation to co-operate encompasses ongoing monitoring of an industrial facility, such as the Orion (Botnia) mill. In that regard the Court notes that the Parties have a long-standing and effective tradition of co-operation and co-ordination through CARU. By acting jointly through CARU, the Parties have established a real community of interests and rights in the management of the River Uruguay and in the protection of its environment. They have also co-ordinated their actions through the joint

mechanism of CARU, in conformity with the provisions of the 1975 Statute, and found appropriate solutions to their differences within its framework without feeling the need to resort to the judicial settlement of disputes provided for in Article 60 of the Statute until the present case was brought before the Court.

* * *

282. For these reasons,

THE COURT,

(1) By thirteen votes to one,

Finds that the Eastern Republic of Uruguay has breached its procedural obligations under Articles 7 to 12 of the 1975 Statute of the River Uruguay and that the declaration by the Court of this breach constitutes appropriate satisfaction;

IN FAVOUR: *Vice-President* Tomka, *Acting President*; *Judges* Koroma, Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; *Judge* ad hoc Vinuesa;

AGAINST: *Judge* ad hoc Torres Bernárdez;

(2) By eleven votes to three,

Finds that the Eastern Republic of Uruguay has not breached its substantive obligations under Articles 35, 36 and 41 of the 1975 Statute of the River Uruguay;

IN FAVOUR: *Vice-President* Tomka, *Acting President*; *Judges* Koroma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; *Judge* ad hoc Torres Bernárdez;

AGAINST: *Judges* Al-Khasawneh, Simma; *Judge* ad hoc Vinuesa;

(3) Unanimously,

Rejects all other submissions by the Parties.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twentieth day of April, two thousand and ten, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Argentine Republic and the Government of the Eastern Republic of Uruguay, respectively.

(Signed) Peter TOMKA,
Vice-President.

(Signed) Philippe COUVREUR,
Registrar.

Judges AL-KHASAWNEH and SIMMA append a joint dissenting opinion to the Judgment of the Court; Judge KEITH appends a separate opinion to the Judgment of the Court; Judge SKOTNIKOV appends a declaration to the Judgment of the Court; Judge CANÇADO TRINDADE appends a separate opinion to the Judgment of the Court; Judge YUSUF appends a declaration to the Judgment of the Court; Judge GREENWOOD appends a separate opinion to the Judgment of the Court; Judge *ad hoc* TORRES BERNÁRDEZ appends a separate opinion to the Judgment of the Court; Judge *ad hoc* VINUESA appends a dissenting opinion to the Judgment of the Court.

(Initialled) P.T.

(Initialled) Ph.C.

Annex 20

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16 April 1938 and 11 March 1941

VOLUME III pp. 1905-1982

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LX.

TRAIL SMELTER CASE [1].

PARTIES: United States of America, Canada.

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

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

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

Canadian company.—Smelter operated in Canada.—Fumes.—Damages caused on United States territory.—Recourse to arbitration.—Date of damages.—Evidence.—Cause.—Effect.—Indirect and remote damage.—Violation of Sovereignty.—Interpretation of Special Agreement as to scope.—Preliminary correspondence.—Interest.—Future régime applicable.—Appointment of technical consultants.—Law applicable.—National law.—Matters of procedure.—Convention, Article IV.—Reference to American law.—Provisional decision.—Certain questions finally settled.—*Res judicata*.—Error in law.—Admissibility of revision.—Powers of tribunal.—Discovery of new facts.—Denial.—Costs of investigation.—Claim for indemnity.—Such costs no part of damage.—Claim for request to stop the nuisance.—Law applicable.—Coincidence of national and international laws.—Responsibility of States.—Air and water pollution.—Protection of sovereignty.—Institution of régime to prevent future damages.—Indemnity or compensation on account of decision or decisions rendered.

[1] For bibliography, index and tables, see end of this volume.

Special agreement.

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

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

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

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

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

Recognizing the desirability and necessity of effecting a permanent settlement,

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

The President of the United States of America:

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

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

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

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

ARTICLE I.

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

ARTICLE II.

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

[1] U. S. Treaty Series No. 893.

referred to it under the provisions of Article III. The Tribunal shall consist of a chairman and two national members.

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

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

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

ARTICLE III.

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

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

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

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

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

ARTICLE IV.

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

ARTICLE V.

The procedure in this adjudication shall be as follows:

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

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

3. Within six months from the date on which the exchange of statements and evidence provided for in paragraphs 1 and 2 of this article has been com-

pleted, each Agent shall present in the manner prescribed by paragraphs 1 and 2 an answer to the statement of the other with any additional evidence and such argument as he may desire to submit.

ARTICLE VI.

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

ARTICLE VII.

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

ARTICLE VIII.

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

ARTICLE IX.

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

ARTICLE X.

The Tribunal, in determining the first question and in deciding upon the indemnity, if any, which should be paid in respect to the years 1932 and 1933, shall give due regard to the results of investigations and inquiries made in subsequent years.

Investigators, whether appointed by or on behalf of the Governments, either jointly or severally, or the Tribunal, shall be permitted at all reasonable times to enter and view and carry on investigations upon any of the properties upon which damage is claimed to have occurred or to be occurring, and their reports may, either jointly or severally, be submitted to and received by the Tribunal for the purpose of enabling the Tribunal to decide upon any of the Questions

ARTICLE XI.

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

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

ARTICLE XII.

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

ARTICLE XIII.

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

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

ARTICLE XIV.

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

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this convention and have hereunto affixed their seals.

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

[*seal*] PIERRE DE L. BOAL.
[*seal*] R. B. BENNETT.

TRAIL SMELTER ARBITRAL TRIBUNAL.

DECISION

REPORTED ON APRIL 16, 1938, TO THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND TO THE GOVERNMENT OF THE DOMINION OF CANADA UNDER THE CONVENTION SIGNED APRIL 15, 1935.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PART ONE.

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

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

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

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

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

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

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

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

As to climatic conditions, it may be stated that the region is, in general, a dry one though not what is termed "arid". The average annual precipitation at Northport from 1923 to 1936 inclusive averaged slightly below seventeen inches. It varied from a minimum of 9.60 inches in 1929 to a maximum of 26.04 inches in 1927. The average crop-year precipitation over the same period is slightly over sixteen inches, with a variation from a minimum of 10.10 inches in 1929 to a maximum of 24.01 in 1927. The rainfall in the growing-season months of April, May and June at Northport, has been in 1932, 5.43 inches; in 1933, 3.03 inches; in 1934, 2.74 inches; in 1933, 2.02 inches; in 1929, 4.44 inches. The average snowfall was reported in 1915 by United States Government agents as fifty-eight inches at Northport. The average humidity varies with some regularity from day to day. In June, 1937, at Northport, it had an average maximum of 74 per cent at 5 a.m. and an average minimum of 26 per cent at 5 p.m.

The range of temperature in the different months as it appears from the records of the years 1934, 1935, and 1936, at Northport was as follows: In the months of November, December, January and February, the lowest temperature was 1° (in January, 1936), and the highest was 60° (in November 1934); in the growing-season months of April, May, June and July, the lowest temperature was 12° (in April, 1936), and the highest was 110° (in July, 1934); in the remaining months of August, September, October and March, the lowest temperature was 8° (in October, 1935), and the highest was 102° (in August, 1934).

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

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

	1900	*1910*	*1920*	*1930*
Boundary	74	91	73	87
Northport	845	692	1,093	510
Nigger Creek	. . .	27	97	29
Frontier	. . .	103	71	22
Cummins	. . .	. . .	244	89
Doyle	. . .	187	280	195
Deep Creek	65	119	87	81
Flat Creek	52	126	137	71
Williams	71	103	60	37

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

The area of all land in farms in the above precincts, according to the United States Census of Agriculture in 1925 was 21,551 acres; in 1930, 28,641 acres; and in 1935, 24,772 acres. The area in crop land in 1925 was 3,474 acres; in 1930, 4,285 acres; and in 1933, 4,568 acres. The farm population in 1925 was 496; in 1930, 603; and in 1935, 466.

In the precincts nearest the boundary line, *viz.*, Boundary and Northport (including Frontier and Nigger Creek prior to 1935 Census), the area of all land in farms in 1925 was 5,292 acres; in 1930, 8,040 acres; and in 1935, 5,666 acres. The area in crop land in 1925 was 798 acres; in 1930, 1,227 acres; and in 1935, 963 acres. The farm population in 1925 was 149; in 1930, 193; and in 1935, 145.

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

The record and evidence placed before the Tribunal does not disclose in detail claims for damage on account of fumigations which were made between 1896 and 1908, but it does appear that there was considerable litigation in Stevens County courts based on such claims. It also appears in evidence that prior to 1908, the company had purchased smoke easements from sixteen owners of land in the vicinity covering 2,330 acres. It further appears that from 1916 to 1921, claims for damages were made and suits

were brought in the courts, and additional smoke easements were purchased from thirty-four owners of land covering 5,556.7 acres. These various smoke easements extended to lands lying four or five miles north and three miles south and three miles east of Northport and on both sides of the river, and they extended as far as the boundary line.

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

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

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

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

Milch cattle are raised to a certain extent and they are grazed on the wild grasses on the hills and mountains in the summer months, but the dairying

business depends on existence of sufficient land under cultivation as an adjunct to the dairy to provide adequate forage for the winter months.

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

In 1896, a smelter was started under American auspices near the locality known as Trail. In 1906, the Consolidated Mining and Smelting Company of Canada, Limited, obtained a charter of incorporation from the Canadian authorities, and that company acquired the smelter plant at Trail as it then existed. Since that time, the Canadian Company, without interruption, has operated the Smelter, and from time to time has greatly added to the plant until it has become one of the best and largest equipped smelting plants on this continent. In 1925 and 1927, two stacks of the plant were erected to 409 feet in height and the Smelter greatly increased its daily smelting of zinc and lead ores. This increased product resulted in more sulphur dioxide fumes and higher concentrations being emitted into the air; and it is claimed by one Government (though denied by the other) that the added height of the stacks increased the area of damage in the United States. In 1916, about 5,000 tons of sulphur per month were emitted; in 1924, about 4,700 tons; in 1926, about 9,000 tons—an amount which rose near to 10,000 tons per month in 1903. In other words, about 300-350 tons of sulphur were being emitted daily in 1930. (It is to be noted that one ton of sulphur is substantially the equivalent of two tons of sulphur dioxide or SO_2.)

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

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

It has been contended that either by virtue of the Constitution of the State of Washington or of a statute of that State, the Trail Smelter (a Canadian corporation) was unable to acquire ownership or smoke easements over real estate, in the State of Washington, in any manner. In regard to this statement, either as to the fact or as to the law, the Tribunal expresses no opinion and makes no ruling.

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

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

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

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

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

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

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

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

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

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

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

Consideration of the terms of that Convention is given more in detail in the later parts of the Tribunal's decision.

PART TWO.

The first question under Article III of the Convention which the Tribunal is required to decide is as follows:

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

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

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

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

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

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

Since the Tribunal has concluded that, on all the evidence, the existence of injury has been proved, it becomes necessary to consider next the cause of injury. This question resolves itself into two parts—first, the actual caus-

ing factor, and second, the manner in which the causing factor has operated. With reference to causation, the Tribunal desires to make the following preliminary general observations, as to some of the evidence produced before it.

(1) The very satisfactory data from the automatic sulphur dioxide recorders installed by each of the Governments, covering large portions of each year from 1931 to 1937, have been of great value in this controversy. These records have thrown much light upon the nature, the durations, and the concentrations of the fumigations involved; and they will prove of scientific value in any future controversy which may arise on the subject of fumigations.

(2) The experiments conducted by the United States at Wenatchee in the State of Washington and by Canada at Summerland in British Columbia, and the experiments conducted by scientists elsewhere, the results of which have been testified to at length before the Tribunal, have been of value with respect to the effects of sulphur dioxide fumigations on plant life and on the yield of crops. While the Canadian experiments were more extensive than the American, and were carried out under more satisfactory conditions, the Tribunal feels that the number of experiments was still too limited to warrant in all cases so positive conclusions as witnesses were inclined to draw from them; and on the question of the effect of fumigations on the yield of crops, it seems probable that more extensive experimentation would have been desirable, especially since, while the total number of experiments was large, the number devoted to establishing each type of result was in most cases rather small. Moreover, conditions in experimental fumigation plots can rarely exactly reproduce conditions in the field; and there was some evidence that injury occurred on various occasions to plant life in the field, under durations and degrees of concentration which never produced injury to plant life in the experimental plots.

(3) Valuable evidence as to the actual condition of crops in the field was given by experts on both sides, and by certain non-expert witnesses. Unfortunately, such field observations were not made continuously in any crop season or in all parts of the area of probable damage; and, even more unfortunately, they were not made simultaneously by the experts for the two countries, who acted separately and without comparing their conclusions with each other contemporaneously.

(4) The effects of sulphur dioxide fumigations upon the forest trees, especially upon the conifers, were testified to at great length by able experts, and their studies in the field and in the experimental plots, with reference to mortality, deterioration, retardation of ring growth and shoot growth, sulphur content of needles, production of cones and reproduction in general, have been of great value. As is usual in this type of case, though the poor condition of the trees was not controverted, experts were in disagreement as to the cause—witnesses for the United States generally finding the principal cause of injury to be sulphur dioxide fumigations, and witnesses for Canada generally attributing the injury principally to ravages of insects, diseases, winter and summer droughts, unwise methods of logging, and forest and ground fires. It is possible that each side laid somewhat too great emphasis on the causes for which it contended.

(5) Evidence was produced by both sides as to experimental tests of the sulphur contents of the soils and of the waters in the area. These tests, however, were, for the most part, too limited in number and in location to afford a satisfactory basis from which to draw absolutely positive conclusions.

In general, it may be said that the witnesses expressed contrary views and arrived at opposite conclusions, on most of the questions relating to cause of injury.

The Tribunal is of opinion that the witnesses were completely honest and sincere in their views and that the expert witnesses arrived at their conclusions as the integral result of their high technical skill. At the same time, it is apparent that remarks are very pertinent, such as were made by Judge Johnson in the United States District Court (Anderson *v.* American Smelting & Refining Co., 265 Federal Reporter 928) in 1919:

> Plaintiff's witnesses give it as their opinion and best judgment that SO_2 was the cause of the injuries appearing upon the plants in the field; defendants' witnesses in like manner express the opinion and give it as their best judgment that the injury observed was caused by something else other than SO_2. It must not be overlooked that witnesses who give opinion evidence are sometimes unconsciously influenced by their environment, and their evidence colored, if not determined, by their point of view. The weight to be given to such evidence must be determined in the light of the knowledge, the training, the power of observation and analysis, and in general the mental equipment, of each witness, assuming, as I do, that the witnesses of the respective parties were honest and intended to testify to the truth as they perceived it. . . . The expert witnesses called by plaintiffs, who made a survey of the affected area, made valuable observations; but seem to have assumed as a basis for their conclusions that leaf markings having the appearance of SO_2 injury were in fact SO_2 injury—an unwarranted generalization. . . . It is quite evident that the testimony of witnesses whose mental attitude is to account for every injury as produced by some other cause is no more convincing than the testimony of witnesses who attribute every injury similar in appearance to SO_2 injury to SO_2 as the sole and only cause. The expert witnesses of defendants manifested the same general mental attitude; that is to say, they were able to find a sufficient cause operating in any particular case other than SO_2, and therefore gave it as their opinion that such other cause was the real cause of the injury, or markings observed. The real value I find in the testimony of these opinion witnesses of the parties lies in their description of appearances and statement of the surrounding circumstances, rather than in their ultimate expressed opinions. I have no doubt of the accuracy of the experiments made by the expert and scientific witnesses called by the parties.

On the basis of the evidence, the United States contended that damage had been caused by the emission of sulphur dioxide fumes at the Trail Smelter in British Columbia, which fumes, proceeding down the valley of the Columbia River and otherwise, entered the United States. The Dominion of Canada contended that even if such fumes had entered the United States, they had caused no damage after January 1, 1932. The witnesses for both Governments appeared to be definitely of the opinion that the gas was carried from the Smelter by means of surface winds, and they based their views on this theory of the mechanism of gas distribution. The Tribunal finds itself unable to accept this theory. It has, therefore, looked for a more probable theory, and has adopted the following as permitting a more adequate correlation and interpretation of the facts which have been placed before it.

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

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

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

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

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

different on the east and the west side of the valley, but the possible bearing of this upon fumigations in the valley must await further study.

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

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

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

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

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

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

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

The properties owned by individual farmers alleged by the United States to have suffered damage are divided by the United States in its itemized schedule of damages, into three classes: (a) properties of "farmers residing

on their farms"; (b) properties of "farmers who do not reside on their farms"; (ab) properties of "farmers who were driven from their farms"; (c) properties of large owners of land. The Tribunal has not adopted this division.

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

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

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

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

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

the reduction in the value of the land itself. The Tribunal is of opinion that such injury to the soil itself can be cured by artificial means, and it has awarded indemnity with this fact in view on the basis of the data available.

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

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

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

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

(A) As regards these lands in their use as pasture lands, the Tribunal is of opinion that there is no evidence of any marked susceptibility of wild grasses to fumigations, and very little evidence to prove the respective amounts of uncleared land devoted to wild grazing grass and barren or shrub land, or to prove the value thereof, which would be necessary in order to estimate the value of the reduction of the use of such land. The Tribunal, however, has awarded a small indemnity for damage to about 200 acres of such lands in the immediate neighborhood of the boundary.

It has been contended that the death of trees and shrubs due to fumigation has had an injurious effect on the water storage capacity of the soil and has even created some soil erosion. The Tribunal is of opinion that while there may have been some erosion of soil and impairment of water storage capacity in a limited area near the boundary, it is impossible to determine whether such damage has been due to fires or to mortality of trees and shrubs caused by fumigation.

(B) As regards uncleared land in its use as timberland, the Tribunal has found that damage due to fumigation has occurred to trees during the years 1932 to 1937 inclusive, in varying degrees, over areas varying not only from year to year but also from species to species. It has not seemed feasible to give a determination of the geographical extent of the damage except in so far as it may be stated broadly, that a territory coinciding in extent with the

Bayle cruises (hereinafter described) may be considered as an average area, although the contours of the actually damaged area do not coincide for any given species in any given year with that area and the intensity of the damage in a given year and for a given species varies, of course, greatly, according to location.

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

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

> Since a cruise of the timber in the Northport area has not been made by a forest engineer of either Government, this report does not make any recommendations for settlements of timber damage. However, a brief statement as to the timber situation is submitted.
>
> *Present condition.* Practically the entire region was covered with timber when it was first settled. Probably 90 per cent of the merchantable timber has now been removed. The timber on about one-third of the area has been cut only in part, that is to say only the more valuable species have been logged, and on a large part of the rest of the area that has been cut-over are stands too small to cut at time of logging. These so-called residual stands, together with the remaining virgin timber, make up the timber resources of the Northport area at the present time. Heavy toll of these has been taken this season by two large forest fires still smouldering as this report is being written. . . . Government forest pathologists are working to determine the zone of economic injury to timber, but their task, a difficult one at best, is incomplete. Much additional data must be collected and after that all must be compiled and analyzed, hence no attempt is made to submit a map with this report delimiting the zone of injury to forest trees. Admittedly, however, serious damage to timber has already taken place and reproduction is impaired.

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[1] See Henry W. Sterrett *v.* Northport Smelting and Refining Co. (1902), 30 Washington Reports 164; Edwin J. Rowe *v.* Northport Smelting and Refining Co. (1904), 35 Washington Reports 101; Charles N. Park *v.* Northport Smelting and Refining Co. (1907), 47 Washington Reports 597; John O. Johnson *v.* Northport Smelting and Refining Co. (1908), 50 Washington Reports 507. These cases were not cited by counsel for either side.

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

It is to be further noted that in the official document of the State of Washington entitled *Forest Statistics, Stevens County, Washington, Forest Survey Release No.* 5, *A June,* 1937. *Progress Release,* there appears a map entitled *Forest Survey, Stevens County, Washington,* 1935, on which four types of forest lands are depicted by varied colorings and linings, and most of the lands in the area now in question are described as—"Principally Non-Restocked Old Burns and Cut-Overs; Rocky and Subalpine Areas" and "Principally Immature Forest—Recent Burns and Cut-Overs". And these terms are defined as follows (page 23): "Woodland—that portion of the forest land neither immediately or potentially productive of commercial timber. Included in this classification are: subalpine—stands above the altitude range of merchantability; rocky, non-commercial—area too steep, sterile, or rocky to produce merchantable timber." This description of timber as inaccessible, from the standpoint of logging, is further confirmed by the report made by G. J. Bayle (the forest engineer referred to in "The Deans' Report") of cruises made by him prior to 1932 (Canadian Document C 4, pp. 5,6) to the effect that much of the timber is "far away from transportation", "of very little, if any, commercial value", "sale price would not bring the cost of operating", "scattered", "located on steep slopes". On page 9 of the *Forest Survey Release No.* 5, above referred to, it is further stated:

> As a consequence of the recent serious fires principally in the north portion of the county, 52,402 acres of timberland have recently been deforested, many of which are restocking. Also concentrated in the north end of the county are 77,650 deforested acres representing approximately 6 per cent of the timberland area on which the possibilities of natural regeneration are slight. Much of this latter deforestation is thought to be the effect of alleged smelter fume damage.

(a) The Tribunal has adopted as the measure of indemnity, to be applied on account of damage in respect of uncleared land used for merchantable timber, the measure of damages applied by American courts, *viz.*, that since the destruction of merchantable timber will generally impair the value of the land itself, the measure of damage should be the reduction in the value of the land itself due to such destruction of timber; but under the leading American decisions, however, the value of the merchantable timber destroyed is, in general, deemed to be substantially the equivalent of the reduction in the value of the land (see *Sedgwick on Damages,* 9th Ed. 1920, Section 937a). The Tribunal is unable to accept the method contended for by the United States of estimating damage to uncleared timberland by applying to the value of such land as stated by the farmers (after deducting value of the timber) a ratio of loss measured by the reduced crop yield on cleared land. The Tribunal is of opinion, here as elsewhere in this decision, that, in accordance with American law, it is not restricted to the method proposed by the

United States in the determination of amount of damages, so long as its findings remain within the amount of the claim presented to it.

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

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

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

With regard to the contention made by the United States of damage due to failure of trees to produce seed as a result of fumigation, the Tribunal is of opinion that it is not proved that fumigation prevents trees from producing sufficient seeds, except in so far as the parent-trees may be destroyed or deteriorated themselves. This view is confirmed by the Hedgcock studies on cone production of yellow pine. There is a rather striking correlation between the percentage of good, fair, and poor trees found in the Hedgcock Census studies and the percentages of trees bearing a normal amount of cones, trees bearing few cones, and trees bearing no cones in the Hedgcock cone

production studies. In so far, however, as lack of cone production since January 1, 1932, is due to death or impairment of the parent-trees occurring before that date, the Tribunal is of opinion that such failure of reproduction both was caused and occurred prior to January 1, 1932, with one possible exception as follows: From standard American writings on forestry, it appears that seeds of Douglas fir and yellow pine rarely germinate more than one year after they are shed [1], but if a tree was killed by fumigation in 1931, germination from its seeds might occur in 1932. It appears, however, that Douglas fir and yellow pine only produce a good crop of seeds once in a number of years. Hence, the Tribunal concludes that the loss of possible reproduction from seeds which might have been produced by trees destroyed by fumigation in 1931 is too speculative a matter to justify any award of indemnity.

It is fairly obvious from the evidence produced by both sides that there is a general lack of reproduction of both yellow pine and Douglas fir over a fairly large area, and this is certainly due to some extent to fumigations. But, with the data at hand, it is impossible to ascertain to what extent this lack of reproduction is due to fumigations or to other causes such as fires occurring repeatedly in the same area or destruction by logging of the cone-bearing trees. It is further impossible to ascertain to what extent lack of reproduction due to fumigations can be traced to mortality or deterioration of the parent-trees which occurred since the first of January, 1932. It may be stated, in general terms, that the loss of reproduction due to the forest being depleted will only become effective when the amount of these trees per acre falls below a certain minimum [2]. But the data at hand do not enable the Tribunal to say where and to what extent a depletion below this minimum occurred through fumigations in the years under consideration. An even approximate appraisal of the damage is further complicated by the fact that there is evidence of reproduction of lodgepole pine, cedar, and larch, even close to the boundary and in the Columbia River Valley, at least in some locations. This substitution may not be due entirely to fumigations, as it appears from standard American works on conifers that reproduction of yellow pine is often patchy; that when yellow pine is substantially destroyed in a given area, it is generally supplanted by another species of trees; and that lodgepole pine in particular has a tendency to invade and take full possession of yellow pine territory when a fire has occurred. While the other species are inferior, their reproduction is, nevertheless, a factor which has to be taken into account; but here again quantitative data are entirely lacking. It is further to be noted that the amount of rainfall is an important factor in the reproduction of yellow pine, and that where the normal annual rainfall is but little more than eighteen inches, yellow pine does not appear to thrive. It appears in evidence that the annual precipitation at Northport, in a period of fourteen years from 1923 to 1936, averaged slightly below seventeen inches. With all these considerations in mind, the

[1] See "Life of Douglas Fir Seed in the Forest Floor", by Leo A. Isaac, Journal of Forestry. Vol. 23 (1935), pp. 61-66; "The Pine Trees in the Rocky Mountain Region", by G. B. Sudworth, United States Department of Agriculture Bulletin (1917); "Timber Growing and Logging Practice in the Douglas Fir Region", by T. T. Munger and W. B. Greely, United States Department of Agriculture Technical Bulletin (1927). As to yellow pine and rainfall, see "Western Yellow Pine in Oregon", by T. T. Munger, United States Department of Agriculture Technical Bulletin (1917).

[2] Applied Silviculture in the United States, by R. H. Westveld (1935).

Tribunal has, however, taken lack of reproduction into account to some extent in awarding indemnity for damage to uncleared land in use for timber.

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

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

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

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

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

(6) The United States in its Statement (pp. 49-50) alleges the discharge by the Trail Smelter, not only of "smoke, sulphurous fumes, gases", but

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

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

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

for violation of national sovereignty, but as compensation for expenses incurred by individual claimants in prosecuting their claims for wrongful acts by the offending Government.

In his oral argument, the Agent for the United States, Mr. Sherley, claimed repayment of the aforesaid expenses of investigations on a further and separate ground, *viz.*, as an incident to damages, saying (Transcript, p. 5157): "Costs and interest are incident to the damage, the proof of the damage which occurs through a given act complained of", and again (Transcript, p. 5158): "The point is this, that it goes as an incident to the award of damage." The Tribunal is unable to accept this view. While in cases involving merely the question of damage to individual claimants, it may be appropriate for an international tribunal to award costs and expenses as an incident to other damages proven (see cases cited by the Agent for the United States in the Answer and Argument, pp. 431, 437, 453-465, and at the oral argument in Transcript, p. 5153), the Tribunal is of opinion that such costs and expenses should not be allowed in a case of arbitration and final settlement of a long pending controversy between two independent Governments, such as this case, where each Government has incurred expenses and where it is to the mutual advantage of the two Governments that a just conclusion and permanent disposition of an international controversy should be reached.

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

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

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

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

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

PART THREE.

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

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

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

PART FOUR.

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

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

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

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

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

(2) The Tribunal directs that, before May 1, 1938, a consulting meteorologist, adequately trained in the installation and operation of the necessary type of equipment, be employed by the Trail Smelter, the appointment to be subject to the approval of the Technical Consultants. The Tribunal directs that, beginning May 1, 1938, such meteorological observations as may be deemed necessary by the Technical Consultants shall be made, under

their direction, by the meteorologist, the scientific staff of the Trail Smelter, or otherwise. The purpose of such observations shall be to determine, by means of captive balloons and otherwise, the weather conditions and the height, velocity, temperature, and other characteristics of the gas-carrying and other air currents and of the gas emissions from the stacks.

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

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

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

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

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

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

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

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

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

(6) At the end of the trial period above provided for, or at the end of such shorter trial period as the Tribunal may find to be practicable or necessary, the Tribunal in a final decision will determine upon a permanent régime and upon the indemnity and compensation, if any, to be paid under the Convention. Such final decision, under the agreements for extension,

heretofore entered into by the two Governments under Article XI of the Convention, shall be reported to the Governments within three months after the date of the end of the trial period.

(7) The Tribunal shall meet at least once in the year 1939, to consider reports and to take such action as it may deem necessary.

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

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

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

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

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

(10) For the carrying out of the temporary régime herein prescribed by the Tribunal, the Dominion of Canada shall undertake to provide for the payment of the following expenses thereof: (a) the Tribunal will fix the compensation of the Technical Consultants and of such clerical or other assistants as it may find necessary to employ; (b) statements of account shall be rendered by the Technical Consultants to the Tribunal and approved by the Chairman in writing; (c) the Dominion of Canada shall deposit to the credit of the Tribunal from time to time in a financial institution to be designated by the Chairman of the Tribunal, such sums as the Tribunal may find to be necessary for the payment of the compensation, travel, and other expenses of the Technical Consultants and of the clerical or other assistants; (d) written report will be made by the Tribunal to the Dominion of Canada of all the sums received and expended by it, and any sum not expended shall be refunded by the Tribunal to the Dominion of Canada at the conclusion of the trial period.

(11) The terms "Tribunal", and "Chairman", as used herein, shall be deemed to mean the Tribunal, and the Chairman, as it or they respectively may be constituted at any future time under the Convention.

The term "Trail Smelter", as used herein, shall be deemed to mean the Consolidated Mining and Smelting Company of Canada, Limited, or its successors and assigns.

Nothing in the above paragraphs of Part Four of this decision shall relieve the Dominion of Canada from any obligation now existing under the Convention with reference to indemnity or compensation, if any, which the Tribunal may find to be due for damage, if any, occurring during the period from October 1, 1937 (the date to which indemnity for damage is now awarded) to October 1, 1940, or to such earlier date at which the Tribunal may render its final decision.

(*Signed*)
JAN HOSTIE.

(*Signed*)
CHARLES WARREN.

(*Signed*)
R. A. E. GREENSHIELDS.

DECISION

REPORTED ON MARCH 11, 1941, TO THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND TO THE GOVERNMENT OF THE DOMINION OF CANADA, UNDER THE CONVENTION SIGNED APRIL 15, 1935.

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

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

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

The Tribunal herewith reports its final decisions.

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

As between the two countries involved, each has an equal interest that if a nuisance is proved, the indemnity to damaged parties for proven damage shall be just and adequate and each has also an equal interest that unproven or unwarranted claims shall not be allowed. For, while the United States' interests may now be claimed to be injured by the operations of a Canadian corporation, it is equally possible that at some time in the future Canadian

interests might be claimed to be injured by an American corporation. As has well been said: "It would not be to the advantage of the two countries concerned that industrial effort should be prevented by exaggerating the interests of the agricultural community. Equally, it would not be to the advantage of the two countries that the agricultural community should be oppressed to advance the interest of industry."

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

In arriving at its decision, the Tribunal has had always to bear in mind the further fact that in the preamble to the Convention, it is stated that it is concluded with the recognition of "the desirability and necessity of effecting a permanent settlement".

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

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

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

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

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

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

On January 2, 1938, the Agents of the two Governments jointly informed the Tribunal that they had nothing additional to present. Under the provisions of Article XI of the Convention, it then became the duty of the

Tribunal "to report to the Governments its final decisions . . . . within a period of three months after the conclusion of the proceedings", *i.e.* on April 2, 1938.

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

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

Concerning Question No. 1, in the statement presented by the Agent for the Government of the United States, claims for damages of $1,849,156.16 with interest of $250,855.01—total $2,100,011.17—were presented, divided into seven categories, in respect of (*a*) cleared land and improvements; (*b*) of uncleared land and improvements; (*c*) live stock; (*d*) property in the town of Northport; (*e*) wrong done the United States in violation of sovereignty, measured by cost of investigation from January 1, 1932, to June 30, 1936; (*f*) interest on $350,000 accepted in satisfaction of damage to January 1, 1932, but not paid on that date; (*g*) business enterprises. The area claimed to be damaged contained "more than 140,000 acres", including the town of Northport.

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

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

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

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

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

It had been provided in the previous decision that a final decision on the outstanding questions would be rendered within three months from the termination of the trial period therein prescribed, *i.e.*, from October 1, 1940, unless the trial period was ended sooner. The trial period was not terminated before October 1, 1940. As the Tribunal deemed it necessary after the intervening period of two and a half years to receive supplementary statements from the Governments and to hear counsel again before determining upon a permanent régime, a hearing was set for October 1, 1940. Owing, however, to disruption of postal communications and other circumstances, the supplementary statement of the United States was not transmitted to the Dominion of Canada until September 25, 1940, and the public meeting was, in consequence, postponed.

The Tribunal met at Boston, Massachusetts, on September 26 and 27, 1940, for adoption of additional rules of procedure. It met at Montreal, P.Q., with its scientific advisers, from December 5 to December 8, 1940, to consider the Final Report they had rendered in their capacity as Technical Consultants (see Part Four of this decision). It held its public meeting and heard arguments of counsel in Montreal, from December 9 to December 12, 1940.

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

I.

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

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

More or less half way between Trail and the boundary is a place, on the east side of the river, known as Columbia Gardens; at the boundary, on the east side of the river and on the south side of its affluent, the Pend-d'Oreille,

are two places respectively known as Waneta and Boundary; the former is on the Canadian side of the boundary, the latter on the American side; four or five miles south of the boundary, and on the west side of the river, is a farm, named after its owner, Fowler Farm (Section 22, T. 40, R. 40), and on the east side of the river, another farm, Stroh Farm, about five miles south of the boundary.

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

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

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

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

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

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

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

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

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

The history of what may be termed the economic development of the area may be briefly stated as follows: Previous to 1892, there were few settlers in this area, but homesteading and location of farms received an impetus, particularly on the east side of the river, at the time when the construction of the Spokane and Northern Railway was undertaken, which was completed between the City of Spokane and Northport in 1892, and extended to Nelson in British Columbia in 1893. In 1892, the town of Northport was founded. In 1900, the population of this town was 787. It fell in 1910 to 476 but rose again, in 1920, to 906. In 1930, it had fallen to 391. The population of the precincts nearest the boundary line, *viz.*, Boundary and Northport (including Frontier and Nigger Creek Precincts prior to 1931) was 919 in 1900; 913 in 1910; 1,304 in 1920; 648 in 1930 and 651 in 1940. In these precincts, the area of all land in farms in 1925 was 5,292 acres; in 1930, 8,040 acres; in 1935, 5,666 acres and in 1940, 7,175 acres. The area in crop-land in 1925 was 798 acres; in 1930, 1,227 acres; in 1935, 963 acres and in 1940, about 900 acres[1]. In two other precincts east of the river and south of the boundary, Cummins and Doyle, the population in 1940 was 293, the area in farms was 6,884 acres and the area in crop-land was about 1,738 acres [2].

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

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

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

[2] For the Precinct of Cummins, the acreage of crop failure and of crop-land, idle or fallow, is only approximately correct, the census figures making similar omissions and for the same reason.

The most important industry in the area formerly was the lumber industry. It had its beginning with the building of the Spokane and Northern Railway. Several saw mills were constructed and operated, largely for the purpose of furnishing ties to the railway. In fact, the growing trees—yellow pine, Douglas fir, larch, and cedar—were the most valuable asset to be transformed into ready cash. In early days, the area was rather heavily wooded, but the timber has largely disappeared and the lumber business is now of small size. On about 57,000 acres on which timber cruises were made in 1927-1928 and in 1936 in the general area, it may be doubtful whether there is today more than 40,000 thousands of board feet of merchantable timber.

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

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

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

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

II.

In 1896, a smelter was started under American auspices near the locality known as Trail, B.C. In 1906, the Consolidated Mining and Smelting Company of Canada, Limited, obtained a charter of incorporation from the Canadian authorities, and that company acquired the smelter plant at Trail as it then existed. Since that time, the Canadian company, without interruption, has operated the Smelter, and from time to time has greatly added to the plant until it has become one of the best and largest equipped smelting plants on the American continent. In 1925 and 1927, two stacks of the plant were erected to 409 feet in height and the Smelter greatly increased its daily smelting of zinc and lead ores. This increased production resulted in more sulphur dioxide fumes and higher concentrations being emitted into the air. In 1916, about 5,000 tons of sulphur per month were emitted; in 1924, about 4,700 tons; in 1926, about 9,000 tons—an amount which rose near to 10,000 tons per month in 1930. In other words, about 300-350 tons of sulphur were being emitted daily in 1930. (It is to be noted that one ton of sulphur is substantially the equivalent of two tons of sulphur dioxide or SO_2.)

From 1925, at least, to 1937, damage occurred in the State of Washington, resulting from the sulphur dioxide emitted from the Trail Smelter as stated in the previous decision.

The subject of fumigations and damage claimed to result from them was referred by the two Governments on August 7, 1928, to the International Joint Commission, United States and Canada, under Article IX of the Convention of January 11, 1909, between the United States and Great Britain, providing that the high contracting parties might agree that "any other question or matters of difference arising between them involving the rights, obligations or interests of either in relation to the other, or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada shall be referred from time to time to the International Joint Commission for examination and report. Such reports shall not be regarded as decisions of the question or matters so submitted either on the facts or on the law, and shall not, in any way, have the character of an arbitral award."

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

The International Joint Commission sat at Northport, at Nelson, B.C., and in Washington, D.C., in 1928, 1929 and 1930, and on February 28, 1931, rendered a unanimous report which need not be considered in detail.

After outlining the plans of the Trail Smelter for extracting sulphur from the fumes, the report recommended (Part I, Paragraphs (*a*) and (*c*)) that "the company be required to proceed as expeditiously as may be reasonably possible with the works above referred to and also to erect with due dispatch such further sulphuric acid units and take such further or other action as may be necessary, if any, to reduce the amount and concentration of SO_2 fumes drifting from its said plant into the United States until it has reduced the amount by some means to a point where it will do no damage in the United States".

The same Part I, Paragraph (*g*) gave a definition of "damage":

> The word "damage", as used in this document shall mean and include such damage as the Governments of the United States and Canada may deem appreciable, and for the purposes of paragraphs (*a*) and (*c*) hereof, shall not include occasional damage that may be caused by SO_2 fumes being carried across the international boundary in air pockets or by reason of unusual atmospheric conditions. Provided, however, that any damage in the State of Washington howsoever caused by said fumes on or after January 1, 1932, shall be the subject of indemnity by the company to any interests so damaged. . . .

Paragraph 2 read, in part, as follows:

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

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

Two years after the filing of the above report, the United States Government, on February 17, 1933, made representations to the Canadian Government that existing conditions were entirely unsatisfactory and that damage was still occurring and diplomatic negotiations were entered into which resulted in the signing of the present Convention.

The Consolidated Mining and Smelting Company of Canada, Limited, proceeded after 1930 to make certain changes and additions in its plant, with the intention and purpose of lessening the sulphur contents of the fumes, and in an attempt to lessen injurious fumigations, a new system of control over the emission of fumes during the crop growing season came into operation about 1934. To the three sulphuric acid plants in operation since 1932, two others have recently been added. The total capacity is now of 600 tons of sulphuric acid per day, permitting, if these units could run continually at capacity, the fixing of approximately 200 tons of sulphur per day. In addition, from 1936, units for the production of elemental sulphur have been put into operation. There are at present three such units with a total capacity of 140 tons of sulphur per day. The capacity of absorption of sulphur dioxide is now 600 tons of sulphur dioxide per day (300 tons from the zinc plant gases and 300 tons from the lead plant gases). As a result, the maximum possible recovery of sulphur dioxide, with all units in full operation has been brought to a figure which is about equal to the amount of that gas produced by smelting operations at the plant in 1939. However, the normal shutdown of operating units for repairs, the power supply, ammonia available, and the general market situation are factors which influence the amount of sulphur dioxide treated.

In 1939, 360 tons, and in 1940, 416 tons, of sulphur per day were oxidized to sulphur dioxide in the metallurgical processes at the plant. Of the above,

for 1939, 253 tons, and for 1940, 289 tons per day, of the sulphur which was oxidized to sulphur dioxide was utilized. One hundred and seven tons

NORTHPORT

(FUMIGATIONS IN HOURS AND MINUTES AT THE CONCENTRATIONS NOTED IN FIRST COLUMN)

1938	April		May		June		July		August		Sept.	
Concentrations p.p.m.	h.	m.	h.	m.	h.	m.	h.	m.	h.	m.	h.	m.
.11-.25	6	0	0	0	0	20	5	50	10	40	28	20
.26-.50	0	50	0	0	0	0	1	40	3	0	6	0
above .50	0	10	0	0	0	0	0	0	0	5	0	20
Maximum p.p.m.	.66		.08		.15		.33		.61		.51	
1939												
.11-.25	1	40	10	0	9	20	5	20	5	0	25	0
.26-.50	0	0	0	0	2	0	0	0	2	0	3	40
above .50	0	0	0	0	0	0	0	0	0	0	0	0
Maximum p.p.m.	.16		.21		.30		.24		.33		.36	
1940												
.11-.25	16	20	32	40	5	40	9	20	10	0	23	10
.26-.50	2	0	0	0	0	0	0	0	0	0	0	0
above .50	0	0	0	0	0	0	0	0	0	0	0	0
Maximum p.p.m.	.37		.23		.22		.19		.17		.23	

WANETA

(FUMIGATIONS IN HOURS AND MINUTES AT THE CONCENTRATIONS NOTED IN FIRST COLUMN)

1938	June		July		August		September	
Concentrations p.p.m.	h.	m.	h.	m.	h.	m.	h.	m.
.11-.25	13	0	18	40	20	40	56	30
.26-.50	0	50	1	20	3	20	5	20
above .50	0	20	0	0	5	0	0	20
Maximum p.p.m.	.52		.30		1.63		.75	

1939	April		May		June		July		August		Sept.	
	h.	m.	h.	m.	h.	m.	h.	m.	h.	m.	h.	m.
.11-.25	11	55	10	0	20	20	10	40	13	20	16	50
.26-.50	4	40	5	40	8	20	5	0	6	20	9	20
above .50	0	20	0	0	1	20	0	0	0	40	1	40
Maximum p.p.m.	.52		.46		.79		.39		.56		.59	

1940	June		July		August		September	
	h.	m.	h.	m.	h.	m.	h.	m.
.11-.25	5	20	18	20	27	20	28	0
.26-.50	0	0	6	40	4	40	8	40
above .50	0	0	0	0	0	40	0	0
Maximum p.p.m.	.15		.49		.64		.42	

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

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

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

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

PART TWO.

The first question under Article III of the Convention is: "(1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor."

This question has been answered by the Tribunal in its previous decision, as to the period from January 1, 1932 to October 1, 1937, as set forth above.

Concerning this question, three claims are now propounded by the United States.

I.

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

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

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

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

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

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

In proceeding as it did the Tribunal did not act exclusively on its own interpretation of the Convention. It stated to the Governments its intention of granting damages for the period down to October 1, 1937, whilst ordering further investigations before establishing a permanent régime. It is with this understanding that both Governments, by an exchange of letters between the Minister of the United States at Ottawa and the Secretary of State of the Dominion of Canada (March 14, 1938, March 22, 1938), concurred in the extension of time requested.

This interpretation of Article XI of the Convention, moreover, is not in contradiction with the intention of the parties as expressed in the Convention. It was not foreseen at the time that further investigations might be needed, after the hearings had been ended, as proved to be the case. But the duty was imposed upon the Tribunal to reach a solution just to all parties concerned. This result could not have been achieved if the Tribunal had been forced to give a permanent decision as to a régime on the basis of data which it and both its scientific advisers considered inadequate and unsatisfactory. And, on the other hand, it is obvious that equity would not have been served if the Tribunal, having come to the conclusion that damage had occurred after January 1, 1937, had withheld its decision granting damages for more than two and one half years.

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

As Dr. James Brown Scott (*Hague Court Reports*, p. XXI) expressed it: ".... in the absence of an agreement of the contending countries excluding the law of nations, laying down specifically the law to be applied, international law is the law of an international tribunal". In deciding in conformity with international law an international tribunal may, and, in fact, frequently does apply national law; but an international tribunal will not depart from the rules of international law in favor of divergent rules of

national law unless, in refusing to do so, it would undoubtedly go counter to the expressed intention of the treaties whereupon its powers are based. This would particularly seem to be the case in matters of procedure. In this respect attention should be paid to the rules of procedure adopted by this Tribunal with the concurrence of both Agents on June 22, 1937, wherein it is said (Article 16): "With regard to any matter as to which express provision is not made in these rules, the Tribunal shall proceed as international law, justice and equity may require." Undoubtedly such provisions could not prevail against the Convention, but they show, at least, how, in the common opinion of the Tribunal and of the Agents, Article IV of the Convention was understood at the time. According to the latter, the Tribunal shall apply the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice. This text does not bind the Tribunal to apply national law and practice to the exclusion of international law and practice.

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

This interpretation is confirmed by the correspondence exchanged between parties, as far as it is part of the record. On February 22, 1934, the Canadian Government declared (letter of the Secretary of State for External Affairs to the Minister of the United States at Ottawa) that it "would be entirely satisfied to refer the Tribunal to the principles of law as recognized and applied by the courts of the United States of America in such matters". Now, the matters referred to in that sentence are determined by the preceding sentences:

> The use of the word "injury" is likely to cause misunderstanding which should be removed when the actual terms of the issue are settled for inclusion in the Convention. In order to avoid such misunderstanding, it would seem to be desirable to use the word "damage" in place of "injury" and further, either to define the word actually used by a definition to be incorporated in the Convention or else by reference to the general principles of the law which are applied by the courts in the two countries in dealing with cognate matters.

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

That the sanctity of *res judicata* attaches to a final decision of an international tribunal is an essential and settled rule of international law.

If it is true that international relations based on law and justice require arbitral or judicial adjudication of international disputes, it is equally true

that such adjudication must, in principle, remain unchallenged, if it is to be effective to that end.

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

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

The Fabiani case (French-Venezuelan Claims Commission, Ralston's Report, Decision of Umpire Plumley, p. 110) is of particular interest for the present case.

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

Again in the case of the claim of the Orinoco Steamship Company between the United States and Venezuela, an arbitral tribunal constituted under the statute of the Permanent Court of Arbitration (October 25, 1910, *American Journal of International Law*, V, p. 230) emphasized the importance in international disputes of the principle of *res judicata*. The first question for the arbitral tribunal to decide was whether the decision previously rendered by an umpire in this case "in view of all the circumstances and under the principles of international law" was "not void, and whether it must be considered to be so conclusive as to preclude a re-examination of the case on its merits". As we will presently see, the tribunal held that the decision was partially void for excess of power. This, however, was rigidly limited and the principle affirmed as follows: ". . . . it is assuredly in the interest of peace

and the development of the institution of international arbitration so essential to the well-being of nations, that, in principle, such a decision be accepted, respected and carried out by the parties without reservation".

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

This principle was affirmed in the judgment of the Court on the claim of Belgium against Greece on behalf of the *Société Commerciale de Belgique* (Series A/B, No. 78, p. 174), wherein the Court said: ". . . . since the arbitral awards to which these submissions relate are, according to the arbitration clause under which they were made, 'final and without appeal', and since the Court has received no mandate from the parties in regard to them, it can neither confirm nor annul them either wholly or in part".

In the well-known case of Frelinghuysen *v.* Key (110 U.S. 63, 71, 72), the Supreme Court of the United States, speaking of an award of the United States Mexican Claims Commission, under the Convention of July 4, 1868, whereby (Art. V) parties agreed, *inter alia*, to consider the result of the proceedings as a "full, perfect, and final settlement of every claim", said: "As between the United States and Mexico, the awards are final and conclusive until set aside by agreement between the two Governments or otherwise."

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

Under the Statute of the Permanent Court of International Justice whereby (Article 59) "The decision of the Court has no binding force except between the parties and in respect of that particular case", the Permanent Court of International Justice, in an interpretative judgment (Judgment No. 11, Series A, No. 13, pp. 18, 20—Chorzów Case), expressed the opinion that the force of *res judicata* was inherent even in what was an incidental decision on a preliminary point, the ownership of the Oberschlesische Company. The minority judge, M. Anzilotti, pointed out that "under a generally accepted rule which is derived from the very conception of *res judicata*, decisions on incidental or preliminary questions which have been rendered with the sole object of adjudicating upon the parties' claims are not binding in another case" (same decision, p. 26). Later on, in the same case (Judgment 13, Series A, No. 17, Dissenting Opinion of M. Ehrlich, pp. 75, 76), M. Ehrlich, the dissenting national judge appointed by Poland, adopted this statement. But M. Anzilotti (Judgment 11, Series A, No. 13, Dissenting Opinion, p. 27) did not expressly answer in the negative the question which he formulated, namely: "Does this general rule also cover the case of an action for indemnity following upon a declaratory judgment in which the preliminary question has been decided?" It is true that, when the case came up again on the question of indemnity (Judgment 13, Series A, No. 17, pp. 31, 32), the Court seems to have avoided—as M. Ehrlich pointed out—the assertion that there was *res judicata* and reserved the effect of its incidental decision "as regards the right of ownership

under municipal law". But the Court said: ". . . . it is impossible that the Oberschlesische's right to the Chorzów factory should be looked upon differently for the purposes of that judgment (the previous Judgment No. 7 wherein it was decided that the attitude of the Polish Government in respect of the Oberschlesische was not in conformity with international law) and in relation to the claim for reparation based on the same judgment", thus admitting in effect (M. Anzilotti now concurring) that it was bound by its previous decision.

In the present case, the decision was not preliminary or incidental. Neither was it a decision on a question of jurisdiction. There is some authority (Tiedemann *v.* Poland, *Recueil des Décisions des Tribunaux Arbitraux Mixtes*, Tome VII (1928), p. 702), in support of the contention that a decision upon the question of jurisdiction only, may, under certain circumstances, be reversed by the same court; and it might be argued, as, in fact, was done by France in the Fabiani case, that a decision merely denying jurisdiction can never constitute *res judicata* as regards the merits of the case at issue. But assuming the first contention to be correct as the second undoubtedly is, that would not affect the issue in the present case. Here, as in the Fabiani case, the decision was not one denying jurisdiction.

The United States does not contend that the previous decision is void for excess of power, but asks for reconsideration and revision, as far as the costs of investigation are concerned, on account of a material error of law (Record, p. 6540).

In the absence of agreement between parties, the first question concerning a request tending to revision of a decision constituting *res judicata*, is: can such a request ever be granted in international law, unless special powers to do so have been expressly given to the tribunal?

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

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

Arbitral decisions do not give to the question an unanimous answer. Thus, in the United States Mexican Mixed Claims Commission of 1868, whilst Umpire Lieber, on a motion for rehearing, re-examined the case, Umpire Thornton, in the Weil, LaAbra, and other cases, refused a rehearing, *inter alia* on the ground that the provisions of the Convention in effect debarred him from rehearing cases which he had already decided (Moore, *International Arbitrations*, 1329, 1357). In the single case of Schreck, however, he granted a request of one of the Agents to reconsider his decision. The case also of A. A. Green (Moore, *International Arbitrations*, 1358) was reconsidered by the Umpire and that of G. Moore (Moore, *International Arbitrations*, 1357) by the two Commissioners. In the Lazare case (Haiti *v.* United States), the Arbitrator, Mr. Justice Strong, refused a rehearing, "solely for

the reason", that in his opinion, his "power over the award was at an end" when it "had passed from his hands and been filed in the State Department". (Moore, *International Arbitrations*, 1793.) In the Sabotage cases, before the American-German Mixed Claims Commission, the Umpire, Mr. Justice Roberts, granted a rehearing, although there was no express provision in the agreement empowering the Commission to do so (December 15, 1933, Documents, p. 1122, *American Journal of International Law*, 1940, pp. 154, 164).

Whether final, in part, or not, the previous decision did not give final answers to all the questions. The Tribunal, by that decision, did not become *functus officio*. Part of its task was yet before it when the request for revision was presented. Under those circumstances, the difficulties and uncertainties do not arise that might present themselves where an arbitral tribunal, having completed its task and finally adjourned, would be requested to reconsider its decision.

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

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

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

In the Sabotage cases and in other cases before the Mixed Claims Commission, United States and Germany, a contrary practice had prevailed. But when the question of revision came to a head, the Umpire, Mr. Justice Roberts (decision of December 15, 1933, Documents, p. 1115; *American Journal of International Law*, 1940, pp. 157-158), said: "I am convinced as the matter is now viewed in retrospect that it would have been fairer to both the parties, definitely to pass in the first instance upon the question of the Commission's power. . . . Orderly procedure would have required that these issues be decided by the Umpire before the filing of the tendered evidence. The American Agent has . . . . filed a very large quantity of evidence which . . . . I have thought it improper to examine." As the position apparently required further elucidation, a motion was presented to determine "whether the next hearing shall be merely of a preliminary nature" (Documents, p. 1159). The Umpire decided that it should, saying: "Germany insists that the preliminary question be determined separately. I am of opinion this is her right."

The Tribunal is of opinion that this procedure should be followed.

As said above, the petition is founded upon an alleged error in law. It is contended by the United States that the Tribunal erred in the interpretation of the Convention when it decided that the monies expended for the investigation undertaken by the United States Government of the problems created in the United States by the operation of the Smelter at Trail could not be

included within the "damage caused by the Trail Smelter" (Article III (1) of the Convention, Record, p. 6030). Statements by the Tribunal that the controversy did not involve "any such type of facts as the persons appointed" in the *I'm Alone* case "felt to justify them in awarding to Canada damages for violation of sovereignty" and that in cases where a private claim was espoused "damages awarded for expenses were awarded, not as compensation for violation of national sovereignty, but as compensation for expenses incurred by individual claimants in prosecuting their claims for wrongful acts by the offending Government" were also challenged, although petitioner added that possibly these further statements might be regarded as dicta. (Record, p. 6040.) It was further argued that the solution adopted by the Tribunal was not a "solution just to all parties concerned", as required by Article IV of the Convention.

According to the Hague Convention (Article 83), a request tending to the revision of an award can only be made on the ground of the discovery of some new fact calculated to exercise a decisive influence upon the award and which at the time the discussion was closed was unknown to the Tribunal and to the party demanding the revision.

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

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

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

In the Green case, quoted above (Moore, *International Arbitrations*, 1358), the Umpire granted a rehearing because certain evidence which was before the Commissioners was not transmitted to him. In the case of George

Moore, also quoted above (Moore, *International Arbitrations*, 1357), a new document was produced. In the latter case, the Commissioners stated that it was their practice to grant revision where new evidence was such as ought undoubtedly to produce a change in the minds of the Commission except where there might be some gross laches or injustice would probably be done to the defendant Government. In the single case of Schreck, also quoted above (Moore, *International Arbitrations*, 1357), Umpire Thornton reconsidered his decision at the request of the Agent of the claimant Government and, in this case, the revision was granted because he found that he had clearly committed an error in law. Because a claimant was born in Mexico, he had taken for granted that he had Mexican nationality. "The Agent of the United States produced the appropriate law of Mexico, by which it appeared that the assumption was clearly erroneous."

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

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

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

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

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

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

> I think it clear that where the Commission has misinterpreted the evidence, or made a mistake in calculation, or where its decision does

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

This statement may be entirely justified by circumstances special to the Mixed Claims Commission, in particular by the practice followed *ab initio* by this Commission, apparently with the concurrence, until the Sabotage cases reached their last stages, of the Umpire, the Commissioners and the Agents, but in so far as it does not refer to the correction of possible errors arising from a slip or accidental omission, it does not express the opinion generally prevailing as to the position in international law, stated for instance in the following passage of a recent decision: ".... in order to justify revision it is not enough that there has taken place an error on a point of law or in the appreciation of a fact, or in both. It is only lack of knowledge on the part of the judge and of one of the parties of a material and decisive fact which may in law give rise to the revision of a judgment" (de Neuflize *v.* Disconto Gesellschaft, *Recueil des Décisions des Tribunaux Arbitraux Mixtes*, t. VII, 1928, 629) [1].

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

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

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

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

II (*a*).

The Tribunal is requested to say that damage has occurred in the State of Washington since October 1, 1937, as a consequence of the emission of sulphur dioxide by the smelters of the Consolidated Mining and Smelting

[1] This decision refers to the rules of procedure of the Franco-German Mixed Arbitral Tribunals but these rules themselves are expressive of the opinion generally prevailing as to the position in international law.

Company at Trail, B.C., and that an indemnity in the sum of $34,807 should be paid therefor.

It is alleged that acute damage has been suffered, in 1938-1940, in an area of approximately 6,000 acres and secondary damage, during the same period, in an area of approximately 27,000 acres. It is also alleged that damage has been suffered in the town of Northport, situated in the latter area. On the basis of investigations made in 1939 and 1940, the area of acute damage is claimed to extend on the western bank of the Columbia River to a point approximately due north of the mouth of Deep Creek, the average width of this area on this bank being about 1½ miles, and on the eastern bank of the river, to a point somewhat to the south of the northern limit of Section 20, T. 40, R. 41, the width of this area on that bank varying from approximately 1¼ miles at the border to ¼ mile at its lower end. The area of secondary damage is claimed to extend on both banks of the river to about one mile below Northport; it extends laterally, at the boundary, westward to the western limit of Section 2, T. 40, R. 40, and eastward to the eastern limit of Section 1, T. 40, R. 41; it extends along Cedar Creek above Section 14, T. 40, R. 41, along Nigger Creek to the middle of Section 9, T. 40, R. 40, along Little Sheep Creek to the middle of Section 10, T. 40, R. 39, along Big Sheep Creek to the western limit of Section 15, T. 40, R. 39, and along Deep Creek, to the southeastern corner of Section 14, T. 39, R. 40. It is to be noted that the area of damage alleged by the United States in its original statement of case was about 144,000 acres.

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

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

The present report covers the period until October 1, 1940.

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

The Tribunal has examined carefully the records of all fumigations specifically alleged by the United States as having caused or been likely to cause

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

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

II (*b*).

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

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

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

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

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

These are not part of the damage, any more than other costs involved in seeking and obtaining a judicial or arbitral remedy, such as the fees of

counsel, the travelling expenses of witnesses, etc. In effect, it would be quite impossible to frame a logical distinction between the costs of preparing expert reports and the cost of preparing the statements and answers provided for in the procedure. Obviously, the fact that these expenditures may be incurred by different agencies of the same government does not constitute a basis for such a logical distinction.

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

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

The word "damage" is used in several passages of the Convention. It may not have everywhere the same meaning but different meanings should not be given to it in different passages without some foundation either in the text itself or on its history. It first occurs in the preamble where it is said that "fumes discharged from the Smelter .... have been causing damage in the State of Washington". It then appears in Article I, where it is said that the $350,000 to be paid to the United States will be "in payment of all damage which occurred in the United States .... as a result of the operation of the Trail Smelter". In Article III itself, the word appears twice. The Tribunal is asked "whether damage caused by the Trail Smelter in the State of Washington has occurred" and "whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent". Article X secures to qualified investigators access to the properties "upon which damage is claimed to have occurred or to be occurring". Finally, Article XI deals with "indemnity for damage .... which may occur subsequently to the period of time covered by the report of the Tribunal".

The underlying trend of thought strongly suggests that, in all these passages, the word "damage" has the same meaning, although in Article X, its scope is limited to damage to property by the context.

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

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

"damaged by.... fumes" by an appointee of the Governor of the State of Washington and where it is said that no allowance was included for indemnity for damage to the lands of the Government of the United States. If, with that report before them, parties intended to include costs of investigations in the word "damage", as used in Article III, they would no doubt have expressed their intention more precisely.

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

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

When a State espouses a private claim on behalf of one of its nationals, expenses which the latter may have incurred in prosecuting or endeavoring to establish his claim prior to the espousal are sometimes included and, under appropriate conditions, may legitimately be included in the claim. They are costs, incidental to damage, incurred by the national in seeking local remedy or redress, as it is, as a rule, his duty to do, if, on account of injury suffered abroad, he wants to avail himself of the diplomatic protection of his State. The Tribunal, however, has not been informed of any case in which a Government has sought before an international jurisdiction or been allowed by an international award or judgment indemnity for expenses by it in preparing the proof for presenting a national claim or private claims which it had espoused; and counsel for the United States, on being requested to cite any precedent for such an adjudication, have stated that they know of no precedent. Cases cited were instances in which expenses allowed had been incurred by the injured national, and all except one prior to the presentation of the claim by the Government [1].

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[1] Santa Clara Estates Company, British Venezuelan Commission of 1903 (Ralston's Report, pp. 397, 402); Orinoco Steamship Company (United States) *v.* Venezuela (Ralston's Report, p. 107); United States-Venezuelan Arbitration at The Hague, 1909, p. 249 (Foreign Relations of the United States, 1911, p. 752); Compagnie Générale des Asphaltes de France, British-Venezuelan Arbitration (Ralston's Report, pp. 331, 340); H. J. Randolph Hemming under the Special Agreement of August 18, 1910 (Nielsen's Report, pp. 620, 622); Shufeldt (United States *v.* Guatemala), Department of State Arbitration Series No. 3, p. 881; Mather and Glover *v.* Mexico (Moore, International Arbitrations, pp. 3231-3232); Patrick H. Cootey *v.* Mexico (Moore, International Arbitrations, pp. 2769-2970); The Louisa (Moore, International Arbitrations,

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

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

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

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

PART THREE.

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

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

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

As has been said above, the report of the International Joint Commission (1 (*g*)) contained a definition of the word "damage" excluding "occasional damage that may be caused by SO_2 fumes being carried across the international boundary in air pockets or by reason of unusual atmospheric conditions", as far, at least, as the duty of the Smelter to reduce the presence of that gas in the air was concerned.

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

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p. 4325); Dr. John Baldwin *v.* Mexico (Moore, International Arbitrations, pp. 3235-3240); Robert H. May *v.* Guatemala (Foreign Relations of the United States, 1900, p. 674); Salvador Commercial Company *v.* Guatemala (Foreign Relations of the United States, 1902. pp. 859-873).

ington with such frequency, duration and intensity as to cause injury", the conditions afforded "grounds of complaint on the part of the United States, regardless of the remedial works.... and regardless of the effect of those works" (same letter).

The first problem which arises is whether the question should be answered on the basis of the law followed in the United States or on the basis of international law. The Tribunal, however, finds that this problem need not be solved here as the law followed in the United States in dealing with the quasi-sovereign rights of the States of the Union, in the matter of air pollution, whilst more definite, is in conformity with the general rules of international law.

Particularly in reaching its conclusions as regards this question as well as the next, the Tribunal has given consideration to the desire of the high contracting parties "to reach a solution just to all parties concerned".

As Professor Eagleton puts in (*Responsibility of States in International Law*, 1928, p. 80): "A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction." A great number of such general pronouncements by leading authorities concerning the duty of a State to respect other States and their territory have been presented to the Tribunal. These and many others have been carefully examined. International decisions, in various matters, from the Alabama case onward, and also earlier ones, are based on the same general principle, and, indeed, this principle, as such, has not been questioned by Canada. But the real difficulty often arises rather when it comes to determine what, *pro subjecta materie*, is deemed to constitute an injurious act.

A case concerning, as the present one does, territorial relations, decided by the Federal Court of Switzerland between the Cantons of Soleure and Argovia, may serve to illustrate the relativity of the rule. Soleure brought a suit against her sister State to enjoin use of a shooting establishment which endangered her territory. The court, in granting the injunction, said: "This right (sovereignty) excludes.... not only the usurpation and exercise of sovereign rights (of another State).... but also an actual encroachment which might prejudice the natural use of the territory and the free movement of its inhabitants." As a result of the decision, Argovia made plans for the improvement of the existing installations. These, however, were considered as insufficient protection by Soleure. The Canton of Argovia then moved the Federal Court to decree that the shooting be again permitted after completion of the projected improvements. This motion was granted. "The demand of the Government of Soleure", said the court, "that all endangerment be absolutely abolished apparently goes too far." The court found that all risk whatever had not been eliminated, as the region was flat and absolutely safe shooting ranges were only found in mountain valleys; that there was a federal duty for the communes to provide facilities for military target practice and that "no more precautions may be demanded for shooting ranges near the boundaries of two Cantons than are required for shooting ranges in the interior of a Canton". (R. O. 26 I, p. 450, 451; R. O. 41, I, p. 137; see D. Schindler, "The Administration of Justice in the Swiss Federal Court in Intercantonal Disputes", *American Journal of International Law*, Vol. 15 (1921), pp. 172-174.)

No case of air pollution dealt with by an international tribunal has been brought to the attention of the Tribunal nor does the Tribunal know of any such case. The nearest analogy is that of water pollution. But, here also, no decision of an international tribunal has been cited or has been found.

There are, however, as regards both air pollution and water pollution, certain decisions of the Supreme Court of the United States which may legitimately be taken as a guide in this field of international law, for it is reasonable to follow by analogy, in international cases, precedents established by that court in dealing with controversies between States of the Union or with other controversies concerning the quasi-sovereign rights of such States, where no contrary rule prevails in international law and no reason for rejecting such precedents can be adduced from the limitations of sovereignty inherent in the Constitution of the United States.

In the suit of the State of Missouri *v.* the State of Illinois (200 U.S. 496, 521) concerning the pollution, within the boundaries of Illinois, of the Illinois River, an affluent of the Mississippi flowing into the latter where it forms the boundary between that State and Missouri, an injunction was refused. "Before this court ought to intervene", said the court, "the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side. (See Kansas *v.* Colorado, 185 U.S. 125.)" The court found that the practice complained of was general along the shores of the Mississippi River at that time, that it was followed by Missouri itself and that thus a standard was set up by the defendant which the claimant was entitled to invoke.

As the claims of public health became more exacting and methods for removing impurities from the water were perfected, complaints ceased. It is significant that Missouri sided with Illinois when the other riparians of the Great Lakes' system sought to enjoin it to desist from diverting the waters of that system into that of the Illinois and Mississippi for the very purpose of disposing of the Chicago sewage.

In the more recent suit of the State of New York against the State of New Jersey (256 U.S. 296, 309), concerning the pollution of New York Bay, the injunction was also refused for lack of proof, some experts believing that the plans which were in dispute would result in the presence of "offensive odors and unsightly deposits", other equally reliable experts testifying that they were confidently of the opinion that the waters would be sufficiently purified. The court, referring to Missouri *v.* Illinois, said: ".... the burden upon the State of New York of sustaining the allegations of its bill is much greater than that imposed upon a complainant in an ordinary suit between private parties. Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence."

What the Supreme Court says there of its power under the Constitution equally applies to the extraordinary power granted this Tribunal under the Convention. What is true between States of the Union is, at least, equally true concerning the relations between the United States and the Dominion of Canada.

In another recent case concerning water pollution (283 U.S. 473), the complainant was successful. The City of New York was enjoined, at the request of the State of New Jersey, to desist, within a reasonable time limit, from the practice of disposing of sewage by dumping it into the sea, a practice which was injurious to the coastal waters of New Jersey in the vicinity of her bathing resorts.

In the matter of air pollution itself, the leading decisions are those of the Supreme Court in the State of Georgia *v.* Tennessee Copper Company and

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

On the question whether an injunction should be granted or not, the court said (206 U.S. 230):

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

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

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

The Tribunal, therefore, finds that the above decisions, taken as a whole, constitute an adequate basis for its conclusions, namely, that, under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

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

Considering the circumstances of the case, the Tribunal holds that the Dominion of Canada is responsible in international law for the conduct of the Trail Smelter. Apart from the undertakings in the Convention, it is,

therefore, the duty of the Government of the Dominion of Canada to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined.

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

PART FOUR.

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

Answering this question in the light of the preceding one, since the Tribunal has, in its previous decision, found that damage caused by the Trail Smelter has occurred in the State of Washington since January 1, 1932, and since the Tribunal is of opinion that damage may occur in the future unless the operations of the Smelter shall be subject to some control, in order to avoid damage occurring, the Tribunal now decides that a régime or measure of control shall be applied to the operations of the Smelter and shall remain in full force unless and until modified in accordance with the provisions hereinafter set forth in Section 3, Paragraph VI of the present part of this decision.

SECTION 1.

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

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

The previous decision directed that during the trial period, a consulting meteorologist, to be appointed with the approval of the Technical Consultants, should be employed by the Trail Smelter. On May 4, 1938, Dr. J. Patterson was thus appointed. On May 1, 1939, Dr. Patterson resigned to take up meteorological service in the Canadian Air Force, and Dr. E. W. Hewson was given leave from the Dominion Meteorological Service and appointed in his stead.

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

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

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

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

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

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

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

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

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

SECTION 2.

(*a*)

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

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

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

From an examination of the recorded data, it appears that the Columbia Gardens recorder located 6 miles below the Smelter, is above the knee of the attenuation curve. The Waneta recorder, 10 miles below the Smelter, is still in the region of very rapid decrease of sulphur dioxide while the Northport recorder, 19 miles below the Smelter, is well below the knee of the curve. There is very little variation in the average ratio of concentrations between the various recorders. For example, the average ratio for the years 1932 to 1935, between Columbia Gardens and Northport, was 1 to .31, while the average ratio for the experimental period from May, 1938, to November, 1940, was 1 to .39. The individual variations from this ratio are relatively small. The ratio between Columbia Gardens and Waneta for the period 1932 to 1935 was .6 and that for the period May 1938, to November 1940, was .75. The individual variations of the ratio between Columbia Gardens and Waneta are, however, much greater than those between Columbia Gardens and Northport. It is accordingly found that the Columbia Gardens recorder and the Northport recorder give as complete a picture of the attenuation of sulphur dioxide with distance as can be obtained with any reasonable number of recorders.

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

Although as a result of the investigations carried out by the Technical Consultants, the conclusion might be warranted that the Waneta recorder could be discontinued, it has, nevertheless, been decided to have it main-

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

(*b*)

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

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

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

During the growing season, the descent of sulphur dioxide to the earth's surface is more likely to occur at some hours than at others. At about nine to ten o'clock in the morning, there is usually a very pronounced maximum of fumigations, and this morning fumigation occurs with such regularity that it has been the practice of the Smoke Control Office at the Smelter for some time to cut down the emission of sulphur to the atmosphere during the early morning hours and to keep it down until from eight to eleven o'clock in the morning. The amount and duration of the cut are determined after an analysis of the wind velocity and direction, and of the conditions of turbulence or diffusion of the smoke. This is a fundamental feature of the program of smoke control, and the main reason for its success is that it prevents accumulations of sulphur dioxide which tend to descend from higher elevations when the early morning sun disturbs the thermal balance by heating the earth's surface. This early morning diurnal fumigation reaches

all recorders in the valley almost simultaneously, the intensity being usually highest near the Smelter. The concentration of sulphur dioxide during this type of fumigation rises as a rule very rapidly to a maximum in a few minutes and then drops off exponentially, only traces often remaining after two or three hours. A similar diurnal fumigation, usually of shorter duration, is occasionally observed in the early evening due to a disturbance of the thermal balance as the sun sets.

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

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

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

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

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

only adequate protection against this type of fumigation is to prevent accumulations of large amounts of sulphur dioxide, either up or down stream, at or just before the periods when diurnal fumigations may be expected.

(*c*)

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

(*d*)

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

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

(*e*)

There are several limitations to the application of the turbulence criterion. On a number of occasions, marked fumigations have occurred when the instrument showed that the turbulence was good or excellent. On every occasion of that sort which has been studied, pilot balloon observations revealed that there was a strong down-river wind from the surface of the

valley floor to about 2,500 feet above mean sea level. At about 4,000 feet, however, the height to which the valley sides reached, conditions were calm or very nearly so. Ordinarily, with good turbulence, the sulphur dioxide would be rapidly diffused upward and rise above the sides of the valley without difficulty. The non-turbulent condition at 4,000 feet associated with the calm layer acts effectively as a blanket, preventing the escape of the gas through the top of the valley. The turbulence in the lower layers serves then only to distribute the sulphur dioxide more or less uniformly in the valley. There is no exit through the top, and the gas moves down the valley with no lateral diffusion, in much the same way as if it were flowing along in a giant pipe. This type does not occur very frequently, but when it does, the sulphur dioxide recorder at Columbia Gardens must be used to prevent the building up of high concentrations in the valley. That is the type of fumigation which can be controlled most readily by means of such a recorder.

(*f*)

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

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

(*g*)

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

(*h*)

It has been found by the Technical Consultants that meteorological conditions at the Smelter sometimes prevail under which the instrumental readings at the level where the instruments now are or may be located do not fully reflect the degree of turbulence in the atmosphere at the higher gas-carrying levels. Under those conditions, it is possible that visual observations by trained observers may sometimes determine the turbulence more accurately. Where by such visual observations the conclusion shall be

reached that the turbulence at higher levels is definitely better than at the level of the instruments, the load can sometimes be safely increased from the maximum allowable as determined by the instruments under the régime herein prescribed. Conversely, where by such visual observations the conclusion shall be reached that the turbulence at higher levels is definitely worse than at the level of the instruments, it will be the duty of the Smelter (and to its advantage in lessening risk of injurious fumigation) to reduce the load from the maximum allowable as determined by the instruments under the régime herein prescribed.

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

(*i*)

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

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

(*j*)

The foregoing paragraphs are the result of an extended investigation of meteorological and other conditions which have been found to be of significance in smoke behavior and control in the Trail area. The attempt made to solve the sulphur dioxide problem presented to the Tribunal has finally found expression in a régime which is now prescribed as a measure of control.

The investigations made during the past three years on the application of meteorological observations to the solution of this problem at Trail have built up a fund of significant and important facts. This is probably the most thorough study ever made of any area subject to atmospheric pollution by industrial smoke. Some factors, such as atmospheric turbulence and

the movement of the upper air currents have been applied for the first time to the question of smoke control. All factors of possible significance, including wind directions and velocity, atmospheric temperatures, lapse rates, turbulence, geostrophic winds, barometric pressures, sunlight and humidity, along with atmospheric sulphur dioxide concentrations, have been studied. As said above, many observations have been made on the movements and sulphur dioxide concentrations of the air at higher levels by means of pilot and captive balloons and by airplane, by night and by day. Progress has been made in breaking up the long winter fumigations and in reducing their intensity. In carrying finally over to the non-growing season with a few minor modifications a régime of demonstrated efficiency for the growing season, there is a sound basis for confidence that the winter fumigations will be kept under control at a level well below the threshold of possible injury to vegetation. Likewise, for the growing season a régime has been formulated which should throttle at the source the expected diurnal fumigations to a point where they will not yield concentrations below the international boundary sufficient to cause injury to plant life. This is the goal which this Tribunal has set out to accomplish.

The Tribunal has carefully considered the suggestions made by the United States for a régime by which a prefixed sum would be due whenever the concentrations recorded would exceed a certain intensity for a certain period of time or a certain greater intensity for any twenty minute period.

It has been unable to adopt this suggestion. In its opinion, and in that of its scientific advisers, such a régime would unduly and unnecessarily hamper the operations of the Trail Smelter and would not constitute a "solution fair to all parties concerned".

SECTION 3.

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

I. Instruments.

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

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

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

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

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

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

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

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

II. Documents.

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

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

III. Stacks.

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

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

IV. Maximum Permissible Sulphur Emission.

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

GROWING SEASON

	Turbulence Bad		Turbulence Fair		Turbulence Good		Turbulence Excellent
	(1) Wind not favorable	(2) Wind favorable	(3) Wind not favorable	(4) Wind favorable	(5) Wind not favorable	(6) Wind favorable	(7) Wind not favorable and favorable
Midnight to 3 a.m. . .	2	6	6	9	9	11	11
3 a.m. to 3 hrs. after sunrise	0	2	4	4	4	6	6
3 hrs. after sunrise to 3 hrs. before sunset	2	6	6	9	9	11	11
3 hrs. before sunset to sunset	2	5	5	7	7	9	9
Sunset to midnight . .	3	7	6	9	9	11	11

NON-GROWING SEASON

	Turbulence Bad		Turbulence Fair		Turbulence Good		Turbulence Excellent
	(1) Wind not favorable	(2) Wind favorable	(3) Wind not favorable	(4) Wind favorable	(5) Wind not favorable	(6) Wind favorable	(7) Wind not favorable and favorable
Midnight to 3 a.m. . .	2	8	6	11	9	11	11
3 a.m. to 3 hrs. after sunrise	0	4	4	6	4	6	6
3 hrs. after sunrise to 3 hrs. before sunset	2	8	6	11	9	11	11
3 hrs. before sunset to sunset	2	7	5	9	7	9	9
Sunset to midnight . .	3	9	6	11	9	11	11

General Restrictions and Provisions.

(*a*) If the Columbia Gardens recorder indicates 0.3 part per million or more of sulphur dioxide for two consecutive twenty minute periods during the growing season, and the wind direction is not favorable, emission shall be reduced by four tons of sulphur per hour or shut down completely when the turbulence is bad, until the recorder shows 0.2 part per million or less of sulphur dioxide for three consecutive twenty minute periods.

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

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

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

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

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

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

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

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

V. Definition of Terms and Conditions

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

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

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

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

If at any time another instrument should be found to be better adapted to the measurement of turbulence, and should be accepted for such measure-

ment by agreement of the two Governments, the scale of this instrument shall be calibrated by comparison with the Bridled Cup Turbulence Indicator.

VI. Amendment or Suspension of the Régime.

If at any time after December 31, 1942, either Government shall request an amendment or suspension of the régime herein prescribed and the other Government shall decline to agree to such request, there shall be appointed by each Government, within one month after the making or receipt respectively of such request, a scientist of repute; and the two scientists so appointed shall constitute a Commission for the purpose of considering and acting upon such request. If the Commission within three months after appointment fail to agree upon a decision, they shall appoint jointly a third scientist who shall be Chairman of the Commission; and thereupon the opinion of the majority, or in the absence of any majority opinion, the opinion of the Chairman shall be decisive; the opinion shall be rendered within one month after the choice of the Chairman. If the two scientists shall fail to agree upon a third scientist within the prescribed time, upon the request of either, he shall be appointed within one month from such failure by the President of the American Chemical Society, a scientific body having a membership both in the United States, Canada, Great Britain and other countries.

Any of the periods of time herein prescribed may be extended by agreement between the two Governments.

The Commission of two, or three scientists as the case may be, may take such action in compliance with or in denial of the request above referred to, either in whole or in part, as it deems appropriate for the avoidance or prevention of damage occurring in the State of Washington. The decision of the Commission shall be final, and the Governments shall take such action as may be necessary to ensure due conformity with the decision, in accordance with the provisions of Article XII of the Convention.

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

SECTION 4.

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

The value of this trial period has been acknowledged by each Government. In the memorandum submitted by the Canadian Agent, under date of December 28, 1940, while commenting on the expense involved, it is stated (p. 8):

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

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

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

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

> JUDGE WARREN: We stated very frankly to the Agents that we were prepared in March (1938) to render a final decision but that we thought it would be highly unsatisfactory to both parties to do so unless we had some experimentation.
>
> Mr. TILLEY: There is no doubt about that—quite properly, if I may say so, with deference.
>
> JUDGE WARREN: We were trying to do this for the benefit of both parties. We were prepared to answer the questions.
>
> Mr. TILLEY: Nothing could have been more in the interests of the parties concerned than what you did.

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

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

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

> I will say at the outset that I believe the meteorological studies which we (were?) conducted have been very helpful. They have been undoubtedly gone into at considerable length with a definite effort to put the finger on the problem which has been confronting us now for some fifteen years. . . . As I say, I think these studies have been most helpful, because up to that time we had more or less only to leave to conjecture what happened when these gases left the stacks; we did not know through any definite experiments what became of this gas problem.

The scientist employed by the United States, Mr. S. W. Griffin, in his report submitted November 30, 1940, relating to the Final Report of the Technical Consultants, stated (p. 3):

> Regarding the investigations of the Canadian meteorologists in working out the complicated air movements which take place over this irregular terrain, there can be no doubt of the value of their contribution in adding much to the knowledge, both of a fundamental and detailed character, to that which previously existed.
>
> (p. 5) It remains to be determined whether or not the three year period of experimentation may eventually bring about a permanent abeyance of harmful sulphur dioxide fumigations, south of the international boundary. However this may be, there can be little doubt that the knowledge gained in some of the researches described in the report is sufficiently fundamental in character and broad in application that, if published, the work should be of interest and value to any smelter management engaged in processes which pollute the air with sulphur dioxide.

PART FIVE.

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

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

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

But since the desirable and expected result of the régime or measure of control hereby required to be adopted and maintained by the Smelter may not occur, and since in its answer to Question No. 2, the Tribunal has required the Smelter to refrain from causing damage in the State of Washington in the future, as set forth therein, the Tribunal answers Question No. 4 and decides that on account of decisions rendered by the Tribunal in its answers to Question No. 2 and Question No. 3 there shall be paid as follows: (*a*) if any damage as defined under Question No. 2 shall have occurred since October 1, 1940, or shall occur in the future, whether through failure on the part of the Smelter to comply with the regulations herein prescribed or notwithstanding the maintenance of the régime, an indemnity shall be paid for such damage but only when and if the two Governments shall make arrangements for the disposition of claims for indemnity under the provisions of Article XI of the Convention; (*b*) if as a consequence of the decision of the Tribunal in its answers to Question No. 2 and Question No. 3, the United States shall find it necessary to maintain in the future an agent or agents in the area in order to ascertain whether damage shall have occurred in spite of the régime prescribed herein, the reasonable cost of such investigations not in excess of $7,500 in any one year shall be paid to the United States as a compensation, but only if and when the two Governments determine under Article XI of the Convention that damage has occurred in the year in question, due to the operation of the Smelter, and "disposition of claims for indemnity for damage" has been made by the two Governments; but in no case shall the aforesaid compensation be payable in excess of the indemnity

for damage; and further it is understood that such payment is hereby directed by the Tribunal only as a compensation to be paid on account of the answers of the Tribunal to Question No. 2 and Question No. 3 (as provided for in Question No. 4) and *not* as any part of indemnity for the damage to be ascertained and to be determined upon by the two Governments under Article XI of the Convention.

PART SIX.

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

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

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

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

ANNEX.

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

TRAIL SMELTER ARBITRAL TRIBUNAL.
UNITED STATES AND CANADA.

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

SIR:

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

Respectfully yours,

JAN HOSTIE.
CHARLES WARREN.
R. A. E. GREENSHIELDS.

II. *Letter from the Technical Consultants to the Chairman of the Trail Smelter Arbitral Tribunal, April* 26, 1941.

REGINALD S. DEAN.

1529 ARLINGTON DRIVE,
SALT LAKE CITY, UTAH.
April 28, 1941.

DR. JAN F. HOSTIE,
Trail Smelter Arbitral Tribunal,
710 Mills Building,
Washington, D.C.

DEAR DOCTOR HOSTIE:

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

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

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

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

Yours sincerely,

ROBERT E. SWAIN,
R. S. DEAN,
Technical Consultants.